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Case No. A140203
Sonoma County Super. Ct. No. SCV-251-712

IN THE COURT OF APPEAL OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

STOP THE CASINO 101 COALITION, ET AL.
Plaintiffs and Appellants,

vs.

EDMUND G. BROWN, JR.,
Defendant and Respondent.

ON APPEAL FROM THE SUPERIOR COURT
IN AND FOR SONOMA COUNTY
HONORABLE ELLIOT L. DAUM

APPELLANT'S REPLY BRIEF

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*ROBERT D. LINKS (SBN 61914)
MARGLYN E. PASEKA (SBN 276054)
SLOTE, LINKS & BOREMAN, LLP
One Embarcadero Center, Suite 400
San Francisco, CA 9411-3619
Telephone: 415-393-8099
Fax: 415-294-4545
Email: bo@slotelaw.com

Attorneys for Appellants
(Additional counsel listed on next page)

Additional Counsel for Appellants:

MICHAEL T. HEALY (SBN 133718)
Law Offices of Michael T. Healy
11 Western Avenue
Petaluma, CA 94952
Telephone: 707-762-8768
Fax: 707-762-7589
Email: mthealy@sbcglobal.net

BRUCE A. MIROGLIO (SBN 104716)
Law Offices of Bruce A. Miroglio
1250 Church Street
St. Helena, CA 94574
Telephone: 707-963-7400
Fax: 707-968-5040
Email: bruce@famlegal.com

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INTRODUCTION

Respondent's brief is remarkable in three respects. First, the Governor admits that appellants are correct on the fundamental legal issue in this case: the Graton Indians must have jurisdiction over the subject casino site in order to qualify for a compact. (See Respondent's Brief ("RB") at 10)("a 'tribe must have jurisdiction over 'Indian Lands.'").)

Second, the Governor ignores that the jurisdiction requirement is imposed by state law. Indeed, a running theme in the Governor's brief is that appellants are challenging federal laws. However, IGRA's jurisdiction requirement was written into state law when the voters passed Proposition 1A and thereby amended the California Constitution to allow Indian gaming "in accordance with federal law."

Third, the Governor never affirmatively claims that the Graton Indians actually *do* have the required jurisdiction. Rather, the Governor consistently attempts to avoid the issue—discussing various other requirements for Class III gaming that were met, but (like the trial court) pointedly avoiding the one critical requirement that is the subject of this litigation.

The facts remain unchallenged. For 160 years—from the day California joined the Union in 1850 until 2010—the subject property was privately-owned and governed by state law.[1] Although title was transferred by a Nevada casino operator to the federal government in trust for the Graton Indians, the State of California has never relinquished any of its sovereign jurisdiction over the site, and the federal government has never accepted that jurisdiction. For that reason, the Graton Indians do not have jurisdiction over the site and, thus, cannot qualify for a compact under IGRA or the state constitution.

Appellants are entitled to a declaration that the statute approving the instant compact—Government Code section 12012.56—is invalid. The trial court judgment to the contrary must be reversed.

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[1] The Governor's brief erroneously states that title was transferred to the Federal government in trust for the tribe in 2008. (RB at 4.) In fact, that did not occur until October 2010. (3 JA 615-636.)

APPELLANTS' REPLY ARGUMENT

I. THE GOVERNOR DOES NOT CONTEST THAT JURISDICTION OVER A CASINO SITE IS A PREREQUISITE TO CLASS III GAMING

As we demonstrated in our opening brief, when the voters authorized Indian gaming in the state, they adopted an important limit. Voters were opposed to urban gambling, and proponents of Indian casinos assured voters that the location of those facilities would be limited. (2 JA 534.) That limit is provided by IGRA's jurisdiction requirement.

IGRA repeats the jurisdiction requirement four different times. (See Section 25 U.S.C. § 2710(d).) Subsection 2710(d)(3) squarely applies this requirement to compacts, providing that only a "tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted" can request a state to enter into a compact.

The Governor does not contest this point. Indeed, the Governor expressly concedes that "in order to conduct class III gaming under IGRA a 'tribe must have jurisdiction over 'Indian Lands.'" (RB at 10 (citing *Big Lagoon Rancheria v. California* (9th Cir. 2014) 741 F.3d 1032.) The Governor even notes that "the State successfully made

that very argument in a recent *federal* appeal....” referring again to the *Big Lagoon* case. (*Id.* (emphasis in the original text).)[2]

Despite the concession, the Governor attempts to argue that the jurisdiction requirement applies only for approval of a gaming ordinance and that appellants’ “primary” argument relies on the “provision setting forth the requisites for approval of a gaming ordinance.” (RB at 11.) That is not correct. As noted above, section 2710(d) repeats the jurisdiction requirement four separate times. The first time is in the context of the requirement of a tribal gaming ordinance. The other three times, however, all are in the context of the compact requirement. Most importantly, Section 2710(d)(3)(A) provides that a tribe “having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted” can request a compact from the state and the state must

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[2] The Ninth Circuit granted rehearing *en banc* in the *Big Lagoon* case on June 11, 2014 during briefing of this appeal. See *Big Lagoon Rancheria v. California*, 2014 WL 2609714. The initial decision in the *Big Lagoon* case did not address the jurisdiction argument pending before this court; rather, the Ninth Circuit determined that the State of California did not have an obligation to negotiate a compact under IGRA because the tribe in question was not in existence in 1934 when the Indian Reorganization Act took effect (see 25 U.S.C. § 465) and hence could not obtain “Indian land” pursuant to that statute. (See *Carcieri v. Salazar* (2009) 555 U.S. 379.)

negotiate with the tribe in good faith. This is directly on point, and completely rebuts the Governor's argument.

II. THE GOVERNOR DOES NOT CHALLENGE THE CORE PRINCIPLES OF APPELLANTS' EXTENSIVE ANALYSIS OF THE LAW REGARDING JURISDICTION AND ITS APPLICATION TO THIS CASE

As we explained at length in appellants' opening brief ("AOB") there are only three ways to transfer jurisdiction over land from the state to the federal government:

1) The federal government can reserve jurisdiction over the site when the state is admitted to the Union.

2) The federal government can acquire the property pursuant to the Enclaves Clause.

3) The state legislature can formally cede jurisdiction over the site; to complete the process, the federal government must formally accept the cession.

(See *Coso Energy Developers v. County of Inyo* (2004) 122 Cal.App.4th 1512, 1520; AOB at 29-33.)

A cession can be of exclusive, partial, or concurrent jurisdiction. A state's cession of jurisdiction is not effective until the federal government accepts it. (See 40 U.S.C. § 3112.) The federal government cannot by unilateral action acquire territorial (legislative)

jurisdiction over lands within a state's borders. The Governor does not dispute these points, so much as ignore them.

Moreover, and as we have also shown, these rules apply the same to Indian lands as to non-Indian lands. (AOB at 26-28, 39-46.) The typical method by which Indian lands satisfy the jurisdiction requirement is by reservation of land on admission of the state, not cession at a subsequent time. (AOB at 30.) To prove the point, appellants cited a number of cases holding that Indians did not have jurisdiction over lands because the state had not ceded it. (See AOB at 39-46.)[3]

The Governor ignores these cases and instead attempts to confuse the issue by repeatedly implying that appellants are challenging whether the casino site constitutes Indian lands. (See RB at 1 ("[T]his appeal remains wholly predicated upon … [the claim that

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[3] The cases cited include *Ex Parte Sloan* (D.Nev. 1877) 22 F.Cas. 324; *Organized Village of Kake v. Egan* (1962) 369 U.S. 60; *Surplus Trading Co. v. Cook* (1930) 281 U.S. 647; and *United States v. Lewis* (S.D. Cal. 1918) 253 F. 469. See AOB at 40-44. The Governor also fails to respond to the 1958 analysis, co-authored by California's then-Attorney General (and soon to be governor) Edmund G. Brown, that Indian lands owned by the Federal government are treated "no different than any other lands so owned. Jurisdiction depends on the manner of acquisition and the grants of cession...." (See AOB at 45-46.)

IGRA's] definition of 'Indian lands' may be ignored…); RB at 10 ["the Property is, by definition, 'Indian lands' within the meaning of IGRA"] and RB at 16 ["Appellants cite no case where a court has held that property must be ceded to the federal government for land to be considered 'Indian lands' under IGRA"].)

However, the issue in this case is not whether the lands are "Indian lands," but rather, whether those lands are under the jurisdiction of the Graton Indians or the State of California.

III. THE GOVERNOR NEVER AFFIRMATIVELY CLAIMS THAT THE GRATON INDIANS HAVE JURISDICTION

Given the Governor's concession that the Graton Indians must have jurisdiction prior to requesting a compact—much less prior to engaging in Class III gaming—one would expect the Governor to at least make a strong affirmative argument that the Graton Indians actually do have jurisdiction over the casino site; furthermore, one would expect the Governor to explain exactly when and how jurisdiction left the State of California and became vested in the Graton Indians. However, the court hears no such argument or analysis.

The silence perhaps is a tacit acknowledgement of the instant facts, as to which there can be no dispute. The casino site was under the state's jurisdiction for over a century-and-a-half before an entity related to a Nevada casino operator transferred title to the federal government in 2010.[4] The state was not involved in any way in that transaction, nor has there has been any cession of jurisdiction, or any formal acceptance of a jurisdictional transfer by the federal government. (See 5 JA at 1330:18-23 (concession by respondent's counsel); 5 JA 1281 (trial court finding); and 5 JA 1135-1139 (response to request for admissions).) Federal law declares in unmistakable language that it is "conclusively presumed that jurisdiction has not been accepted until the Government accepts jurisdiction over land …." (40 U.S.C. § 3112(c).)

Instead of showing how the Graton casino site satisfies one of the three methods by which the federal government could have obtained jurisdiction, the Governor relies on a string of cases

[4] As pointed out in our opening brief, the casino site was never the historical home of any Indians or any tribe. The former Graton Rancheria in Sonoma County consisted of a 15.45 acre parcel located several miles distant in a rural area near the small town of Graton. (AOB at 10.)

involving tribes and lands that do satisfy the historic jurisdiction protocol.

Consider for example *Bradley v. Deloria*, (S.D. 1998) 587 N.W. 2d 591 (See RB at 9). The case involved a process server's authority to serve legal papers within the boundaries of an Indian reservation. The Governor cites this case for the proposition that "state officials have no jurisdiction on Indian reservation … and that "[a]n Indian reservation constitutes a sovereign nation separate from a state…." (RB at 9; see *Bradley*, *supra*, 587 N.W.2d at 593.)

The citation does not help the Governor. *Bradley* involved the Crow Creek reservation, which pre-existed South Dakota's admission to the Union by 26 years. (See *Sioux Tribe v. United States* (1941) 94 Ct. Cl. 150, 155 (reservation created in1863).) The reservation was expressly removed from state jurisdiction when South Dakota joined the Union. (See *Bradley*, 587 N.W. 2d at 592; see also Act of Feb. 22, 1889, ch. 180, § 4, 25 Stat. 676-684.)[5] For our purposes, the most

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[5] The Enabling Act divided the former Dakota Territory and related territories and created the states of North Dakota, South Dakota, Montana and Washington.

important portion of the South Dakota Enabling Act is the section that declared that:

> [T]he people inhabiting said proposed States do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian Tribes; that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, *and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States*… .

(25 Stat. 676, 677 (emphasis added).)

In sum, *Bradley* is a classic example of tribal lands being "reserved out" of a state when it is admitted to the Union.[6] Moreover, *Bradley* is a poignant reminder that any court seeking to determine jurisdiction issues must look carefully at the history of the "Indian land" in question. If the land was separate and apart from a state upon

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[6] As we noted in our opening brief, the Graton parcel may be unique in that it involves a Class III casino on a parcel that has utterly no history of tribal occupancy or tribal settlement. This was the question left open by the Ninth Circuit in *Artichoke Joe's v. Norton* (9th Cir. 2003) 353 F.3d 712, 735 & n. 16. To the extent there are other casinos on other lands that historically have been occupied by other tribes, there may well be aboriginal tribal sovereignty over the property or equitable doctrines that might pertain. (See, *e.g.*, *City of Sherrill v. Oneida Indian Nation* (2005) 544 U.S. 197.) Be that as it may, it is most definitely not the case here.

its admission to the Union, it remains separate and apart. However, that is far different from what occurred here. To equate the transfer by Station Casinos to the creation of the Crow Creek reservation in 1863 is to distort history and historical context beyond all meaning. As the record demonstrates, the subject property was never reserved out of state lands; it was continuously subject to California law ever since the state was admitted to the Union. The distinction between this case and *Bradley* could not be more evident.

The Governor further attempts to muddy the water by claiming appellants have "abandoned their [Enclaves Clause] argument." (RB at 16, n.3.) However, as specifically noted in our opening brief (see AOB at 56-57), appellants never made an "enclaves clause argument." Rather, we have consistently made a *jurisdiction* argument, to wit, that the Graton Indians must have—but lack—jurisdiction over the casino site.

Another facet of respondent's position must be noted. Indeed, it is a troubling aspect of the Governor's position vis-à-vis the Graton Act. The Governor's brief assumes that the federal government can, if it chooses, unilaterally strip California of sovereignty over land within its borders. That, needless to say, is a curious position for any

governor to take for it drastically undermines the state's authority over its own territory. Fortunately, the Governor's assumption is wrong. Long ago, a Congressionally-sponsored report declared that "[t]he Federal Government cannot, by unilateral action on its part, acquire legislative jurisdiction over any area within the exterior boundaries of a State." (4 JA 1157-58 [Report of the Interdepartmental Committee for the Study of Jurisdiction Over Federal Areas Within the States (U.S. Gov't Printing Office 1957)].)

IV. THE GOVERNOR'S BRIEF MISSES THE POINT WHEN IT FOCUSES ON THE GRATON ACT, THE NIGC APPROVAL OF A GAMING ORDINANCE, AND THE TRANSFER OF TITLE TO THE CASINO SITE

Unable to contest appellants on the law governing territorial jurisdiction or that law's application to the subject casino site, the Governor instead discusses at length other gaming requirements that were satisfied, but which have no pertinence to the jurisdiction issue. (See, e.g., RB at 6-7.) We submit most respectfully that these arguments are nothing more than diversionary tactics, meant to distract the court from the core issue of jurisdiction.

A. Recognition of the Graton Indians Did Not Transfer Jurisdiction Over the Casino Site

The Governor argues that the Graton Act restored federal recognition of the Graton Indians and that the enactment constituted "an acknowledgment of the re-establishment of the tribal government, and the attendant government-to-government relationship with the federal government." (RB at 7.) That is not what the Graton Act says.

The Governor relies on two sections of the Graton Act, the first of which provides that "all [federal] laws and regulations of general application to Indians and nations … shall be applicable to the Tribe and its members." (RB at 7; see also 25 U.S.C. § 1300n-2(a).) Section 1300n-2, however, generally concerns federal benefits programs, as opposed to territorial jurisdiction.[7] The Act makes the Graton Indians subject to federal laws; it says nothing about any specific piece of real estate being removed from California's sovereign jurisdiction. Nor does it say anything about a specific parcel being subject to the sovereignty of the Graton Indians.

[7] The Governor cites to a publication in the Federal Register, but that is a list of tribal entities "recognized and eligible for funding and services from the Bureau of Indian Affairs by virtue of their status as Indian tribes." (RB at 7; see also 77 Fed.Reg. 47868 (Aug. 6, 2012).)

The Governor also relies on a section of the Act which restores "rights and privileges" of the Graton Indians. (RB at 7; see also 25 U.S.C. § 1300n-2(b).) But that portion of the Graton Act does not address the question of sovereignty or jurisdiction, either; it only restores rights and privileges "which were diminished or lost under the Act of August 18, 1958." The quoted language begs the question whether there was a Graton Tribe that exercised *any* sovereignty prior to 1958.

There is no evidence in the record that the Graton Indians exercised jurisdiction over the former Rancheria site prior to 1958, and they certainly did not have jurisdiction over the casino site. (See Providing for the Distribution of the Land and Assets of Certain Indian Rancherias and Reservations in California, S.Rep. No.85-1874, 85th Cong., 2d Sess. (1958) at 24-25 to accompany H.R. 2824, The Rancheria Act, Pub. L. No. 85-671, 72 Stat. 619 (1958) (discussing the former Rancheria and noting of the Indians there that "the group is not organized, either formally or informally.")

Ignoring the unusual situation in this case, the Governor asserts the general rule that "federally recognized Indian tribes ... exercise inherent sovereign authority over their members and territories." (RB

at 8.) In support of this proposition, the Governor cites *Big Horn County Elec. Coop. v. Adams* (9th Cir. 2000) 219 F.3d 944, 954. However, the issue was completely different in *Big Horn*. That case concerned the Crow Reservation in what is now Montana—a reservation that was "established by the 1868 Treaty of Fort Laramie" (*Id*. at 948), twenty-one years *before* the state was admitted to the Union.

Moreover, Montana is one of the states whose Indian lands were specifically reserved at the time of admission. (See Act of Feb. 22, 1889, ch. 180, § 4, 25 Stat. 676-684; Montana Const., Art. I ["all lands owned or held by any Indian or Indian tribes shall remain under the absolute jurisdiction and control of the congress of the United States..."].) The California Constitution has no similar provision.

Upon analysis, it is readily apparent that *Big Horn* squares precisely with our analysis. It fits to the letter one of the three methods by which the federal government can obtain jurisdiction over lands within a state's borders. The inescapable fact is that the Graton Act and the approval of the instant compact did not, and could not, by themselves alone change jurisdiction over the subject property.

As appellants demonstrated in their opening brief, Congress is capable of addressing the jurisdiction question at the time of tribal recognition; we cited the Pokagon Act to that effect. (See AOB at 12.) The Governor attempts to rebut the contrast between the Graton Act and the Pokagon Act by citing two additional acts recognizing other tribes. (RB at 8.) Those acts, however, are completely irrelevant to the issue here. No one challenged compacts for those tribes.

Furthermore, Congress explicitly recognizes tribal jurisdiction over land when appropriate. In the same bill that included the Graton Act, Congress also restored the Shawnee Tribe to federal recognition. With regard to the Shawnee, Congress stated "The Tribe shall have jurisdiction over trust land…." (25 U.S.C. § 1041f(a).) This makes sense for the Shawnee Tribe because its lands were to be split off from a longstanding Cherokee reservation. *Id.* The Graton Act, which lacks a similar provision, is far different.

The Governor fails to address a number of appellants' arguments regarding recognition. In our opening brief, we argued that when the federal government recognizes an Indian tribe, it recognizes the tribe's "eligib[ility] for the special programs and services provided by the United States to Indians because of their status as Indians." (25

U.S.C. § 479-1a.) The federal government has no power to unilaterally divest a state of jurisdiction over land within the state borders and transfer that sovereignty to an Indian tribe, especially a newly-created tribe. (AOB at 36-37.) Lastly, in this instance Congress explicitly disclaimed any intent to alter jurisdiction. The House Report on the Graton Act states, "This bill is not intended to preempt state...law." (H.Rep. No. 106-677 at p. 3 (2000) (the report is included in the record); see 5 JA 1181-1183.) The Governor ignores all of these points.

B. Designation of the Site as a Reservation did not Confer Jurisdiction on the Graton Indians

The Governor relies on the designation of the casino site as part of the Graton Indians' reservation but, once again, respondent never explains how that action changed California's jurisdiction over the property. (RB at 8.) The Governor argues that "generally, tribes have jurisdiction within a reservation's boundaries..." citing *Shawnee Tribe v. United States* (10th Cir. 2005) 423 F.3d 1204, 1220, fn. 17. The qualifier "generally" is the key here. The statement is true most of the time because, as noted previously many Indian reservations pre-

existed their host state, and the state was admitted subject to then-existing Indian rights. (See *supra*, page 8; see also AOB at 30.)

This is certainly true of the Shawnee reservation, which was established by treaties in 1825 and 1831, some 30 years before Kansas joined the Union. (*Shawnee Tribe*, 423 F.3d at 1208.) The Kansas Admission Act (Act of Jan. 29, 1861, ch. 20, 12 Stat. 126-128) reads:

> [N]othing contained in the said constitution respecting the boundary of said State shall be construed ... to include any territory which, by treaty with such Indian tribe, is not, without the consent of said tribe, to be included within the territorial limits or jurisdiction of any State of Territory; but all such territory shall be excepted out of the boundaries, and constitute no part of the State of Kansas....

(12 Stat. at 127.)

The United States Supreme Court took note of this situation when it declared that the Shawnee Reservation was exempt from state taxation. The Court said that the integrity of the State of Kansas was not diminished by such a determination:

> There can be no question of State sovereignty in the case, as Kansas accepted her admission into the family of States on condition that the Indian rights should remain unimpaired and the general government at liberty to make any regulation respecting them, their lands, property, or other rights, which it would have been competent to make if Kansas had not been admitted into the Union. The treaty of 1854 left the

> Shawnee people a united tribe, with a declaration of their dependence on the National government for protection and the vindication of their rights. Ever since this their tribal organization has remained as it was before.

(*In Re Kansas Indians* (1866) 72 U.S. 737, 756.)

The Governor's citation of *Shawnee Tribe* thus reinforces the point made earlier: that when analyzing jurisdiction over land occupied by a tribe, the historical background of the property is crucial to the analysis. As with *Bradley* and *Big Horn*, *supra*, the historical difference between the Shawnee Reservation issues and the Graton casino site is dramatic. In the case now before the court, there is utterly no history of reservation status; no treaty; no prior tribal ownership; or government or any other Indian activity on the subject property, which has been subject to California's exclusive sovereignty since the state was admitted to the Union. (See 2 JA 541-555.)

The Governor attempts to distinguish *State v. Shepard* (1941) 239 Wis. 345, 300 N.W. 905, on the grounds that the Indian trust lands in that case had not been set aside as a reservation. (RB at 20.) However, the holding covered "Indian country," which includes reservation lands. (See 18 U.S.C. § 1151.) The court wrote, "To vest jurisdiction in the United States even of lands in Indian country within

a state, a cession of such jurisdiction by the State is essential." (*Shepard*, 300 N.W. at 907.)[8]

The fact remains: the Governor cites no case where unilateral designation of federally owned lands as a reservation served to divest a state of jurisdiction. The bottom line in this case is straightforward. The federal government cannot unilaterally strip California of jurisdiction by simply declaring land within the state's borders to be an Indian reservation. A formal cession of jurisdiction is required.

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[8] The Governor also relies on *United States v. McGowan* (1938) 302 U.S. 535, but that case dealt with a different issue. It involved a challenge, brought by an Indian residing on a federal "Indian colony," to the application of federal laws that imposed liquor restrictions on Indians. The case did not involve a challenge to tribal jurisdiction. The argument was that federal law should not apply; moreover, there does not appear to have been a conflict between federal and state law regarding transportation of liquor on Indian land. Thus the court wrote: "The federal prohibition against taking intoxicants into this Indian colony does not deprive the State of Nevada of its sovereignty over the area in question." (302 U.S. at 539.) What *McGowan* stands for is that the federal government may well have jurisdiction over Indians; but that is far different from saying that the federal government has jurisdiction over state land. Indeed, it is worth noting that key precedents cited by the Court in *McGowan* confirm the historical tradition and practice that for lands to be truly within federal jurisdiction, they are usually "reserved out" prior to statehood. (See, *e.g.*, *United States v. Pelican* (1914) 232 U.S. 442, 445-447.)

C. Transfer of the Land to the Federal Government in Trust for the Graton Tribe did not Satisfy IGRA's Requirement that the Indian Lands be Under the Tribe's Jurisdiction

The Governor argues that the federal government took the site into trust pursuant to the Graton Act and that the site now constitutes Indian lands under IGRA. (RB at 10.) However, unilaterally taking title, even for an Indian tribe, does not divest a state of its territorial jurisdiction. In this case the issue is magnified because the state did not transfer the land; it was deeded by a Nevada casino operator to the federal government without any involvement by the state. To shift jurisdiction under such circumstances is unprecedented.

The Governor fails to show how this change of title divested California of its sovereignty over the casino site. People (and governments, too) acquire land and put land into trust every day. But that action changes *title* to the property, not *jurisdiction* over it.

D. Approval of the Tribal Gaming Ordinance Did Not Settle the Issue of Jurisdiction

The Governor argues that the issue of jurisdiction was settled when the National Indian Gaming Commission (NIGC) approved the Graton Indians' tribal gaming ordinance. The Governor cites *Citizens Against Casino Gambling in Erie County v. Stevens* (E.D. N.Y. 2013)

945 F.Supp.2d 391, for the proposition that appellants should have sued the Chairman of the NIGC instead of pursuing this litigation. The Governor is flat wrong on this point.

The Graton Indians did not even own the casino site when the ordinance was approved. The Chairman could not—and did not—make any determination as to the Tribe's jurisdiction over the casino site. In fact, he reserved the issue in the formal approval letter that was issued in 2008, specifically noting:

> This letter constitutes approval of the Gaming Ordinance under the Indian Gaming Regulatory Act. It is important to note, however, that approval is granted for gaming only on Indian lands, as defined in IGRA, *over which the Graton Rancheria exercises jurisdiction*.

(4 JA 988 (emphasis added).)

As this language proves, the NIGC did *not* approve this or any other casino site. Moreover, there is no record evidence that the Graton gaming ordinance has been reviewed by NIGC since the site was obtained in 2010, and so the NIGC has not had to review the issue in this context.

E. Eligibility of the Site for an Exception to IGRA's Prohibition against Gaming on Lands Acquired After 1988 has nothing to do with the Jurisdiction Requirement

The Governor claims that determination by federal officials that the site qualifies for the restored lands exemption from the general prohibition against Indian gaming on lands acquired after IGRA's passage in 1988 settled eligibility for class III gaming. (RB at 12.) However, a determination under section 2719 has nothing to do with effectuating a formal transfer of California's sovereignty and the Governor has cited no case suggesting otherwise. The statutory language is clear that the "restored lands" exception is an exception *only* to the requirement that the lands be acquired before 1988. (See 25 U.S.C. § 2719(b)(1)(B).)

F. The Indian Canon of Construction Has Nothing to do with this Case

The Governor raises for the first time on appeal that the so-called Indian canon of liberal statutory construction (see *Montana v. Blackfeet Tribe of Indians* (1985) 471 U.S. 759, 766) somehow applies to this case. (RB at 12-13.) However, the Governor does not even attempt to apply the canon to any specific language. In any

event, the canon has no application at all in a case like this where there is no statutory ambiguity. Because IGRA is crystal clear on the need for jurisdiction, the Indian canon is irrelevant. (See *Negonsott v. Samuels* (1993) 507 U.S. 99, 110.)

Not only is IGRA clear on the jurisdiction point, but it is also worth noting that California's courts strictly construe legislative actions against finding a cession of jurisdiction over lands. (See *Coso Developers v. County of Inyo*, *supra*, 122 Cal.App.4th at 1533.) The court's task here is simple because the Governor points to no action of the Legislature that could possibly be construed as a cession of jurisdiction.

G. The Governor's Claim that Federal Law Controls this Case Actually Favors Appellants

The Governor argues that federal laws, namely IGRA and the Graton Act, control this case. (RB at 14-15.) As we have shown, none of the Governor's claims are relevant to the issue of who has jurisdiction over the casino site. Although we quite agree that federal law is relevant to this case, we rely on different law than the Governor. We rely on IGRA's requirement that a tribe have territorial jurisdiction over land to be used as a casino site. Because the state

has never ceded its jurisdiction over Graton casino site—and because the federal government has never accepted a cession under federal law (40 U.S.C. § 3112(c)) —the Graton Indians do not have jurisdiction over the site. For that reason, the compact is illegal.

The Governor seeks to avoid the impact of the federal "acceptance of cession" statute by asserting that the Indian Commerce Clause provides Congress with plenary power to legislate in the field of Indian affairs. (RB at 15.) It surely does that—but not to the extent the Governor urges. The text of the clause gives Congress the power "[t]o regulate Commerce with …the Indian Tribes." (U.S. Const., Art. I, Sec. 8, cl. 3.) However, the Indian Commerce Clause does not give Congress the power to create tribal sovereignty over land; it provides the power to *recognize* tribal sovereignty where it has existed historically; but no court has ever held that Congress has the power to create tribal sovereignty over state land in the first instance where it never before existed.

The Governor also invokes the Supremacy Clause to argue that state laws that conflict with federal law are "without effect." (RB at 15.) What the Governor ignores is an obvious point: there is no

conflict. Rather, appellants seek to enforce a state constitutional provision that incorporates federal law. [9]

H. This Case was Properly Filed in State Court

The Governor's real argument, it seems, is that this case should have been filed in federal court against federal officials. However, the heart of appellants' case is grounded in state law. When Proposition 1A was enacted 14 years ago, it amended the California Constitution to permit Indian tribes to engage in Nevada-style casino gambling "in accordance with federal law." The incorporation of federal restrictions played a significant role in winning the voters' approval of

[9] The Governor's citation of *Brock v. County of Los Angeles* (1937) 9 Cal.2d 291 is off point. Appellants do not attack the validity of any federal statute or federal act. It is the action of the *California Legislature* in approving the instant compact via the enactment of Government Code section 12012.56 that we question. Moreover, *Brock* did not even purport to insulate a state statute from judicial review due to the existence of federal statutes or actions covering similar subject matters. Indeed, the high courts of five states have examined the compliance of gubernatorial Indian gaming compacts, negotiated pursuant to IGRA, with their state constitutions. See *Saratoga County Chamber of Commerce v. Pataki* (2003) 100 N.Y.2d 801; *State ex rel. Clark v. Johnson* (1995) 120 N.M. 562; *Florida House of Representatives v. Crist* (Fla. 2008) 999 So.2d 601; *State ex rel. Stephan v. Finney* (1994) 254 Kan. 632; *Panzer v. Doyle* (2004) 271 Wis.2d 295. Appellants merely ask this court to do the same.

the constitutional amendment. When Proposition 1A was being considered by the electorate, its proponents promised voters that:

> Proposition 1A and federal law strictly limit Indian gaming to tribal land. The claim that casinos could be built anywhere is totally false…The majority of Indian Tribes are located on remote reservations…

(2 JA 534.)

Whether the Graton site squares with that representation—not to mention the letter and spirit of the state constitutional provision—is an issue that belongs in this forum.[10]

It is the fundamental duty of California courts to interpret and uphold the California Constitution. (*Strauss v. Horton* (2009) 46 Cal.4th 364, 388-89 ("this court will continue to exercise its traditional responsibility to faithfully enforce *all* of the provisions of the California Constitution")(emphasis original).)

The issue is properly before a California court.

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[10] If IGRA or the Graton Act were interpreted to permit the federal government to unilaterally strip California of its territorial jurisdiction, such a ruling would raise grave constitutional concerns. (See *Hawaii v. Office of Hawaiian Affairs* (2009) 556 U.S. 163, 176.) As noted above, Congress does not have the power to create tribal sovereignty were it never existed before, nor can Congress single-handedly diminish a state's territorial jurisdiction.

V. THE GOVERNOR'S RELIANCE ON *CITY OF ROSEVILLE* IS UNAVAILING

The Governor relies heavily on *City of Roseville v. Norton* (D.D.C. 2001) 219 F.Supp.2d 130. So did the trial court.

In our opening brief, we explained why this reliance is misplaced. (See AOB at 52-60.) To reiterate: the parties in *City of Roseville* erroneously assumed jurisdiction would follow title. In contrast, appellants have directly challenged that assumption.

The Governor ignores this distinction and continues to argue that *City of Roseville* is "nearly identical to this case." (RB at 17.) The legal issues raised by the parties in the two cases, however, are vastly different. *City of Roseville* involved a challenge to an attempt to take land into trust under a restoration act on the grounds that the Act violated the federal Constitution. The basis of the claim was that if the tribe obtained *title* to the site, the tribe would obtain at least some measure of *sovereignty* over the site. The court wrote, "According to plaintiffs, if the United States accepts the parcel in trust on behalf of the UAIC pursuant to the Auburn Indian Restoration Act, the land is effectively removed from the sovereign jurisdiction of the State of California." (219 F.Supp.2d at 149.) Thus, the plaintiffs in

City of Roseville mistakenly conflated title and jurisdiction and assumed that transfer of title would automatically divest the state of jurisdiction and instantly vest that jurisdiction in the tribe. The plaintiffs in *City of Roseville* feared that transfer of title—in and of itself—would strip California of its sovereign authority over the land in question.

In contrast, this case involves a challenge to an Indian gaming compact on the grounds that the Graton Indians do not have jurisdiction over the site as required by IGRA. We have raised a claim under the California Constitution, which incorporates IGRA compliance as a prerequisite to Class III gaming. Most importantly, we challenge the assumption that when the Graton Indians obtained beneficial *title* to the site, they somehow obtained *jurisdiction* over it. In that regard, we are making exactly the opposite claim from the plaintiffs in *City of Roseville*. We argue that despite the fact that title to the site has been transferred to the federal government in trust, the Graton casino site has *not* been removed from the sovereign jurisdiction of the State. We argue that aspects of dominion over land are transferred through separate processes, and transfer of title does

not accomplish transfer of sovereignty. This claim is totally at odds with the issues and rulings made in *City of Roseville*.

Furthermore, in that case the court complained that "plaintiffs merely cite the text of the [Enclaves] Clause." (219 F.Supp.2d at 150.) The plaintiffs in *City of Roseville* apparently did not cite any case law in support of their theory. In marked contrast, appellants in this case have extensively briefed the issue of jurisdiction, including case law, governmental studies, and learned treatises, all of which confirm appellants' position.

As noted above, the Governor has not responded to the score of authorities cited, but instead attempts to divert the court's attention away from the central issue. To that end, the Governor relies on another "land into trust" case—*Carcieri v. Kempthorne* (1st Cir. 2007) 497 F.3d 15, revd., *Carcieri v. Salazar* (2009) 555 U.S. 379—where the challenge was yet again based on the mistaken conflation of title and jurisdiction. But it is important to observe that the First Circuit opinion was reversed on other grounds by the United States Supreme Court, which ruled that the subject property could not be taken into trust because the tribe involved in that case was not under federal jurisdiction in 1934 when the Indian Reorganization Act (25

U.S.C. § 465) took effect. The lower court decision cited by the Governor is no longer binding authority; its pronouncements are mere dicta and in any event do not analyze the same issue presented here.[11]

VI. THE GOVERNOR DID NOT DEFEND THE TRIAL COURT'S RULING OF JUDICIAL ESTOPPEL

In appellants' opening brief, we established that contrary to the trial court's ruling, this case is not barred under the doctrine of judicial estoppel merely because of the dismissal of a separate CEQA action filed by one of the appellants.

The Governor has not defended that portion of the ruling below, nor responded to appellants' opening brief on this issue. No more need be said.

VII. DECLARATORY RELIEF IN FAVOR OF APPELLANTS WILL NOT CREATE CONFUSION OR CONFLICT. THE PROPER APPROACH IS TO REMAND THIS CASE TO THE TRIAL COURT FOR ISSUANCE OF AN APPROPRIATE REMEDIAL ORDER

The Governor contends that if appellants prevail:

> All that would result is confusion and conflict between

[11] In any event, to the extent that the First Circuit's analysis in *Carcieri* concerns the Enclaves Clause (see RB at 19), it is inapposite here for the case does not discuss, much less determine, precisely how jurisdiction can be transferred from a sovereign state to the federal government.

> the state, the federal government, and the Tribe, with the State being left with no ability to regulate gaming on the Property.

(RB at 22.)

The Governor's prediction of doom and gloom is without basis. There will be no "confusion" or "conflict" if the court issues a definitive ruling on the jurisdiction question. Indeed, we submit that the present situation is where the confusion lies, for the Governor and the Legislature are seriously confused on the jurisdiction principles at stake here. That confusion is what led them to make an incorrect assumption about which sovereign retained jurisdiction over the subject property.

But there is more to be said about remedies. As we noted in our opening brief, the proper approach is to issue declaratory relief and remand the case to the trial court so a carefully crafted remedial order can issue. It is quite clear that the Governor is not powerless in the wake of a ruling in favor of appellants. If anything, the Governor and the State are *more* powerful in such an event because they will have clear jurisdiction to enforce state laws to prohibit tribal officials and the public from engaging in illegal gambling on the casino site. That is exactly what the recent *Bay Mills* case teaches (see *Michigan v. Bay*

Mills Indian Community (2014) 134 S.Ct. 2024, discussed *infra*). For while the tribe itself is probably immune from suit (indeed, that is why appellants did not name them as a defendant); and while this case was not filed in federal court (where the state might well have claimed 11th Amendment immunity; see *Seminole Tribe of Florida v. Florida* (1996) 517 U.S. 44)), the plain fact is, there are abundant law enforcement options for the Governor to employ, as was pointed out by the United States Supreme Court in *Bay Mills*:

> So, for example, Michigan could, in the first instance, deny a license to Bay Mills for an off-reservation casino… And if Bay Mills went ahead anyway, Michigan could bring suit against tribal officials or employees (rather than the Tribe itself) seeking an injunction for, say, gambling without a license…. tribal immunity does not bar such a suit for injunctive relief against *individuals,* including tribal officers, responsible for unlawful conduct…. And to the extent civil remedies proved inadequate, Michigan could resort to its criminal law, prosecuting anyone who maintains—or even frequents—an unlawful gambling establishment…In short …the panoply of tools Michigan can use to enforce its law on its own lands—no less than the suit it could bring on Indian lands under § 2710(d)(7)(A)(ii) —can shutter, quickly and permanently, an illegal casino.

(*Michigan v. Bay Mills Indian Community* (2014) 134 S.Ct. at 2035.)[12]

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[12] The Court in *Bay Mills* confronted a suit by the State of Michigan to enjoin Tribal gaming off Indian land. (See 134 S.Ct. at 2028-2029.)

Presumably, under the rubric of "cooperative Federalism" (see *Artichoke Joe's v. Norton* (9th Cir. 2003) 353 F.3d 712, 715), the federal government will honor this court's decree and the Governor and the Department of the Interior will be able to tailor remediation so that order prevails.

The long and short of all this is that the state has ample tools and resources to craft an appropriate remedy.

CONCLUSION

This case is important. It involves the allocation of jurisdiction between federal, state and tribal governments. Further, it involves a new phenomenon: partnerships between tribes and out-of-state casino operators, coupled with the acquisition of new lands in urban areas for use as Indian casinos. Tribes and their investor partners have asserted

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The Court noted in passing that the landmark *Cabazon* case "left fully intact a state's regulatory power over tribal gaming outside Indian [sovereign] territory…" (134 S.Ct. at 2034.) The Court made specific reference to the possibility of designating an illegal gambling facility as a public nuisance. (134 S.Ct. 2035.) Although the reference in *Bay Mills* was to the state law of Michigan, the law of California law is similar. See, e.g., Cal. Penal Code §§ 330 (conducting banking or percentage games is a misdemeanor); 330a , 330b, 330.1 (same treatment of slot machines); 11225-11235 (red light abatement law; illegal gambling included); Cal. Civ. Code §§ 3480 (public nuisances); 3491 (remedies include criminal proceedings, civil action; abatement).

that the transfer of title to the federal government automatically strips the state of jurisdiction over the lands in question and automatically vests it in the tribe.

Appellants have challenged the mistaken assertion that jurisdiction follows title. Moreover, appellants have stressed repeatedly that the federal government does not have the power to unilaterally extinguish state jurisdiction. Indeed, in *Hawaii v. Office of Hawaiian Affairs* (2009) 556 U.S. 163, the Supreme Court faced an argument that a Congressional statute divested the State of Hawaii from certain lands. The Court flatly rejected the argument noting that the subject statute "would raise grave constitutional concern if it purported to 'cloud' Hawaii's title to its sovereign lands more than three decades after the State's admission the Union." (556 U.S. at 176.) The court went further and declared in a unanimous opinion that:

> We have emphasized that "Congress cannot, after statehood, reserve or convey … lands that have already been bestowed upon a State." *Idaho v. United States,* 533 U.S. 262, 280, n. 9, 121 S.Ct. 2135, 150 L.Ed.2d 326 (2001) (internal quotation marks and alteration omitted); see also *id.,* at 284, 121 S.Ct. 2135 (Rehnquist, C.J., dissenting) ("[T]he consequences of admission are instantaneous, and it ignores the uniquely sovereign character of that event ... to suggest that

> subsequent events somehow can diminish what has already been bestowed").

(*Id.*)

Ten years ago, a California appellate court expressed a similar sentiment. The court saw the jurisdiction issue through a well-focused lens, and noted that:

> A business or other entity seeking to avoid compliance with California regulations ... could convey its land to the United States in exchange for the right to operate on the land, and inform the state and county it is now operating within a "federal enclave" beyond California's jurisdiction. Such an extraordinary delegation of the state's power to assert or transfer its jurisdiction has no reasonable or rational basis and would produce patently absurd consequences.

(*Coso Energy Developers v. County of Inyo, supra,* 122 Cal.App.4th at 1527.)

These principles apply here. There is no authority for the federal government or an Indian tribe to unilaterally strip the State of California of its longstanding sovereignty. Indeed, if somehow unilateral federal action can divest the California of its sovereign jurisdiction over lands within the state, not only would it be a constitutional first, but in addition the balance of power would tilt decidedly away from California and, over the

long term, threaten our state's ability to govern itself and protect its economic health.

In this case the Graton Indians and their Nevada partner are exploiting an alleged exemption from state law for an economic advantage that stretches Proposition 1A beyond its limits. The United States Supreme Court confronted a similar problem when a tribe sought to evade cigarette taxes on sales of tobacco products to non-Indians at a reservation store. The Court had no hesitation in rejecting the claimed exemption from state law:

> We do not believe that principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere.

(*Washington v. Confederated Tribes of the Colville Indian Reservation* (1979) 447 U.S. 134, 155.)

Those very sensitivities pertain to this case, for the Graton Indians, having never satisfied IGRA's jurisdiction prerequisite, are not exempt from California's constitution and statutes that prohibit casino gambling.

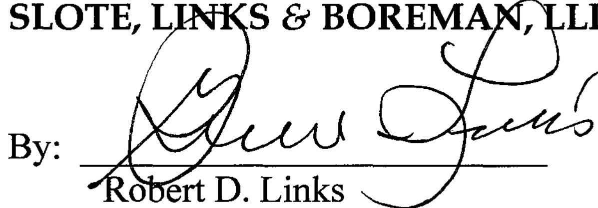
The fact is, the state of California has not ceded jurisdiction over the Graton casino site. (See AOB at 7; see also 5 JA at 1330:18-23 (concession by respondent) and 5 JA 1281 (trial court finding).) The casino site remains subject to California's sovereign jurisdiction, including the application of its anti-gambling laws which are firmly embedded in Article 4, section 19 of the state constitution and the Penal Code.

For these reasons, the trial court judgment must be reversed; declaratory relief should issue in favor of appellants; and this case should be remanded for the crafting of an appropriate remedy.

Dated: 7-3-2014

Attorneys for Appellants:

SLOTE, LINKS & BOREMAN, LLP



By: ______________________
Robert D. Links

LAW OFFICES OF MICHAEL T. HEALY

By: /s/
Michael T. Healy

LAW OFFICES OF BRUCE A. MIROGLIO

By: /s/
Bruce A. Mirolgio

CERTIFICATE REGARDING NUMBER OF WORDS IN REPLY BRIEF
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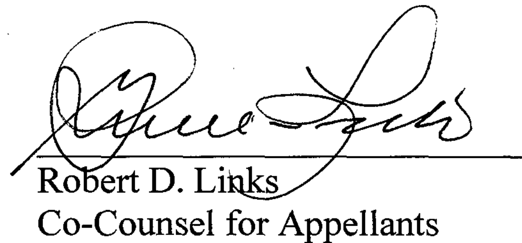
California Rules of Court

The undersigned here by certifies, pursuant to Rule 8.204(c)(1), that this brief consists of 7,890 words, including footnotes, as measured by the "word count" feature of Microsoft Word software.

Dated: 7-3.2014



Robert D. Links
Co-Counsel for Appellants

PROOF OF SERVICE

I, the undersigned, hereby certify that I am a citizen of the United States, over the age of 18 years and am not a party to the within entitled action. I am employed in the City & County of San Francisco, California and my business address is One Embarcadero Center, Suite 400, San Francisco, CA 94111-3619. I am an active member of the State Bar of California. I am readily familiar with my employer's practice for collection and processing of correspondence for mailing with the United States Postal Service. On the date last written below, I served the following document(s):

APPELLANTS' REPLY BRIEF

on the parties to this action, through their respective attorneys of record, by placing a true and correct copies thereof in sealed envelope(s) addressed as shown below and served them as checked:

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WILLIAM L. WILLIAMS, JR. (SBN 99581)
Deputy Attorney General
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Counsel for Defendant and Respondent

COURT CLERK
Sonoma County Superior Court
Attn: Honorable Elliot L. Daum
600 Administration Drive, Room 107-J
Santa Rosa, CA 95403

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350 McAllister Street
San Francisco, CA 94102

I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct and that this Proof of Service was signed by me on July 3, 2014 at San Francisco, California.

Marglyn E. Paseka