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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

STAND UP FOR CALIFORNIA!, 7911 Logan Lane, Penryn, California 95663

RANDALL BRANNON, 26171 Valerie Avenue, Madera, California 93638;

MADERA MINISTERIAL ASSOCIATION, 17755 Road 26, Madera, California 93638;

SUSAN STJERNE, 24349 Tropical Drive, Madera, California 93638;

FIRST ASSEMBLY OF GOD – MADERA, 22444 Avenue 18 ½, Madera, California 93637; and

DENNIS SYLVESTER, 18355 Road 25, Madera, California 93638,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, 1849 C Street, N.W., Washington, D.C. 20240;

Case No. 2:16-CV-02681 AWI EPG
[Related Cases: 16-cv-950-AWI and 1:15-cv-00419-AWI]
Hon. Anthony W. Ishii, Ctrm. 2
Mag. Judge Erica P. Grosjean, Ctrm. 10

PLAINTIFFS' NOTICE OF MOTION TO STAY ACTION; MEMORANDUM OF POINTS AND AUTHORITIES

Date: June 26, 2017
Time: 1:30 p.m.
Ctrm: 2

Complaint Filed: November 11, 2016

SARAH MARGARET ROFFEY JEWELL, in her official capacity as Secretary, U.S. Department of the Interior, 1849 C Street, N.W., Washington, D.C. 20240;

BUREAU OF INDIAN AFFAIRS, U.S. Department of the Interior, 1849 C Street, N.W., Washington, D.C. 20240;

LAWRENCE ROBERTS, in his official capacity as Principal Deputy Assistant Secretary, Bureau of Indian Affairs, U.S. Department of the Interior, 1849 C Street, N.W., Washington, D.C. 20240,

Defendants.

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TO THE COURT, AND TO ALL PARTIES AND THEIR COUNSEL OF RECORD,

PLEASE TAKE NOTICE, that on June 26, 2017 at 1:30 p.m., or as soon thereafter as the matter may be heard in the above-entitled Court, located at 2500 Tulare Street, Fresno, California, plaintiffs Stand Up for California!, Randall Brannon, Madera Ministerial Association, Susan Stjerne, First Assembly of God - Madera, and Dennis Sylvester, will and hereby do move this Court for an order staying this action pending the determination by the California Supreme Court in *United Auburn Indian Community of the Auburn Rancheria v. Brown*, Case No. S238544 (review granted Jan. 25, 2017) and *Stand Up for California! v. State of California*, Case No. S239630 (review granted Mar. 22, 2017).[1]

This stay is sought pursuant to this Court's inherent powers to stay cases, *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936), on the grounds that the pending decision by the California Supreme Court is necessary for a complete adjudication of issues raised in plaintiffs' First Amended Complaint. This motion is based on this Notice of Motion and Motion, the attached Memorandum of Points and Authorities, the administrative record, all pleadings and papers filed in this action, and such other and further matters as the Court may consider.

[1] Briefing is currently underway in *United Auburn*. Action in *Stand Up for California!* has been deferred pending a disposition in *United Auburn*.

Plaintiffs' counsel has notified counsel for defendants and intervenor-defendant of their intent to bring this motion. Counsel for defendants and intervenor-defendant intend to oppose this motion.

Dated: May 12, 2017

SNELL & WILMER L.L.P.
Sean M. Sherlock
Heidi McNeil Staudenmaier

PERKINS COIE LLP
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Brian Daluiso

By: */s/ Sean M. Sherlock*
Sean M. Sherlock
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In this action plaintiffs challenge the decision of the U.S. Secretary of the Interior (the "Secretary")[2] to issue "Secretarial Procedures" allowing intervenor defendant the North Fork Rancheria of Mono Indians (the "North Fork Tribe") to conduct Class III gaming on land adjacent to the city of Madera, California (the "Madera Site"). Last month the California Supreme Court granted review of the decision by the California Court of Appeal, Fifth Appellate District, in a related case involving the parties to this action. The California Supreme Court's resolution of that action is necessary for a complete adjudication of issues raised before this Court. Accordingly, plaintiffs move this Court to stay this action pending the California Supreme Court's decision.

This Court should stay this action pending the decision by the California Supreme Court for the following reasons:

1. The California Supreme Court's decision is necessary for the complete adjudication of this case. Plaintiffs' fifth claim for relief in this action asserts that the Secretarial Procedures are not valid, because the Governor of California lacked authority under California law to concur in the Secretary's decision to take the Madera Site into trust for the North Fork Tribe for purposes of gaming. [Dkt. 13 ¶¶ 68-73.] On December 12, 2016, the California Court of Appeal, Fifth Appellate District, agreed with plaintiff Stand Up, and held that the Governor lacked such authority. *Stand Up for California v. State of California*, 6 Cal.App.5th 686 (2016) (review granted Mar. 22, 2017, Case No. S239630) ("*Stand Up v. California*"). The Fifth District disagreed with an earlier decision by the Third District Court of Appeal on the same issue in a case involving different parties in *United Auburn Indian Community v. Brown*, 4 Cal.App.5th 36 (2016) (review granted Jan. 25, 2017, Case No. S238544) ("*United Auburn*"). The California Supreme Court has granted review in both cases. If the California Supreme Court decides that the Governor's concurrence was invalid, then under federal law the Madera Site is not eligible for

[2] Under Federal Rules of Civil Procedure 25(d), the current Secretary, Ryan Zinke, is automatically substituted as a defendant in this action in place of the former Secretary, Sarah Margaret Roffey Jewell.

tribal gaming and the Secretarial Procedures must be invalidated.

2. The California Supreme Court likely will invalidate the concurrence. This Court has recognized that predicting the outcome of a decision in another court is an uncertain endeavor, but the likelihood of that court ruling in the moving party's favor is not dispositive of the stay analysis. Nonetheless, Stand Up has strong reason to contend that the decision will be in Stand Up's favor in light of the Fifth District's rejection of the Third District's decision and reasoning.

3. None of the parties to this action will be harmed by a stay. Because resolution of the state-law issue by the California Supreme Court is necessary for a complete adjudication of Stand Up's First Amended Complaint, all parties will benefit from the stay. Moreover, both the Tribe and the federal defendants have represented, in another case before this Court raising similar issues, that they are amenable to such a stay.

4. A stay will simplify the issues before this Court and conserve the resources of all the parties and the Court. If the Supreme Court holds the concurrence valid, then the federal defendants and the North Fork Tribe will likely be entitled to summary judgment on Stand Up's claim arising out of the concurrence, and the parties can focus their attention on Stand Up's remaining claims. If the Supreme Court holds the concurrence invalid, the Court can determine the effect of that holding on the Secretarial Procedures and potentially resolve the case solely on that issue.

5. The decision by the California Supreme Court will issue within a reasonable time. The Supreme Court has granted review, and briefing on the issue is underway. While oral arguments have not been set, a definitive decision on the concurrence's legality for all parties and the Court outweighs any delay from a stay because the validity of the Secretarial Procedures cannot be determined in the absence of that decision.

II. STATEMENT OF FACTS

In 2005, the North Fork Tribe submitted a fee-to-trust application to the Department of the Interior to acquire the Madera Site for the purpose of developing a casino resort. [AR00000160.][3]

[3] Citations to "AR" are to the administrative record filed in this case on April 6, 2017. [Dkt. 26.]

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The Tribe also, in 2006, submitted a request for a two-part determination in order to legally conduct gaming on the newly acquired trust land. In a 2011 record of decision, the Secretary determined that gaming at the Madera Site would be in the Tribe's best interest and would not be detrimental to the surrounding community. [AR00000240-41.] The Secretary then requested the concurrence of Governor Brown, which concurrence was necessary in order for the Tribe to conduct gaming on the land. 25 U.S.C. § 2719(b)(1)(A). Governor Brown issued his concurrence nearly one year later. [AR00000241, 165, 572.] After accepting the Governor's concurrence, the Secretary then issued a 2012 record of decision to acquire the Madera Site into trust. [AR00000160.] The land was accepted in trust in February 2013. [AR00000012.]

At the same time Governor Brown issued his concurrence, he announced that he had negotiated and a concluded a tribal-state gaming compact with the North Fork Tribe to govern gaming at the Madera Site and would be forwarding the compact to the Legislature for ratification. [AR00000572.] In May, 2013, the California Legislature passed AB 277, a bill to ratify the compact. [AR00002187.] Before AB 277 went into effect, however, a citizen referendum on AB 277 qualified for the November 2014 ballot to allow California voters to decide whether to approve or reject the Legislature's ratification of the compact. [AR00000455.] On November 4, 2014, the voters rejected the Legislature's ratification of the compact. [AR00002187.]

In the wake of the referendum, the North Fork Tribe filed suit in this Court against the State of California pursuant to IGRA's remedial scheme. *North Fork Rancheria of Mono Indians of California v. State of California* (*North Fork I*), 2015 WL 11438206 (E.D. Cal. Nov. 13, 2015). This Court found that Tribe had submitted sufficient evidence showing the North Fork Tribe and the State had not entered into a compact, *id.* at *7, and held that the State failed "to enter negotiations with North Fork for the purpose of entering a Tribal State compact within the meaning of § 2710." *Id.* at *12. The Court ordered the State and the North Fork Tribe to conclude a compact within 60 days. *Id.* They did not conclude a compact within that time, so the court appointed a mediator. [AR00000001.] The mediator selected the Tribe's proposed compact and gave the State 60 days to consent to the Tribe's compact. The State did not consent. The

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mediator then forwarded the selected compact to the Secretary to prescribe Secretarial Procedures. [AR00000001.]

On July 29, 2016, the Secretary issued the Secretarial Procedures accompanied by a letter notifying the North Fork Tribe that Secretarial Procedures were in effect. [AR00002186-88.] The Secretarial Procedures allow the Tribe to conduct gaming on the Madera Site despite the absence of a compact with the state. 25 U.S.C. §2710(d)(B)(7)(vii).

Plaintiffs filed their original complaint in this action on November 11, 2016, challenging the validity of the Secretarial Procedures under IGRA, the Johnson Act, the National Environmental Policy Act, the Clean Air Act, and the Freedom of Information Act. [Dkt 1.]

Following a December 12, 2016, decision in *Stand Up v. California* by the California Court of Appeal for the Fifth District, which held that Governor Brown's concurrence in the Secretary's two-part determination was invalid because Governor Brown lacked the authority under California law to concur, plaintiffs filed their First Amended Complaint on January 17, 2017. [Dkt. 13.] In the First Amended Complaint plaintiffs added a fifth claim for relief alleging that because the Governor lacked the authority to concur, gaming at the Madera Site is prohibited under IGRA, and therefore the Secretarial Procedures are invalid. [Dkt. 13 ¶¶ 68-73.]

On March 8, 2017, this Court set a briefing schedule for cross-motions for summary judgment. [Dkt. 23.] Finally, on March 22, 2017, the California Supreme Court granted petitions for review of the Fifth District's decision in *Stand Up v. California* invalidating the Governor's concurrence. The Supreme Court's grant of review precipitated Stand Up's need to seek a stay.

III. ARGUMENT

A. The Court Has Inherent Discretion to Stay This Action.

"[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936); see also *In re Taco Bell wage and Hour Actions*, No. 1:07-CV-01314-OWW-DLB, 2011 WL 3846727 at *1 (E.D. Cal. Aug 30, 2011 (ordering stay pending decision by California Supreme Court). A district court may stay a case where it "find[s] it efficient for its own docket and the fairest course for the

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parties to enter a stay of an action before it, pending resolution of independent proceedings which may bear upon the case." *Mediterranean Enters., Inc. v. Sangyong Corp.*, 708 F.2d 1458, 1465 (9th Cir. 1983); *In re Taco Bell*, 2011 WL 3846727 at *5.

A stay is appropriate where "a determination in one or more of the other proceedings might impact the justiciability of this action." *North Fork Rancheria of Mono Indians of California v. State of California* (*North Fork II*), 2016 WL 4208452 at *4. If other proceedings may have such an impact, a stay is warranted if the moving party demonstrates that a stay will not harm other parties; where it would be inequitable to the moving party to continue; where delay would simplify any questions to be resolved in the action; and other proceedings are likely to conclude within a reasonable time. *Id.* at *6-8 (evaluating *Landis* factors).

Here, the pending decision by the California Supreme Court regarding the validity of the Governor's concurrence under California law is necessary to the resolution of Stand Up's fifth claim and potentially dispositive of the entire case. Finally, under the *Landis* factors, a stay is warranted in this case.

B. <u>The California Supreme Court's decision is necessary to resolve a claim before this Court</u>.

Under IGRA, the Secretary may issue Secretarial Procedures for tribal gaming only on land that is eligible for tribal gaming. 25 U.S.C. § 2719(a) (prohibiting gaming on trust land acquired after October 17, 1988). Because the Madera Site was made eligible for gaming by the Secretary under IGRA's two-part determination, the Secretary's determination was subject to the valid concurrence of the Governor. 25 U.S.C. § 2719(b)(1)(A). The Governor's concurrence provision of IGRA is an example of "contingent legislation" whereby Congress expressly provides a condition under state law that must be met before a federal statutory provision can take effect. *Confederated Tribes of Siletz v. United States*, 110 F.3d 688, 695 (9th Cir. 1997). "[T]he Governor must agree that gaming should occur on the newly acquired trust land before gaming can in fact take place." *Id.* at 696. Whether the Governor's concurrence was authorized and valid is a matter of state law – not federal law. *Id.* at 697-98. And this precise issue – whether the Governor's concurrence was authorized and valid under California law -- is now under

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consideration by the California Supreme Court.

Thus, if the California Supreme Court holds that the Governor had authority to concur in the Secretary's two-part determination, then plaintiff's fifth claim for relief in this action will fail. If, however, the California Supreme Court holds that the Governor did not have authority to concur in the Secretary's two-part determination, then plaintiffs will prevail on their fifth claim for relief in this action.

The district court in *Stand Up for California! v. U.S. Dep't of the Interior (Stand Up v. DOI)*, 204 F. Supp. 3d. 212 (D.D.C. 2016), held that although the Governor's concurrence is a separate IGRA requirement independent of the two-part determination, "*gaming* on land acquired in trust by the Secretary after October 17, 1988 is contingent upon the Governor's concurrence." *Id.* at 249-50. Therefore, if the Governor never had the authority to concur under state law, there has never been a valid concurrence issued for the Madera Site, and the Secretarial Procedures cannot, under IGRA, authorize gaming.

In *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546 (10th Cir. 1997), the Governor of New Mexico had entered into compacts with several New Mexico tribes. *Id.* at 1548. The compacts had been approved by the Secretary and published in the Federal Register. *Id.* at 1550. Subsequent to the compacts' approvals and publication, however, the Supreme Court of New Mexico held that the Governor lacked the authority under state law to enter compacts with Indian tribes. *Id.* at 1548. In light of that decision, the 10th Circuit held that because IGRA requires a compact to be properly entered into by a state, under the laws of the state, before it can go into effect under federal law, the Secretary's approval of the compact and publication in the Federal Register could not cure the Governor's *ultra vires* actions. *Id.* at 1548, 1553. In reaching this decision, the court considered and rejected the argument that the compact should be treated as valid because the Secretary was under no obligation to inquire into the vagaries of state law when he approved the compacts:

> Congress did not intend to force the Secretary to make extensive inquiry into state law to determine whether the person or entity signing the compact for the state in fact had the authority to do so. *However that does not mean that consequences should not flow,*

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> *such as a determination that the compact is invalid, if it turns out that the state has not validly bound itself to the compact.*

Id. at 1557 (emphasis added). Thus despite that the Secretary was not required to assess the validity of the compact before approving it, "[t]he Secretary cannot, under [IGRA], vivify that which was never alive . . . ." *Id.* at 1548. The compacts were therefore invalid under federal law.

The same is true here. IGRA expressly provides that gaming cannot occur on newly acquired trust land unless and until the Governor concurs in the Secretary's determination. 25 U.S.C. § 2719(b)(1)(A). When the Governor concurs, he does so as the state executive under state law. *Confederated Tribes of Siletz*, 110 F.3d at 697-98. Therefore, if Governor Brown never had the authority under state law to issue the concurrence, the concurrence was void *ab initio*, and the Secretary never had the authority under IGRA to give effect to the concurrence and authorize gaming.

In briefing before this Court in *Picayune Rancheria of Chukchansi Indians v. United States Department of the Interior*, No. 1:16-cv-00950-AWI-EPG (E.D. Cal., filed July 1, 2016) ("*Picayune*"), the North Fork Tribe and the federal defendants have argued that the legal status of the concurrence under state law can have no effect on the validity of the Secretarial Procedures under federal law because the Secretary was entitled to rely on the validity of the concurrence. [Request for Judicial Notice, Attachment 1 (*Picayune* Dkt. 26 at 40-42); Attachment 2 (*Picayune* Dkt. 29 at 42-44).] This argument, however, ignores that in prescribing procedures the Secretary must ensure that the procedures "are consistent with . . . the relevant provisions of the laws of the State . . . ." 25 U.S.C. § 2710(d)(7)(vii). While the Secretary may not have a duty to inquire into state law in approving a compact under IGRA, *see Pueblo of Santa Ana v. Kelly*, 104 F.3d at 1557, the same cannot be said for the Secretary's obligations in prescribing procedures, which expressly require the Secretary to consider state law.

Despite IGRA's affirmative requirement for the Secretary to consider state law and ensure procedures are prescribed consistent with that law, the Tribe argued, "The Ninth Circuit has established that federal officials need not second-guess the facially valid actions of state officials." [Request for Judicial Notice, Attachment 1 (*Picayune* Dkt. 26 at 40).] This is an

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overbroad statement of the law and inapplicable to IGRA.

The cases the Tribe and federal defendants rely on to argue the Secretary is not required to consider state law are the so-called "retrocession" cases involving the actions of the federal government to reclaim jurisdiction over Indian tribes from several states. These cases held that the Secretary's acceptance of retrocession jurisdiction from the state to the federal government occurred legally despite the invalidity of the state actions under state law. *See United States v. Lawrence*, 595 F.2d 1149 (9th Cir. 1979); *Oliphant v. Schlie*, 544 F.2d 1007 (9th Cir. 1976), *rev'd on other grounds*, 435 U.S. 191 (1978); *United States v. Brown*, 334 F.Supp. 536, 540 (D. Neb. 1971).

Notably, neither the Secretary nor the Tribe cited the 10th Circuit's decision in *Pueblo of Santa*, which specifically addressed IGRA's use of contingent legislation and held that "the retrocession cases involve different considerations from this case, and do not control this case." *Pueblo of Santa*, 104 F.3d at 1556 n. 12. These different considerations are made clear by contrasting the statutory language and purposes of the two statutes.

The retrocession statute provides only that "[t]he United States is authorized to accept retrocession by any State of all or any measure of the criminal or civil jurisdiction, or both, acquired by such State . . . ." 25 U.S.C. § 1323(a). "Retrocession does not imply any particular procedure or action on the part of the states involved." *Brown*, 334 F.Supp. at 540. As the Ninth Circuit held in *Oliphant*, the question of retrocession "*is one of federal law, not state law*." *Oliphant*, 544 F.2d at 1012 (emphasis added). "The federal government, having plenary power over the Indians, had the power to prescribe any method or event desired to trigger its own re-assumption of control over Indian affairs within a state. In fact, the triggering event could have been devoid of any mention of state action at all." *Id.* Once the United States accepted retrocession jurisdiction, all actions arising out of the acquired jurisdiction fell to the federal government.

IGRA, by contrast, conceives of Indian gaming as a joint venture among the federal government, an Indian tribe, and a state. *Artichoke Joes California Grand Casino v. Norton*, 353 F.3d 712, 715 (9th Cir. 2003) ("IGRA is an example of 'cooperative federalism' in that it seeks to

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balance the competing sovereign interests of the federal government, state governments, and Indian tribes, by giving each a role in the regulatory scheme.") In this venture, IGRA expressly incorporates and relies on state law. Tribal-state compacts must be validly entered into under state law before they can go into effect under IGRA. 25 U.S.C. § 2710(d)(1)(C); *Pueblo of Santa Ana*, 104 F.3d at 1553. In the absence of a compact, IGRA requires that state laws apply to gaming on Indian land, 18 U.S.C. § 1166(a), but those state laws must be enforced by the federal government. *Id.* § 1166(d). IGRA requires the Secretary in prescribing Secretarial Procedures to ensure that they are consistent with the laws of the state. 25 U.S.C. § 2710(d)(7)(vii). IGRA requires the Governor's concurrence in a two-part determination, but does not provide the Governor with the authority to concur; thus, IGRA relies on state law for that authority.[4] *Confederated Tribes of Siletz*, 110 F.3d at 693.

IGRA's concurrence provision was adopted to give states some measure of control over the most controversial form of Indian gaming—off reservation Indian gaming under a two-part determination. As one federal district court held, "The meaning of § 2719(b)(1)(A) is unmistakably clear: *Congress made the state's interests paramount* by granting the Governor veto power of the DOI's determination." *Confederated Tribes of Siletz Indians v. U.S.*, 841 F.Supp. 1479, 1491-92 (D. Or. 1994), *aff'd on other grounds*, 110 F.3d 688 (9th Cir. 1997) (emphasis added). And as Congress did with the tribal-state compact requirement, it expressly conditioned gaming under a two-part determination on state action by the state executive, who must issue the concurrence under state law, not federal law. *See* 25 U.S.C. § 2719(b)(1)(A); *Confederated Tribes of Siletz*, 110 F.3d at 693.

For these reasons, if the California Supreme Court holds that Governor Brown lacked the authority to concur, the Secretarial Procedures must be invalidated because the Secretary never had the authority to authorize gaming at the Madera Site.

C. <u>There is sufficient reason to conclude that the California Supreme Court will hold</u>

[4] In the *Picayune* briefing the Tribe argues that "IGRA, like the retrocession statute, 'does not imply any particular procedure or action on the part of the states involved.'" [Request for Judicial Notice, Attachment 1 (*Picayune* Dkt. 26 at 42, quoting *Oliphant*, 544 F.2d at 1012).] By way of explanation, the Tribe suggests that the concurrence provision is directed at the Governor not at the state so no state action is expressly required or implied. This argument ignores that the Governor must have the authority to concur and that authority must come from state law.

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Governor Brown lacked the authority to concur under California law.

This Court has recognized that while predicting the outcome of pending litigation is an uncertain business, it is not dispositive of the court's decision to stay a case. *North Fork II*, 2016 WL 4208452 at *6. Nonetheless, there is sufficient reason in this case to support a stay based on the likelihood that the California Supreme Court will invalidate the concurrence. At the very least, there is good reason to reject the North Fork Tribe's argument that the Court is likely to affirm the decision in *United Auburn* and hold the concurrence valid.

The North Fork Tribe's argument, in *Picayune*, in favor of the Third District's decision is based on little more than that the decision came out in the Tribe's favor. The Tribe argues that the Third District decision is more predictive of what will be the Supreme Court's position than Fifth District decision because the Fifth District decision was fractured and the Third District decision was unanimous. [Request for Judicial Notice, Attachment 1 (*Picayune* Dkt. 26 at 45).] This is a superficial view. A closer look at the decision shows that the Fifth District had the benefit of the Third District decision before it, and unanimously rejected the Third District's rationale and conclusions as applied to the North Fork matter.

More substantively, there are several points the Fifth District addressed that the Third District neglected. The Third District held, "The act of concurring . . . is in the nature of an executive act because it involves the implementation of California's existing gaming policy." *United Auburn*, 4 Cal.App.5th at 51. While the Third District noted that California's existing gaming policy is governed by Article IV, Section 19, of the State Constitution, *id.* at 52, it neglected to address significant features of Section 19. Most importantly, Section 19(e) prohibits the Legislature from authorizing Las Vegas-style casino gambling in the state. Section 19(f) is a limited exception to this prohibition and grants the Legislature the power to ratify compacts notwithstanding Section 19(e). As to the Governor, section 19(f) grants limited authority to negotiate compacts, subject to ratification of the Legislature and is not, therefore, binding on the State, as a concurrence is.

As Justice Detjen noted in the Fifth District decision, "*United Auburn* makes no reference to [the] history or . . . implication" of "California's constitutional ban on the legislative authority

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to authorize gaming and the later amendment granting limited powers to the Governor . . . ." *Stand Up v. State of California*, 6 Cal.App.5th at 720 (Detjen, J., concurring and dissenting). Justice Franson agreed: "I note the Third District did not address whether an inherent executive power to concur *conflicts with the ban on casinos in subdivision (e) of section 19 of article IV of the California Constitution*." *Id.* at 769. (Franson, J., concurring and dissenting) (emphasis in original). Nor did the Third District address whether on the facts of North Fork, as distinguished from Enterprise, the Governor's inherent authority, which was exercised for the purpose of class III gaming under a compact, could validate a concurrence after the electorate rejected the compact. *Id.*

Despite concluding that the concurrence was within California's existing gaming policy, the *United Auburn* court neither cited Section 19(e) nor discussed the fact that Section 19, in its entirety, expressly and strictly limits the actions of both the Legislature and the Governor. As Justice Franson held, and the Third District failed to consider, "[t]he faithful execution of this general prohibition [in Section 19(e)] cannot extend to acts that would have the effect of expanding casino-type gambling in California *unless such acts are authorized elsewhere* in the Constitution. *Id.* at 768 (Franson, J., concurring and dissenting) (emphasis in original). In other words, "the field of casino-type gambling in California has been fully occupied by the provisions of Section 19 of article IV of the California Constitution and the authority for any state action that furthers casino-type gambling in California must be rooted in subdivision (f) of the Section 19 of article IV." *Id.* Section 19(f) does not authorize concurrences, which have the practical effect of authorizing gaming on land where gaming is prohibited under Section 19(e).[5]

Additionally, in concluding that the concurrence was an executive action within the Governor's authority, the Third District relied on the decision by the Court of Appeals for the Seventh Circuit in *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. United States*, 367 F.3d 650 (7th Cir. 2004). *United Auburn*, 4 Cal.App.5th at 51-52. But as the Fifth District's

[5] The California Constitution authorizes gaming on Indian land in California. Cal. Const., art. IV, § 19(f). But it is undisputed that at the time the Governor issued his concurrence, the land was not Indian land. Until it became so, it was land governed by Section 19(e) rather than Section 19(f). *See Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. United States*, 367 F.3d 650, 657 (7th Cir. 2004) (holding that at the time of the concurrence, the land is "within the jurisdiction of a state and is not yet subject to federal regulation under IGRA").

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decision recognized, *Lac Courte* does not govern here. Indeed, two of the Fifth District Justices explicitly rejected *United Auburn*'s reliance on *Lac Courte*. Justice Smith held that *Lac Courte* was inapposite, as it held "only that the concurrence provision does not violate the federal Constitution because it does not force governors to usurp state legislative authority by making public policy." *Stand Up v. California* 6 Cal.App. 5th at 703 (Smith, J., lead opinion) (citing *Ginns v. Savage* 61 Cal.2d 520, 524 n. 2 (1964) ("[A]n opinion is not authority for a proposition not therein considered."). Justice Detjen held, "*United Auburn*'s reliance on *Lac Courte* to conclude concurring has an executive characteristic under California law is misplaced" because, as discussed above, *United Auburn* failed to address California's general prohibition of Las Vegas-style gambling and the very limited authority granted to the Governor by Section 19(f). *Id.*, at 720 (Detjen, J. concurring and dissenting). Any inquiry in *Lac Courte* was confined to Wisconsin law.

There is no substance to the Tribe's contention that because none of the Fifth District theories "commanded a majority" the decision is "not a reliable datum for ascertaining state law." [Request for Judicial Notice, Attachment 1 (*Picayune* Dkt. 26 at 47) (internal quotation marks and citation omitted).] Rather, a majority of the court did conclude that Third District's decision mischaracterized and misapplied California law by, among other things, failing to place the concurrence in the context of Article IV, Section 19, and by relying on a case from another jurisdiction that did not purport to address the issue at hand. Certainly, the California Supreme Court will inquire into these infirmities.

D. <u>No party will be harmed by a stay, but moving forward will create uncertainty and confusion</u>.

In deciding whether to stay a case the court should balance the interests of the parties by looking at the possible damage to a party which may result from granting a stay and any hardship or inequity a party may suffer from the denial of a stay. *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962). Here no party will suffer hardship from a stay.

Both the Tribe and the federal defendants have already acknowledged they are amenable to such a stay in response to a similar claim raised by Picayune. [Request for Judicial Notice,

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Attachment 1 (*Picayune* Dkt. 26 at 43); Attachment 2 (*Picayune* Dkt. 29 at 46).] The Tribe and the federal defendants have also taken the position that the California Supreme Court decision will have no impact on the validity of the Secretarial Procedures because the Secretary was legally entitled to rely on the facial validity of the concurrence when it was given. [Request for Judicial Notice, Attachment 1 (*Picayune* Dkt. 26 at 40-42; Attachment 2 (*Picayune* Dkt. 29 at 42-44.] Under this view, neither the Tribe nor the federal defendants can contend both that the decision will have no impact on its proposed casino and that waiting for that Court's decision will cause it harm.

In *North Fork II*, this Court declined to stay the case because the related cases "were in their infancy" and a stay would need to "remain in place until those newly filed cases resolve. In the interim, North Fork would be precluded from operating any gaming activity." *North Fork II*, 2016 WL 4208452 at *7. A stay here would not prevent gaming activity. But the Tribe would conduct such activity at its own risk—a risk it contends it does not face.

Alternatively, moving forward with the case could create potential confusion, uncertainty and inequities for the parties. In the *Picayune* briefing, the North Fork Tribe asked this Court to stay the case pending the California Supreme Court's decision or in the alternative to rule on the legality of the concurrence. [Request for Judicial Notice, Attachment 1 (*Picayune* Dkt. 26 at 43).] Ruling on the legality of the concurrence would be inappropriate for at least three reasons: (1) the issue is not properly before the Court; (2) a decision by this Court could possibly conflict with a decision by the California Supreme Court creating uncertainty and confusion; and (3) ruling on the issue would be contrary to the decision in *Stand Up v. DOI* upon which Stand Up relied in bringing its fifth claim in this action.

In *Stand Up v. DOI*, the district court dismissed Stand Up's challenge to the Governor's concurrence under Rule 19, *Stand Up v. DOI*, 204 F. Supp. 3d at 255, and further held that the proper forum for resolution of the issue was the California Court of Appeal. *Id.* at 251. Stand Up did not appeal the district court's decision dismissing its challenge to the concurrence.

E. <u>A stay will serve the orderly course of justice</u>.

In determining whether a stay would advance the orderly course of justice, the Court

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should consider whether delaying the action pending the resolution of the case before the California Supreme Court would simplify any of the questions to be resolved in this action. *North Fork II*, 2016 WL 4208452 at *9 (citing *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962)). As discussed above, the pending decision will greatly simplify the issues before this Court. If the Supreme Court holds the concurrence invalid, the issue raised by Stand Up's fifth claim is potentially dispositive of the entire case. If gaming cannot be authorized at the Madera Site, there is likely no need for the Court to address Stand Up's other claims.

F. The Supreme Court of California will reach a conclusion within a reasonable time.

Courts in this district have stayed cases where an important issue was pending before the California Supreme Court, even where the Supreme Court had yet to schedule oral argument and final disposition of the case was a likely over a year away. *See, e.g., In re Taco Bell wage and Hour Actions*, 2011 WL 384627 at *3. In reaching this decision, the court in *In re Taco Bell* rejected the argument that the vagaries of the Supreme Court's timeline was "tantamount to an 'indefinite stay." *Id.* Rather, the court held that "the benefits of proceeding with a definite legal standard will more than make up for the costs of delay." *Id.*

Here too, as discussed above, the benefits of waiting for the California Supreme Court to resolve, once and for all, the legality of the Governor's concurrence outweigh any costs of delay.

IV. CONCLUSION

For the foregoing reasons, the Court should stay these proceedings pending a decision by the California Supreme Court on the legality Governor Brown's concurrence.

Dated: May 12, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2017, the attached document PLAINTIFFS' NOTICE OF MOTION TO STAY ACTION; MEMORANDUM OF POINTS AND AUTHORITIES was electronically transmitted to the Clerk of the Court using the CM/ECF System which will send a Notice of Electronic Filing to the following CM/ECF registrants:

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Dated: May 12, 2017

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