C074506

COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

PICAYUNE RANCHERIA OF CHUKCHANSI INDIANS,
~~a federally recognized Indian Tribe,~~

Plaintiff & Appellant,

v.

etc., et al.,

EDMUND G. BROWN, JR., ~~in his capacity~~ as Governor ~~of the State of California, CALIFORNIA DEPARTMENT OF TRANSPORTATION, CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE, COUNTY OF MADERA, CITY OF MADERA~~,

Defendants & Respondents,

NP FRESNO LAND ACQUISITIONS LLC,
~~a California limited liability company~~,

Real Party in Interest & Respondent

Appeal from Superior Court of the State of California
for the County of Sacramento

Judge: Honorable Michael P. Kenny
Case No. 34-2012-80001326

NP FRESNO LAND ACQUISITIONS LLC'S OPPOSITION BRIEF

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, THIRD APPELLATE DISTRICT, DIVISION	Court of Appeal Case Number: C074506
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APPELLANT/PETITIONER: Picayune Rancheria, et al. RESPONDENT/REAL PARTY IN INTEREST: Edmund G., Brown, Jr., et al.	
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(3)		
(4)		
(5)		

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I. INTRODUCTION

The Picayune Rancheria of Chukchansi Indians (the "Appellant") has failed to state a cause of action for violation of the California Environmental Quality Act ("CEQA"). CEQA applies to discretionary projects by public agencies. The Appellant has sued the Governor of the State of California. As the superior court correctly found, the Governor is not a "public agency" as that term is defined by CEQA. Further, the superior court correctly held that the Governor's concurrence in the United States Secretary of the Interior's (the "Secretary's) determination to allow Class III gaming on land acquired by the Federal Government for the North Fork Rancheria of Mono Indians (the "North Fork Tribe") is not a CEQA "project approval" or "project." Thus, the Governor could not violate CEQA because CEQA does not apply to his decisions, and even if it did, the challenged decision was not a CEQA project approval or project.

Even assuming, for the sake of argument, that the Governor's decisions are CEQA projects, the case is moot because a California Court cannot give Appellant relief. Specifically, the Appellant wants the Court to issue a writ ordering the Governor to set aside his concurrence and mandating that the Governor comply with CEQA before making any further decisions regarding the proposed casino. Even if the Governor set aside his concurrence, that action would not remove the land from federal trust or stay the Secretary's decision that federally regulated tribal gaming activities are allowed on the land. And, the Governor has no further decisions to make in the Indian Gaming Regulatory Act process concerning whether the land should be acquired by the federal government for the North Fork Tribe to use for gaming or other purposes.

Given the failure to state a claim, and the inability of the Appellant to amend the pleadings to allege a claim or seek relief that a state court can grant, the superior court's judgment should be affirmed.

II. FACTS AND PROCEDURAL HISTORY

A. The North Fork Tribe Acquires Off-Reservation Land For Gaming Purposes

On or about March 5, 2005, the North Fork Tribe submitted a fee-to-trust application to the United States Department of the Interior to acquire approximately 305 acres of land in Madera County, California (the "Property" or "Madera Site") pursuant to the Indian Reorganization Act ("IRA") of 1934 for the purpose of developing a casino and hotel resort (the "Casino"). (JA 2, ¶ 1; JA 5, ¶ 18; JA 7, ¶ 27.) Because the North Fork Tribe proposed to use the Property, which is outside its reservation, for Class III gaming purposes, the Secretary needed to determine whether the Property qualified for gaming under Section 20 of the federal Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2700, et seq.

Lands taken into trust for an Indian tribe after October 17, 1988, may only be used for gaming under certain circumstances unless the land qualifies under one of several exceptions set forth in Section 20(b) of IGRA, 25 U.S.C. § 2719(b). If none of those circumstances apply, as here, a tribe can request that the Secretary approve gaming on the land pursuant to Section 20(b)(1)(A) of IGRA, commonly referred to as the Secretarial two-part determination process.

The North Fork Tribe sought to qualify the Property, once in trust, for gaming under the Secretarial two-part determination. This determination requires the Secretary to determine that a gaming establishment on the newly acquired land (1) would be in the best interest of the Indian tribe and its members and (2) would not be detrimental to the surrounding community. (JA 6, ¶ 23.) If the Secretary makes a favorable

determination, the process further requires that the Governor of the state where the proposed gaming activity may be conducted "concur" with the Secretary's determination. (JA 6, ¶ 24.) The Governor must send his concurrence to the Secretary within twelve months of receiving the Secretary's request unless the Secretary grants a discretionary six month extension. (25 C.F.R. § 292.23(b).) If, after that time, the Secretary has not received a concurrence, the Secretary cannot allow gaming on the newly acquired land. (*Id.* § 292.23(a)(1), (c).)

On September 1, 2011, the Secretary made a favorable two-part determination regarding the North Fork Tribe's request and asked the Respondent Edmund G. Brown, Jr., governor of the State of California (the "Governor") to "concur" in this determination. (JA 10–11, ¶ 35.) On August 30, 2012, the Governor concurred. (JA 11, ¶ 37.) On November 26, 2012, the Assistant Secretary for Indian Affairs made a final agency determination to take the Property in trust for the North Fork Tribe for gaming purposes pursuant to IRA. (77 Fed.Reg. 71611 (Dec. 3, 2012).)

B. The Appellant Brings Multiple Lawsuits Challenging The Secretary's Decision To Take Land Into Trust For Gaming

The Appellant owns and operates a Class III gaming facility 30 to 40 miles from the Property. (Picayune's Opening Brief ("POB") at p. 12; JA 2.) The Appellant filed an action against the Governor; the California Department of Transportation, California Department of Fish and Game, County of Madera, and City of Madera (collectively, "Respondent Agencies"); and Real Party in Interest NP Fresno Land Acquisitions LLP ("NP Fresno") on November 30, 2012. The Appellant then filed its first amended petition in December 2012, adding the North Fork Tribe as a real party in interest. The Appellant voluntarily dismissed the North Fork Tribe to avoid a meritorious motion to quash service of the summons and

complaint.[1] In response to the amended petition, the Governor, Respondent Agencies, and NP Fresno each filed separate demurrers.

Also in December 2012, an organization called "Stand Up" and the Appellant each filed a lawsuit in the United States District Court for the District of Columbia, primarily challenging two separate decisions made by the Secretary: (1) the September 2011 determination under Section 20 of IGRA; and (2) the November 2012 decision approving a fee-to-trust application submitted by the North Fork Tribe. (JA 272–74 & fns. 5, 12.)[2] The United States agreed to delay taking the Property into trust pending the lawsuit until February 1, 2013 to prevent mootness, and the Stand Up Plaintiffs then moved for a preliminary injunction. (JA 283.) On January 29, 2013, the district court denied the Stand Up Plaintiffs' motion for preliminary injunction. (JA 324.)

Also on January 29, 2013, the United States Department of Justice authored a letter to the Appellant and the Stand Up Plaintiffs, offering to delay taking the Property into trust pending an appeal of the district court's decision if the plaintiffs agreed to file a Notice of Appeal within four days and seek a stay from the appellate court. (JA 326 [DOJ Letter].) Neither the Appellant nor the Stand Up Plaintiffs appealed or sought a stay. Thus, on February 5, 2013, the United States accepted conveyance of the Property from NP Fresno to hold in trust for the North Fork Tribe. (JA 331 [acceptance of conveyance].)

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[1] Originally the petition also named Jennifer Stanley as a petitioner, but she has since been dismissed.

[2] The Stand Up Plaintiffs filed suit on December 19, 2012. (JA 283.) The Appellant filed its complaint on December 31, 2012. (JA 274 fn. 5.) Upon the consent of all parties, the court consolidated the Appellant's lawsuit with the Stand Up Plaintiffs' lawsuit on January 9, 2013. (*Id.*)

C. Superior Court Sustained The Demurrers

On May 29, 2013, the superior court, after reading the briefs and hearing oral argument, sustained the Governor's, Respondent Agencies', and NP Fresno's demurrers without leave to amend. (JA 773, 784.) The superior court held that the petition failed "to state a cause of action for issuance of a writ of mandate based on the Governor's failure to comply with CEQA when making his concurrence decision because the Governor's concurrence decision is not a 'project' under CEQA and because the Governor is not a 'public agency' under CEQA." (JA 777:3–6.) Because the claims in the petition against the Respondent Agencies were "entirely dependent upon the claim asserted against the Governor," the superior court also sustained the Respondent Agencies' demurrers. (JA 782:20–783:4.) Further, the superior court determined that claims against the Respondent Agencies that depend on actions those agencies may take in the future were "not yet ripe." (JA 783:10–12.) The superior court did not allow the Appellant to amend the petition because even if the Appellant added details, it could not "state a cause of action for violation of CEQA against any of the respondents," as the Governor's concurrence did not require CEQA review. (JA 784:4–6.)

III. STANDARD OF REVIEW

When reviewing the sufficiency of a complaint against a general demurrer, the Court must "treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 [internal quotation marks omitted].) The Court will give the petition or complaint "a reasonable interpretation, reading it as a whole and its parts in their context." (*Id.*) The Court also may consider matters that may be judicially noticed. (*Serrano v. Priest* (1971) 5 Cal. 3d 584, 591.)

"When a demurrer is sustained, [the Court] determine[s] whether the complaint states facts sufficient to constitute a cause of action." (*Blank, supra*, 39 Cal.3d at p. 318.) When, as here, it is sustained without leave to amend, the Court "decide[s] whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion" and this Court should reverse; "if not, there has been no abuse of discretion" and this Court should affirm. (*Id.*) The Appellant bears the burden of proving such reasonable possibility. (*Id.*)

IV. ARGUMENT

CEQA applies to "approvals" by "public agencies" regarding a discretionary "project," as each of those terms is defined in the statute. Because the Governor is not a "public agency" and his concurrence is not an "approval" of a discretionary "project," the Appellant cannot show that there is a reasonable possibility that it can amend its petition to allege a CEQA claim. Moreover, even if the Appellant could amend the petition to state a CEQA claim, the case is moot because a state court cannot provide the Appellant the relief it seeks. Therefore, the judgment dismissing the case should be affirmed.

A. The Governor's Concurrence Is Not Subject To CEQA

1. The Governor Is Not A Public Agency Under CEQA

CEQA applies only to discretionary projects "undertaken by a *public agency* which may cause a physical change in the environment (Pub. Resources Code, § 21065; Cal. Code Regs., tit. 14, § 15378.)" (*Hillside Mem'l Park & Mortuary v. Golden State Water Co.* (2011) 205 Cal.App.4th 534, 550 [alterations omitted] [emphasis added]). As the superior court correctly held, the Governor's concurrence pursuant to IGRA is not subject to CEQA because the Governor is not a public agency.

To determine whether the Governor is a public agency as defined by CEQA, the Court should begin by looking at the language in that statute.

(See *In re Dannenberg* (2005) 34 Cal.4th 1061, 1081 ["Because statutory language 'generally provides the most reliable indicator' of [Legislative] intent, we turn to the words themselves, giving them their 'usual and ordinary meanings' and construing them in context" (alteration and citation omitted).].) As defined by CEQA, "'[p]ublic agency' includes any state agency, board, or commission, any county, city and county, city, regional agency, public district, redevelopment agency, or other political subdivision." (Pub. Resources Code, § 21063.) This is consistent with the ordinary meaning of "state agency" as "[a]n executive or regulatory ***body*** of a state" and "local agency" as "[a] political subdivision of a state . . . includ[ing] counties, cities, school districts, etc." (Black's Law Dict. (9th ed. 2009) at p. 72 [emphasis added].) The "governor" is the "chief executive official of a U.S. state" and is not a word that is used interchangeably with " agency." (Black's Law Dict. (9th ed. 2009) at p. 766.)

Public Resource Code Section 21063 supports a reading of "agency" that excludes the Governor because there are no constitutional officers of the state, such as the Governor, on the list of examples of agencies. The inference is that the Legislature intended to exclude state officers from the definition of "agency." (See *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1160–61 [explaining that the "expression of certain things in a statute necessarily involves exclusion of other things not expressed"]; see also *Marin Forests Soc'y v. Cal. Coastal Comm'n* (2005) 36 Cal.4th 1, 31 [differentiating between the Legislature, the Governor, and the "offices, agencies, or commissions" that those constitutional entities can create].) Further, "governor" is used elsewhere in the statute, such as in sections 21080, subdivision (b)(3), and 21182, which shows that the Legislature knew how to refer to the Governor when it wanted to do so.

Both the usual and ordinary meaning of "public agency" and CEQA's specific definition of the phrase do not include the Governor. This is not only the more natural reading of the language, but also the more sensible reading in the context of how state government is organized. Subjecting the Governor's daily decisions to CEQA compliance would be impracticable. CEQA review can take multiple years and would hamper the Governor's ability to exercise the authority granted to him by the California Constitution to run the state.

The Appellant offers three incoherent arguments as to why the Governor is a "public agency" for CEQA purposes, and each fails.

a. *The Appellant Sued The Governor, Not The Office Of The Governor, And Neither Is An Agency Under CEQA*

The Appellant first claims that it sued the Governor as the representative head of the "Office of the Governor" and that *ipso facto*, the "Office of the Governor" is the body being sued, and that office is either a "state agency" or "political subdivision." (POB at p. 30.) In fact, the Appellant sued the Governor (not his Office) for concurring in the Secretary's IGRA Section 20 decision that gaming on the Property would be in the best interest of the North Fork Tribe and not detrimental to the surrounding community. (See JA 3, ¶ 4; see also 25 U.S.C. § 2719, subd. (b)(1)(A) [IGRA authorizes the "Governor," not "Office of the Governor," to make the concurrence].)[3]

The Appellant's argument is based on a misplaced idea that suing the Governor in his official capacity is analogous to suing the head of the Division of State Forestry, in his official capacity. (POB at p. 30 [citing *Nat'l Res. Defense Fund, Inc. v. Arcata Nat'l Corp.* (1976) 59 Cal.App.3d

[3] If the Appellant had sued a different entity, such as the Office of the Governor, than the one authorized by IGRA to make the concurrence, that would have been a defective pleading for failing to name the proper party.

959, 969].) The role of the head of a state agency is different than the Governor's role on behalf of the state. The head of a state agency acts in his or her official capacity as a representative of the agency itself, whereas the Governor in his official capacity acts as a constitutional officer who is elected to speak for the people of the state, rather than solely for the Office of the Governor.

Even if the Appellant had sued the Office of the Governor rather than the Governor, the Appellant has not explained why the "Office of the Governor" is a "state agency" or "political subdivision" under CEQA. To argue that the Governor's office is a "state agency," the Appellant ignores the text of CEQA and the rules of statutory construction, discussed above. Instead, the Appellant relies solely on the state website's inclusion of the "Office of the Governor" on a directory of state agency contacts. (POB at p. 30 [citing JA 426, 664].) The website directory should not be used to interpret the meaning of "public agency" under CEQA for at least two reasons. First, there is no need to resort to external aids to divine the Legislature's intent because the meaning of "public agency" under CEQA is the same as its everyday use, which does not include "Governor." (See, e.g., *People v. Hansel* (1992) 1 Cal.4th 1211, 1217 ["If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the legislature" (ellipsis, citations, and internal quotation marks omitted).].) Second, the directory was not compiled by the Legislature and offers no insight into the Legislature's intent when drafting CEQA.

b. *The Phrase "Political Subdivision" Does Not Encompass The Governor*

The Appellant next argues that the Governor is a "political subdivision" but offer no basis for that reading. (POB at p. 30.) As used in the statute, "political subdivision" comes at the end of a list of local

agencies (cities, counties, regional agencies, and redevelopment agencies) and should be read to refer to other governmental agencies that exist below the state level. (See, e.g., *Joannou v. City of Rancho Palos Verdes* (2013) 219 Cal.App.4th 746, 757 ["Application of the interpretive canon *ejusdem generis* is instructive. . . . Under that rule, when a general term or category is preceded or followed by specific words, the general category is restricted to those things that are similar to those specifically enumerated."].) That reading is supported by the CEQA Guidelines, which uses the phrase "political subdivision" only in its definition of a "local agency," and not in its definitions of a "public agency" or "state agency." (See 14 Cal. Code Regs., §§ 15368 [defining "local agency"], 15379 [defining "public agency"], 15383 [defining "state agency"].)

The Appellant tries to bolster its argument by citing out of context a decision stating that the Legislature intended CEQA to "compel government at all levels to make decisions with environmental consequences in mind." (POB at p. 29.) That statement was made to address the argument that the Local Agency Formation Commission of Ventura County ("LAFCO") was not an "agency" within the meaning of CEQA and has nothing to do with the question at hand. (*Bozung v. Local Agency Formation Comm'n of Ventura County* (1975) 13 Cal.3d 263, 268.) The *Bozung* court unsurprisingly found that the LAFCO, a regional political subdivision, was a "local agency" as that term is used in CEQA. (*Id.* at .p. 277.) *Bozung* was not asked to address (and thus did not address) whether the Office of the Governor or Governor is a "public agency." Had the court been asked to address those questions, it may have noted that CEQA states "that courts, consistent with generally accepted rules of statutory interpretation, shall not interpret [CEQA] or the state guidelines adopted pursuant to Section 21083 in a manner which imposes procedural or substantive requirements beyond those explicitly stated in [CEQA] or in

the state guidelines." (Pub. Resources Code, § 21083.1; see generally *Leavitt v. County of Madera* (2004) 123 Cal.App.4th 1502 [explaining why CEQA demands a literal statutory construction of its words].) Expanding the meaning of "agency" to include the "Governor," or even the "Office of the Governor," would do what CEQA prohibits: impose procedural and substantive requirements beyond those stated in the statute. This Court should not accept Appellant's invitation to expand "agency" beyond CEQA's definition of that term.

c. *No Surplusage Occurs When "Governor" Is Given Its Common-Sense Meaning*

The Appellant's final argument is that the Governor must be subject to CEQA to avoid surplusage. (POB at p. 31.) The Appellant misapplies that canon of statutory interpretation by combining two different statutes, the Government Code and the Public Resources Code, and arguing that if the Governor is not a "public agency" under CEQA then there is surplusage in Government Code section 12012.25, subdivision (g). But even if that was not a misapplication of the canon, reading CEQA to exclude the Governor from its definition of "public agency" does not create surplusage in the Government Code. Government Code section 12012.25, subdivision (g), states that "[i]n deference to tribal sovereignty, neither the execution of a tribal-state gaming compact nor the on-reservation impacts of compliance with the terms of a tribal-state gaming compact shall be deemed to constitute a project for purposes of the California Environmental Quality Act."[4] The clarification that the CEQA exemption is granted "in deference to tribal sovereignty" suggests that the tribe, not the Governor, is the party

[4] The language of section 12012.5, subdivision (f), is similar: "In deference to tribal sovereignty, the execution of, and compliance with the terms of, any compact specified under subdivision (a) or (b) shall not be deemed to constitute a project for purposes of the California Environmental Quality Act."

being exempted. Just as the CEQA Guidelines exempt federal agencies from the definition of "public agencies," the Government Code appears to be exempting tribal agencies, boards, and commissions from the definition of "public agency" too.

Rather than surplusage, the language in the Government Code is needed to express the Legislature's intent to defer to tribal sovereignty over Indian activities, such as the execution of a compact and potential on-site impacts related to Indian gaming facilities. In light of this express deference, it would be incongruous to conclude the Governor had to prepare a CEQA document before deciding whether to concur with the Secretary's decision to allow gaming on Indian land, because such a reading of CEQA would undermine the state's deference to tribal sovereignty as expressed in the Government Code. (See generally *Cal. Medical Ass'n v. Brown* (2011) 193 Cal.App.4th 1449, 1461 ["If we can reasonably harmonize two statutes dealing with the same subject, then we must give concurrent effect to both" (alterations and internal quotation marks omitted).].)

In sum, CEQA's definition of "agency" does not include the Governor and the Appellant has not offered a convincing argument to the contrary.

2. The Governor's Concurrence Is Not A Project Approval

Even assuming arguendo that the Governor is a "public agency," his concurrence is not a project "approval." Under CEQA, an "approval" is "the decision by a public agency which commits the agency to a definite course of action in regard to a project intended to be carried out by any person." (14 Cal. Code Regs., § 15352.) For private projects, "approval occurs upon the earliest commitment to issue or the issuance by the public agency of a discretionary contract, grant, subsidy, loan, or other form of financial assistance, lease, permit, license, certificate, or other entitlement

for use of the project." (*Id.*) An approval is a decision that "preclude[s] or foreclose[s] any alternatives of mitigation measures that CEQA would otherwise require the agency to consider." (*City of Irvine v. County of Orange* (2013) 221 Cal.App.4th 846, 860 [alterations and internal quotation marks omitted].)

The parties disagree regarding what the CEQA project is that the concurrence, assuming it is an approval, approves. (See POB at p. 17, Section B.) But regardless of how the CEQA project is defined, the Governor's concurrence is not a project approval.

a. *The Concurrence Did Not Approve The Casino*

Assuming, as the Appellant argues, that the Casino is the "project" (which it is not as discussed in section 3, below), the concurrence is not an "approval" of the Casino because it did not commit the Governor to a definite course of action regarding the construction of the Casino. Specifically, the concurrence did not bind the Secretary, did not foreclose any alternatives or mitigation measures that may be negotiated during the compact process, and did not foreclose the Governor from not concluding or the Legislature from not ratifying a compact for Class III gaming with the North Fork Tribe pursuant to 25 U.S.C. § 2710(d) and Article IV, Section 19, of the California Constitution.

The concurrence is akin to the decision at issue in *City of Irvine*, which held that a county's decision to approve and submit an application to the state for money to fund a jail expansion was not a CEQA project approval because it "did not effectively preclude [the county] from considering any alternatives or mitigation measures." (221 Cal.App.4th at p. 860.) Because the application entitled the county to "a conditional award for state financing" and did "not guarantee the awarded county [would] receive any reimbursements," the court found that the application "was merely a preliminary step that, if approved by the state, would authorize the

county and state to explore and evaluate the possibility of expanding the [jail]." (*Id.* at p. 861; see also *id.* at p. 862 fn. 5 [noting that "as a practical matter some initial project activities may need to be conducted before completing CEQA," and noting that "the short time period the state gave" the county to submit its application likely meant that as a practical matter the county could not have feasibly complied with CEQA prior to submitting the application].) Thus, even though the county gave many assurances to the state about its "project site control" and ability to meet state operating procedures, the application was not a CEQA project approval. (*Id.* at p. 864.) Instead, the application was an interim step that, if approved, would allow the county "to take the next step in the process" and commit to a project. (*Id.* at p. 863.)

Similar to the county, the Governor's concurrence did not foreclose consideration of alternatives to the Casino. Rather, the concurrence was an interim step that allowed the Secretary to permit gaming on the Madera Site if the Property was subsequently taken into truest. The concurrence alone did not commit the Secretary to taking the land into trust for gaming purposes because the Secretary was still required to make his own final trust determination under federal law. (See *Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin v. United States* (7th Cir. 2004) 367 F.3d 650, 661 ("*Lac Courte*") ["A governor's role under [Section 20 of IGRA] is limited to satisfying one precondition to the Secretary of the Interior's authority under IGRA to permit gaming on after-acquired trust land."].) Nor did the concurrence preclude the Governor from considering alternatives to either Class III gaming or the proposed Casino because the Governor remained free to negotiate and even refuse a gaming compact. And without a compact, Class III gaming is not allowed, even if the Secretary took the land into trust for gaming purposes. (25 U.S.C. § 2710, subd. (d).) Like the county's application for jail funding,

the concurrence was an initial step in a long process, but not an approval under CEQA.[5]

The Appellant cites several cases to support its argument that the concurrence is an "approval" for the Casino, but none of the cited cases help prove Appellant's claim.

The Appellant first cites *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116 to support its claim that the Governor's concurrence is a project approval because "an agency can approve a project even though further discretionary governmental decisions would be needed before any environmental change could occur." (POB at p. 34–35.) *Save Tara* is inapposite, however, because the facts in that case showed that the city's development agreement with a private developer made it highly unlikely that the city would consider alternatives to the proposed low-income, senior housing development. (See *Neighbors for Fair Planning v. City and County of San Francisco* (2013) 217 Cal.App.4th 540, 550–52 [summarizing the facts in *Save Tara*].) Specifically, *Save Tara* found that the city's public announcements that it was determined to proceed with the development, its plans to relocate the existing tenants from the property immediately, its almost half million dollar at-risk loan to the project developer, and its willingness to commit itself to going forward if the city manager found CEQA requirements were satisfied, demonstrated that the city had no plans to change course. (*Save Tara, supra*, 45 Cal.4th at p. 142.) Instead, the city had "committed itself to a definite course of action regarding the project before fully evaluating its environmental effects." (*Id.*)

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[5] Further, like the county's decision to submit an application for jail funding, the Governor's decision had to be made in a relatively short timeframe (twelve months absent the Secretary granting a request for more time from the North Fork Tribe). (25 C.F.R. § 292.23.) That time frame could effectively preclude CEQA review as a practical matter.

As discussed above, the Governor made no similar commitments to the Casino proposed by the North Fork Tribe through his concurrence. Even after the concurrence, the Governor retained the right to change the proposed Casino through compact negotiations or to conclude that the state and tribe could not reach a compact for the Madera Site.

The Appellant's citation to *Lexington Hills Association v. State of California* (1988) 200 Cal.App.3d 415 ("*Lexington Hills*") also does not support its claim that the concurrence is an approval of the Casino. (POB at pp. 19, 30.) *Lexington Hills* concerned an application for a timber harvest plan that would require approvals from the California Department of Forestry and road encroachment permits from Caltrans. Petitioners challenged Caltrans' issuance of road encroachment permits without environmental review. (200 Cal.App.3d at pp. 421, 428–29.) The court held that the relevant project at issue was "all activities integral to [the] proposed logging operation" (*id.* at p. 430), but that Caltrans did not have to comply with CEQA under the circumstances of that case because Caltrans did not issue an approval of such activities (*id.* at p. 433.) According to the court, "[i]t would be an untenable extension of CEQA to impose comprehensive review and reporting responsibilities upon an agency involved in the approval process" such as Caltrans but "not vested with the required approval power" over the project. (*Id.*)

The Governor, like Caltrans, played a limited role in a larger, federal approval process. Also similar to Caltrans, the Governor is not vested with the required approval power under state, federal, or tribal law to take land into trust for gaming purposes, unconditionally approve Class III gaming on the land, or control the North Fork Tribe's use of the land. Accordingly, it would be equally untenable for this Court to extend CEQA to cover the Governor's concurrence.

The Appellant also cites *Bozung*, *supra*, and *Fullerton Joint Union High School District v. State Board of Education* (1982) 32 Cal.3d 779 ("*Fullerton*"), disapproved on other grounds in *Board of Supervisors v. Local Agency Formation Commission* (1992) 3 Cal.4th 903, 918, to argue that the Governor's concurrence is an approval of the Casino under CEQA, but those cases do not support the claim. *Bozung* held that a local agency formation commission's ("LAFCO") approval of a city's annexation request was a CEQA project approval, where the project was not "the actual physical development" that would occur after annexation and over which the LAFCO would not exercise control, but "the LAFCO consideration of the proposed annexation . . . by itself." 13 Cal.3d at pp. 279, 285.) Similarly, *Fullerton* held that the State Board of Education's approval of a plan to create a new school district, which "must construct" a high school if created (3 Cal.4th at p. 797), was itself a CEQA project—not the school that would follow (*id.* at pp. 180–81). Neither *Bozung* nor *Fullerton* support the claim that the Casino was the project approved by the concurrence.

b. *The Concurrence Did Not Approve The Secretary's Action*

Although *Bozung* and *Fullerton* may support an argument that the Governor's concurrence is an approval of the Secretary's determination to allow tribal government gaming on the Madera Site, the Appellant do not make that argument. Assuming the Appellant had argued that that the concurrence was an approval of gaming and not the Casino, however, that approval would nevertheless not be subject to CEQA for at least two reasons.

First, the project applicant, the Secretary, is not a "person" under CEQA who can receive a project approval. (14 Cal. Code Regs., § 15376; see, infra, section 3.b, discussing CEQA's definition of "person.")

Second, the Governor's approval of the Secretary's determination, unlike the approvals in *Bozung* and *Fullerton*, does not mean that the North Fork Tribe must construct the Casino, nor would the Governor's denial mean that the land would stay in its existing condition. Without the Governor's concurrence, the Secretary could have taken the land into trust for the North Fork Tribe (25 C.F.R. § 151.11) and the North Fork Tribe could have proposed any project it wanted on the land, including a casino/hotel resort, as long as the use did not include Class III gaming (25 U.S.C § 2710 [Indian tribes have jurisdiction over Class I and Class II gaming]; see *id.* § 2703 subd. (7)(A) [defining Class II gaming].) Moreover, as discussed above, the Governor could negotiate alternatives to the Casino as part of the gaming compact for Class III gaming or decide not to sign a compact. Accordingly, the Governor's concurrence did not approve the Secretary's action.

For the reasons above, the Governor's concurrence was not a CEQA approval because it did not commit the Governor to any definite course of action regarding development that may have environmental impacts.

3. The Governor Did Not Approve A Project

Assuming arguendo that the Governor is a public agency and the concurrence is an approval, the Governor's concurrence did not approve a "project." "Whether an activity constitutes a project under CEQA is a question of law that can be decided de novo based on the undisputed evidence in the record." (*Taxpayers for Accountable Sch. Bond Spending v. San Diego Unified Sch. Dist.* (2013) 215 Cal.App.4th 1013, 1063–64 [internal quotation marks omitted].)

CEQA defines "project" as "an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment" and falls into one of three categories. (Pub. Resources Code, § 21065.) These categories are: (1)

"[a]n activity directly undertaken by any public agency," (2) "[a]n activity undertaken by a person which is supported, in whole or in part, through contracts, grants, subsidies, loans, or other forms of assistance from one or more public agencies," and (3) "[a]n activity that involves the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies." (*Id.*)

The Guidelines clarify CEQA's definition of "project." The Guidelines describe an "activity directly undertaken by any public agency" to include "public works construction and related activities clearing or grading of land, improvements to existing public structures, enactment and amendment of zoning ordinances, and the adoption and amendment of local General Plans or elements thereof." (14 Cal. Code Regs., § 15378, subd. (a).) The "Guidelines must be read in the context of Public Resources Code section 21151, which provides that local agencies 'shall prepare an environmental impact report on any project *that they intend to carry out or approve* which may have a significant effect on the environment.'" (*Parchester Village Neighborhood Council v. City of Richmond* (2010) 182 Cal.App.4th 305, 313 [ellipsis omitted] ("*Parchester Village*").)

With these definitions in mind, neither the Casino nor the concurrence is the Governor's CEQA project.

a. *The Casino Is Not The Project*

The Appellant argues that the "project" at issue here is the Casino, i.e., the proposed casino/hotel resort that the North Fork Tribe would like to construct on the Madera Site, and the superior court erred in finding otherwise.[6] (POB at p. 18.) Although an approval to construct

[6] Under the Appellant's theory that the casino is the project, the North Fork Tribe is the Casino applicant. Project applicants are indispensable parties in CEQA lawsuits. (*County of Imperial v. Superior Court* (2007) 152

improvements on land fits into CEQA's definition of a project, the North Fork Tribe's activities cannot be the project for the purposes of the Governor's concurrence because IGRA's concurrence procedures do not allow the Governor to shape the Casino by imposing mitigation measures or subjecting it to his further review and approval.[7] (See, e.g., *Lac Courte*, *supra*, 367 F.3d at p. 664 ["Not only is a governor unable to issue the Secretary of the Interior's final decision regarding an Indian tribe's application under § 2719(b)(1)(A), a governor's opportunity to participate in the administration of IGRA will arise irregularly, if it materializes at all."].)

The Governor's lack of authority over the Casino at the concurrence stage is analogous to the City of Richmond's lack of authority to impose regulations on the casino proposed within its borders. (See *Parchester Village*, *supra*, 182 Cal.App.4th at p. 313.) The court in that case found that the proposed casino was not the City of Richmond's "project" because the proposed casino will be built on a site that is entirely outside the City's control and therefore "the City has no legal jurisdiction over the property. Should the City change its mind and decide to 'disapprove' the project, its decision would not be binding" on the U.S. Department of the Interior's Bureau of Indian Affairs. (*Id.*)

Cal.App.4th 13, 35–37.) The Appellant's inability to join an indispensable party is, alone, reason to grant the demurrer without leave to amend.

[7] Appellant misinterprets NP Fresno's brief below when it asserts that NP Fresno stated that "the Governor's concurrence is a final decision as far as the Governor is concerned." (POB at p. 22.) Although the concurrence is the Governor's sole opportunity to agree or disagree with the Secretary's decision, it is not his final decision regarding Class III gaming or the Casino. The Governor could shape the Casino, as well as determine whether the North Fork Tribe should engage in Class III gaming, through his negotiation of a gaming compact (25 U.S.C. § 2710 subd. (3)), which is not the subject of this lawsuit.

For the same reason articulated in *Parchester Village*, the Casino is not the project approved by the Governor's concurrence. The concurrence process does not allow the Governor to impose mitigation measures on or alternatives to the proposed Casino. Instead, the Governor is asked to review the documentation provided by the Secretary, including the environmental impact statement analyzing the proposed Casino (25 C.F.R. §§ 292.16–292.22), and make a yes or no decision whether he supports the Secretary's determination (29 U.S.C. § 2719 subds. (b)(1)(A), (c); see 25 C.F.R. § 292.23 [explaining the Governor's options]). Once the Governor has responded to the Secretary (or failed to respond in the required time period), there is no mechanism for him to change his mind and make his new decision binding on the federal government.

The Appellant's claim that the concurrence is similar to the projects at issue in *Bozung* and *Fullerton* does not change the conclusion that the Casino is not the project approved by the concurrence. (See POB at pp. 21–24.) As discussed in section B.2, above, those cases found that the agency actions themselves were the projects being approved—not the buildings that would result from those agencies' actions. (See *Bozung*, *supra*, 13 Cal.3d at p. 278 [holding that LAFCO's annexation decision, not the project a developer wanted to build once the land was annexed, was the CEQA project]; *Fullerton*, *supra*, 32 Cal.3d at pp. 794–95 ["the principal controversy concerns whether the State Board's approval of the Plan constitutes a 'project' within the purview of CEQA," and not the school that would need to be approved by a school district after Plan approval].) Accordingly, contrary to the Appellant's claim (POB at p. 20), *Bozung* and *Fullerton* show that the superior court asked the right question by looking at whether the Governor's concurrence, rather than the Casino, was a "project."

b. *The Concurrence Is Not The Project*

The superior court not only asked the right question, but reached the right answer: the Governor's concurrence is not a CEQA project. (JA 777–79; contra POB at p. 20.) As the superior court noted, the concurrence does not fit into CEQA's three categories of projects. (JA 778–79; Pub. Resources Code, § 21065.)

(i) The Concurrence Is Not A Form Of Assistance Or An Entitlement For Use

First, the concurrence is not support for an activity of the Secretary or the North Fork Tribe "through contracts, grants, subsidies, loans, or other forms of assistance." (Pub. Resources Code § 21065, subd. (b).) This point is undisputed.

Second, the concurrence also is not an "[a]n activity that involves the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies." (Pub. Resources Code § 21065, subd. (c).) The concurrence did not involve the issuance of an entitlement for use to a person for several reasons. The concurrence is not an entitlement for use because the Governor has no authority to regulate the Secretary or his use of the Madera Site. (See *Confederated Tribes of Siletz Indians of Oregon v. United States* (9th Cir. 1997) 110 F.3d 688, 698 ["IGRA does not allow a state governor to have land taken in trust by the Federal Government. Such a statute would no doubt run afoul of the Appointments Clause."].)

The concurrence also was not issued to a person because CEQA's definition of "person" does not include the Secretary. (See 14 Cal. Code Regs., § 15376 ["'Person' includes any person, firm, association, organization, partnership, business, trust, corporation, limited liability company, company, district, city, county, city and county, town, the state, and any of the agencies and political subdivisions of such entities, and, ***to***

the extent permitted by federal law, the United States, or any of its agencies or political subdivisions." (Emphasis added)].) The Secretary is not a "person" under CEQA because the relevant federal law, IGRA, does not give states authority over the Secretary's decision. (See *Citizens Exposing Truth about Casinos v. Kempthorne* (D.C. Cir. 2007) 492 F.3d 460, 471 [IGRA establishes the "independent Federal regulatory authority for gaming on Indian lands" under which a state's designation of land as a reservation for gaming would be anomalous]; see also *Mashantucket Pequot Tribe v. Town of Ledyard* (2d Cir. 2013) 722 F.3d 457, 466 [describing IGRA as a "federal regulatory regime[] that entirely occup[ies] (and preclude[s] state legislation in)" Indian gaming].)

The Appellant makes much over the superior court's finding that the concurrence is not a project because it is not an entitlement for use by a public agency. (POB at p. 24–29; see JA 802.) Specifically, the Appellant argues that "public agency" refers to the giver of the "entitlement for use," which under the Appellant's theory is the Governor, rather than the recipient of the entitlement, as suggested by the superior court's decision. (POB at p. 25.) Assuming the Appellant reads section 21065 subdivision (c) correctly, the concurrence nevertheless does not fit into "project" as defined by section 21065 subdivision (c). As explained above, the concurrence does not entitle the Secretary to use the land in a specific way because the Secretary will not be using the land and the Governor has no jurisdiction over the Secretary's use of the land under IRA or IGRA.

(ii) The Concurrence Is Not A Discretionary Project

Third, although the concurrence may be "[a]n activity directly undertaken by any public agency" (assuming arguendo that the Governor is a public agency, which he is not), the concurrence nevertheless is not a CEQA project because, as discussed in section A.2.a, above, it is not the

Governor's commitment to a definite course of action regarding the Casino, and, as discussed below, it is not "discretionary." (Contra POB at p. 33.)

Projects can be either "discretionary" or "ministerial." "Ministerial projects proposed to be carried out or approved by public agencies" are not subject to CEQA, while discretionary projects generally are. (Pub. Resources Code, § 21080.) A discretionary project is "a project which requires the exercise of judgment or deliberation when the public agency or body decides to approve or disapprove a particular activity, as distinguished from situations where the public agency or body merely has to determine whether there has been conformity with applicable statutes, ordinances, or regulations." (14 Cal. Code Regs., § 15357.) Notably, "CEQA does not apply to an agency decision simply because the agency may exercise some discretion in approving the project or undertaking." (*San Diego Navy Broadway Complex Coalition v. City of San Diego* (2010) 185 Cal.App.4th 924, 934.) Instead, "to trigger CEQA compliance, the discretion must be of a certain kind; it must provide the agency with the ability and authority to 'mitigate environmental damage' to some degree." (*Id.* [ellipsis omitted].)

Here, IGRA does not permit the Governor to give a conditional concurrence, such as to concur but only if the Secretary ensures that the Casino is modified to include certain mitigation measures. The Governor cannot impose mitigation measures for future actions on the Madera Site as part of his concurrence or unilaterally control the actions of the United States or sovereign tribes such as the North Fork Tribe.[8] (See *Lac Courte*, *supra*, 367 F.3d at p. 656 [holding that the Secretary's decision to take land into trust for gaming purposes is not subject to review by a governor].)

[8] Another reason CEQA does not apply to the Casino is because it has been reviewed in an Environmental Impact Statement ("EIS") pursuant to NEPA and will be constructed on land outside California's jurisdiction. (14 Cal. Code Regs., § 15277.)

Because IGRA's concurrence process provides "no ability to minimize the environmental impacts that might be identified in an EIR" it is ministerial for the purposes of CEQA. (*San Diego Navy Broadway Complex Coalition, supra*, 185 Cal.App.4th at p. 934.)

The Appellant suggests that the Governor should have conducted a CEQA review for "ensuring feasible alternatives to the proposed gaming development would be considered and that feasible mitigation measures would be applied and implemented in order to avoid or minimize the potentially significant environmental impacts of the casino/hotel complex on the surrounding community." (POB at p. 12.) But, as discussed above, even if the Governor wanted to impose mitigation measures different than those in the EIS, he has no authority to do so as part of the Section 20 concurrence. CEQA does not require the preparation of a "useless and wasteful" EIR. (*San Diego Navy Broadway Complex Coalition, supra*, 185 Cal.App.4th at p. 934.) Accordingly, the Governor's concurrence is not a discretionary project subject to CEQA.

The Appellant argues that *Friends of Westwood, Inc. v. City of Los Angeles* (1987) 191 Cal.App.3d 259 supports its claim that because the Governor could decline to concur, the concurrence was a discretionary project. (POB at p. 36.) But *Friends of Westwood* supports the opposite. According to that case, "the touchstone [to determine whether a project is discretionary] is whether the approval process involved allows the government to shape the project in any way which could respond to any of the concerns which might be identified in an environmental impact report." (*Friends of Westwood, supra*, 191 Cal.App.3d at p 267.) Here, the Governor could not use his concurrence to shape the Casino in a way that could respond to any concerns identified in an environmental report (including the EIS included in the Secretary's letter seeking concurrence), and preparation of such a report would have been a futile act. (Cf. *Leach v.*

City of San Diego (1990) 220 Cal.App.3d 389, 395 [holding that a city's decision to draft water between reservoirs was not a discretionary decision under CEQA because the city "could do little or nothing" to "mitigate the environmental damage in any significant way."].)

For the foregoing reasons, the concurrence does not fit into any of CEQA's three categories of "project." Further, the Governor is not a "public agency" and his concurrence is not a "project approval." Accordingly, the Governor's concurrence pursuant to IGRA is not subject to CEQA.

B. This Case Does Not Present A Justiciable Controversy And Should Be Dismissed

Even if the Court were convinced that CEQA applies to the Governor's concurrence, the case must be dismissed as moot. This action does not present a justiciable controversy because this Court cannot provide the Appellant with any effective relief. "California courts will decide only justiciable controversies." (*Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559, 1573.) "An important requirement for justiciability is the availability of 'effective' relief—that is, the prospect of a remedy that can have a practical, tangible impact on the parties' conduct or legal status." (*In re I.A.* (2011) 201 Cal.App.4th 1484, 1490.) California courts have a "duty to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." (*Id.* [internal quotation marks omitted].) A case is moot "when a court ruling can have no practical impact or cannot provide the parties with effective relief." (*Simi Corp. v. Garamendi* (2003) 109 Cal.App.4th 1496, 1503.) When a case is moot, "the court, whether trial or appellate, should generally dismiss it." (*Wilson & Wilson, supra*, 191 Cal.App.4th at p. 1574.)

1. The Claims Against The Governor Are Moot

"Under IGRA, the Governor operates on an episodic basis" and his concurrence episode is over. (*Confederated Tribes of Siletz Indians of Oregon, supra*, 110 F.3d at p. 697.) Ordering the Governor to set aside his concurrence would not affect any action contemplated for the proposed Casino. The Secretary has already taken the Property into trust for gaming purposes. (JA 329 [deed].) Now that the Property is held in federal trust for Class III gaming purposes, no provision in IGRA allows the Governor to force the United States to take it out of trust or ban gaming on it. (See *Lac Courte, supra*, 367 F.3d at p. 656 ["the Secretary of the Interior's decision to execute § 2719(b)(1)(A) by taking the proposed land into trust is not subject to review" by the governor]; see also *Gobin v. Snohomish County* (9th Cir. 2002) 304 F.3d 909, 914 ["In determining the extent of State jurisdiction over Indians, State laws are not applicable to tribal Indians on an Indian reservation except where Congress has expressly intended that State laws shall apply."].)

Because the Governor has no further role to play in the Property transfer, the relief requested by the Appellant would not address its alleged harm. Specifically, the Appellant asked the superior court to "issue a writ of mandate ordering the Governor to set aside his August 30, 2012 concurrence decision and mandating the Governor comply with CEQA before making any further decisions regarding the proposed casino/hotel resort." (JA 13.) Such a writ would not achieve the desired effect, however, because even if the Governor withdraws his concurrence and performs CEQA, neither he nor this court can demand that the Secretary take the land out of trust for Class III gaming purposes. Because this Court cannot grant the Appellant effective relief, this case is moot. (See *Simi Corp., supra*, 109 Cal.App.4th at p. 1503 [A case is moot "when a court

ruling can have no practical impact or cannot provide the parties with effective relief."].)

The Appellant also asked the superior court to "enjoin Respondents from approving any activities related to the siting, construction, or operation of the proposed casino/hotel resort at the Madera Site, or taking any actions in support thereof, until the casino/hotel resort has been subject to legally sufficient CEQA review." (JA 13.) The Respondent Agencies have no role in approving activities on the Madera Site, however, so such an order would have no tangible impact on the Casino. (See *Santa Rosa Band of Indians v. Kings County* (9th Cir. 1976) 532 F.2d 655, 658–59 [holding that Congress did not grant the power to a county "to enforce its zoning ordinance or building code" on tribal land]; see also JA 9, ¶ 30 ["Of course, after the Madera Site has been placed into federal trust, the applicable state and local traffic planning public agencies, including Caltrans, Madera County, and the City of Madera will have no further legal authority over the project site itself and will have no significant ability to shape the size or characteristics of the casino/hotel resort complex. . . ."].) Although the North Fork Tribe has the ability to change the Casino, the North Fork Tribe, as a federally recognized Indian tribe, is not subject to this Court's jurisdiction.

The Appellant speculates that a Court decision to set aside the Governor's concurrence could cause the Secretary to reconsider his record of decision to allow gaming on the land that has been taken into trust and therefore the case is not moot. (POB at pp. 40–41.) To illustrate its point, the Appellant cites *In re Stephon L.* (2010) 181 Cal.App.4th 1227, but that case does not stand for the proposition that a court can render an opinion that may or may not provide effective relief. Instead, *In re Stephon L.* held that "the relevant inquiry in determining mootness with respect to minor's credit claim is the expiration of minor's maximum period of physical

confinement and not the expiration of any camp commitment that does not exhaust minor's maximum period of physical confinement" since until the maximum had been served, the harm the minor alleged was capable of repetition and in fact had reoccurred. (181 Cal.App.4th at p. 1231.) The reasons that the concurrence does not fall into the "capable of repetition yet evading review" exception to the mootness doctrine are discussed in section B.2, below.

Contrary to the Appellant's claim, speculation about possible future actions is not enough to prevent the case from being moot. For example, in *Santa Monica Baykeeper v. City of Malibu* (2011) 193 Cal.App.4th 1538, Baykeeper claimed that "the EIR's analysis of construction-period impacts on hydrology and water quality from erosion, sedimentation, and the potential release of hazardous materials [was] deficient," and even though the project was constructed, this claim was not moot because there was a chance the project would be modified. (*Id.* at p. 1547, 1551.) The court disagreed finding that it could provide no effective relief and that "speculation about future changes to the project site, which are unknown at this time" was not enough to prevent mootness. (*Id.* at pp. 1550–51.) Thus, the Appellant's speculation about what the Secretary may do with the Madera Site if the court finds the Governor's concurrence was a CEQA event also is not enough to prevent mootness.

In addition, the Appellant also argues that the case is not moot because the Secretary has stated in a federal court brief that she would take the land out of trust under certain circumstances. (POB at p. 41.) The Appellant's statement acknowledges that whether the land stays in trust for gaming purposes from this point forward depends solely on the Secretary's action. Unlike the case cited by the Appellant, however, the Secretary is not a party to this case and therefore the Court cannot tell her to do anything. Further, even if the Secretary did take the land out of trust based

on this Court's decision, title to the land could remain with the United States or could go to the North Fork Tribe. Both scenarios present jurisdictional barriers to the Governor, which would nullify the effect of any writ issued to him.

Thus, regardless whether any these speculative events occur, an order directing the Governor to set aside his concurrence would not remedy the Appellant's alleged injury because it would have no impact on what may happen with the Madera Site or the proposed Casino. For this reason, the case is moot. (See *Simi Corp.*, supra, 109 Cal.App.4th at p. 1503 [A case is moot "when a court ruling can have no practical impact or cannot provide the parties with effective relief."].)

2. No Exception To Mootness Applies, And Even If It Did, That Would Only Lead To An Advisory Opinion.

Contrary to the Appellant's claim (POB at pp. 41–42), this case does not fall into any of the "three discretionary exceptions to the rules regarding mootness allowing a court to review the merits of an issue." (*Santa Monica Baykeeper, supra*, 193 Cal.App.4th at p. 1548.) The exceptons are: "(1) when the case presents an issue of broad public interest that is likely to recur; (2) when there may be a recurrence of the controversy between the parties; and (3) when a material question remains for the court's determination." (*Id.* [citations and internal quotation marks omitted].)

Regarding the first exception, the question whether the Governor should have complied with CEQA prior to issuing his concurrence could be considered an issue "of broad public interest," but that alone is not enough to justify the issuance of an advisory opinion. (See *City of Santa Monica v. Stewart* (2005) 126 Cal.App.4th 43, 70 [holding that the constitutional questions at issue were "of great interest to the parties to the litigation and the public at large," but refusing to hear them because "[c]ourts are not free

to render advisory opinions regarding controversies which the parties fear will arise, but which do not presently exist"].)

Instead, for the public interest exception to apply, the moot issue typically also must be likely to recur and evade judicial review. (See, e.g., *In re Conservatorship v. Estate of David L.* (2008) 164 Cal.App.4th 701, 709 & fn. 4 [holding that claims concerning placement finding and orders were moot because they would not continue to evade review while the claim concerning conservatorship fell into the mootness exception because it could evade review]; *W. Coast Seafood Processors Ass'n v. Natural Res. Defense Council* (9th Cir. 2011) 643 F.3d 701, 705 [holding that an intervention issue did not qualify for the mootness exception because the dispute was not "likely always to become moot" (internal quotation marks omitted)].)

The IGRA action at issue here is relatively rare. (JA 17 ["Notably, to date, there have only been four Secretarial Determinations in the entire history of the Indian Gaming Regulatory Act allowing acquisition of new tribal lands for the purpose of allowing gaming."].) For that reason, it is unlikely to arise again.

In addition, should the issue arise again, it would not necessarily escape review. Challengers to a concurrence know when the concurrence is requested and know if CEQA review will occur. For example, the Appellant wrote letters to the Governor urging him to comply with CEQA after he had been asked by the Secretary for his concurrence likely because it saw no notice suggesting that any environmental review under CEQA would be prepared. (See JA 11, ¶ 39; JA 16–38 [letters from the Appellant to the Governor explaining the need for an EIR].) The Appellant also knew that once the land passed into trust the Governor would "have limited power or ability to control gaming and other uses" on it. (JA 16.) Because the Appellant had such knowledge, the Appellant should have a stay of the

land transfer or declaratory relief in federal court to prevent the case from becoming moot. In fact, the Appellant had that opportunity but chose not to pursue it. (See JA 327–29 [Secretary offered to stay the land transfer if the Appellant appealed the federal district court decision, but the Appellant did not appeal].)

Given the Appellant's failure to seek declaratory relief or a stay and the Appellant's knowledge that the case would become moot when the land was conveyed into trust for the North Fork Tribe, the Appellant is partially responsible for its claim becoming moot. (Cf. *Wilson & Wilson*, *supra*, 191 Cal.App.4th at p. 1581 [holding petitioner "partially responsible for its claims becoming moot" and refusing to exercise discretion to hear them because petitioner "failed to seek a stay of the [p]roject's construction" where "completion of the [p]roject deprived the controversy of life"].) This is another reason that this Court should not exercise its discretion to reach the merits.

If the Appellant does not sleep on its rights, then the next time the Governor is asked by the Secretary for a concurrence pursuant to IGRA, the issue of whether CEQA applies will not evade review. There is no need for an advisory opinion now. (Cf. *City of Santa Monica*, *supra*, 126 Cal.App.4th at p. 69 ["We may not disregard the long-standing principle that, even in circumstances when an issue involves significant public interest, California courts adhere to the even older, and more important, judicial policy against issuing advisory opinions."]; contra POB at p. 42.)

This case also does not fall into the second mootness exception. "Recurrence of the controversy between the parties" is highly unlikely because the controversy is specific to the Casino and the Madera Site. (See, e.g., JA 9, ¶ 29 [listing the potential environmental impacts that may occur from Project in its proposed location]; JA 11, ¶ 37 [alleging that the Governor failed to address known "environmental issues" arising from

undertaking the Casino on the Madera Site].) Now that the Madera Site has been taken into trust for the North Fork Tribe for gaming purposes, it will not be subject to another Section 20 determination that could raise the same controversy. Any land transfer for gaming purposes that may arise under IGRA in the future will involve different property, a different project, different environmental impacts, and likely different tribes. The fact-specific nature of this controversy is another reason that this Court should not exercise its discretion to issue an advisory opinion. (See *Building a Better Redondo, Inc. v. City of Redondo Beach* (2012) 203 Cal.App.4th 852, 867 ["[T]he appeal of the judgment in this case presents fact-specific issues that are unlikely to recur and thus does not justify our exercise of discretion to resolve moot questions."].)

Finally, this case does not fall into the third mootness exception because no "material question remains for the court's determination." All questions raised by this case are moot because this Court cannot issue any effectual relief. (See *Wilson & Wilson*, *supra*, 191 Cal.App.4th at p. 1574 ["The pivotal question in determining if a case is moot is therefore whether the court can grant the plaintiff any effectual relief."].) The Governor and NP Fresno no longer have ownership and control of the Madera Site. And the parties that exercise ownership and control over the Madera Site, namely the United States and the North Fork Tribe, are not subject to this Court's jurisdiction. Because the conveyance of the Property into trust "renders it impossible for the court, if it should decide the case in favor of [Appellants], to grant [them] any effectual relief whatever," the Court should dismiss the case. (*Id.*)

In sum, although "[t]here are exceptional circumstances when a reviewing court may, as a matter of discretion, decide an issue that ordinarily would be moot" (*Friends of Bay Meadows v. City of San Mateo*

(2007) 157 Cal.App.4th 1175, 1193 fn. 8), this case does not present such exceptional circumstances.

3. The Claims Against The State And Local Agencies Are Unripe

The Appellant's remaining argument against mootness only serves to demonstrate that the Appellant's claims against the Respondent Agencies, which have not yet taken any action, are unripe. Specifically, according to the Appellant, this Court could, hypothetically, enjoin the Respondent Agencies from issuing future approvals that the North Fork Tribe may need to construct its proposed Casino, and thus this Court could issue an effective remedy. (POB at pp. 39, 42.) But the Appellant has not alleged that any of the Respondent Agencies have violated the law; instead, the Appellant seeks to enjoin possible future violations that these agencies may commit. (See JA 12, ¶ 44 [claiming that possible future actions by these agencies will violate CEQA].)

The Appellant's premature claims violate a key principle of administrative law, which is that "[a]dministrative agencies must be given the opportunity to reach a reasoned and final conclusion on each and every issue upon which they have jurisdiction to act before those issues are raised in a judicial forum." (*Sierra Club v. San Joaquin Local Agency Formation Comm.* (1999) 21 Cal.4th 489, 510.) Here, because the Respondent Agencies have not yet acted, claims against their anticipated future approvals have not been exhausted. CEQA bars courts from hearing such claims. (See Pub. Resources Code, § 21177(b).) Moreover, a court "may not enter a judgment which, rather than resolving a dispute between the parties, purports to act like legislation by regulating acts which may be undertaken at some time in the future." (*Wilson & Wilson*, *supra*, 191 Cal.App.4th at p. 1584 fn. 15.)

V. CONCLUSION

For the forgoing reasons, NP Fresno respectfully requests this Court sustain the demurrer without leave to amend and dismiss this action in its entirety.

Dated: February 24, 2014 **Cox, Castle & Nicholson LLP**

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CERTIFICATE OF WORD COUNT

The text of this brief consists of 10,739 words as counted by the Microsoft Word version 2010 word processing program used to generate the brief.

DATED: February 24, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE
DECLARATION OF SERVICE BY MAIL

CASE NAME: **Picayune Rancheria of Chukchansi Indians, et al. v. Edmund G. Brown, Jr., et al.**
CASE NUMBER: **Appeal From Superior Court of Sacramento Case No. SCV-248271 Court of Appeal, Third Appellate District Case No. C074506**

I am employed in the County of San Francisco, State of California. I am over the age of 18 and not a party to the within action; my business address is 555 California Street, 10th Floor, San Francisco, California 94104.

On **February 24, 2014**, I served the foregoing documents described as:

1) **NP FRESNO LAND ACQUISITIONS LLC'S OPPOSITION BRIEF**

in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

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Peggy Sanchez

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CASE NAME: **Picayune Rancheria of Chukchansi Indians, et al. v. Edmund G. Brown, Jr., et al.**
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