

*United Auburn Indian Community v. Brown*, 4 Cal.App.5th (2016).

The United Auburn Indian Community filed a petition for writ of mandate and complaint for declaratory relief, challenging Governor Brown's concurrence in the Secretary of Interior's decision to take land acquired after 1988 by the Enterprise Rancheria of Maidu Indians into trust for gaming purposes, arguing *inter alia* that the concurrence represented an illegal exercise of legislative power and that the ability to concur was not ancillary and incidental to the Governor's power to enter into gaming compacts with tribes. In sustaining the Governor's demurer to the action, the Superior Court of Sacramento County found that the Governor's concurrence did not violate the separation of powers doctrine and that the power to concur was ancillary and incidental to the power granted by California law to negotiate and execute tribal-state gaming compacts.

In reviewing the lower court, the Third District Court of Appeal ("Court") noted that the standard for evaluating the separation of powers clause is if the action of one branch defeats or materially impairs the core zone of constitutional authority of another branch. The Court noted that in order for the Governor's concurrence to violate the separation of powers clause, it would have to impede the core function of the legislative branch, which is to pass statutes. Upholding the lower court's determination, the Court held that the concurrence represented the implementation of existing gaming policy found in the Constitution and statute and did not defeat or materially impair the legislature's core function. Because the Court determined that the Governor's concurrence was not a legislative act, it found no need to determine whether the power is ancillary and incidental to the Governor's authority to enter into gaming compacts with tribes.

The California Supreme Court granted review of the decision.

*Stand Up For California! v. State*, 6 Cal.App.5th 686 (2016).

Interest group, Stand Up For California!, filed a complaint, challenging Governor Brown's concurrence in the Secretary of the Interior's decision to take land acquired after 1988 by the North Fork Rancheria of Mono Indians ("North Fork") into trust for gaming purposes, arguing that the concurrence violated the California Constitution. In sustaining demurrers filed by the state defendants and North Fork as intervener, the Superior Court of Madera County found that the Governor's power to concur is implied from authority granted to him by California law to negotiate and enter into tribal-state gaming compacts.

Upon review, the Fifth District Court of Appeal ("Court") indicated that, in order for the Governor's concurrence to be valid, state law must authorize this action, but no such express authority exists. Instead, the Court looked to the California Constitution and statutory law, determining that the authority to concur in the Secretary's determination is found by implication in those laws providing authority for the Governor to negotiate and enter into gaming compacts. However, the Court noted, the North Fork compact was the subject of a referendum, nullifying the implementing statute and no other compact has been consummated, but rather North Fork obtained Secretarial procedures under which it could conduct Class III gaming. In this particular instance, where the proposed gaming establishment will be operated under something other than a tribal-state gaming compact, the Court determined that, because the laws through which the Governor's authority to concur is implied are inapplicable, the concurrence was given without authority. Consequently, the Court reversed the lower court's decision and remanded the matter for further proceedings consistent with the order.

The California Supreme Court granted review of the decision, but further action is deferred pending resolution of *United Auburn Indian Community v. Brown*, 4 Cal.App.5th (2016).

*Owen v. Miami Nation Enterprises*, 2 Cal.5th 222 (2016).

The Superior Court of Los Angeles County granted the motion and dismissed the claim for lack of subject matter jurisdiction. The Second District Court of Appeal, finding the payday lending business were sufficiently related to federally recognized Indian tribes to enjoy immunity from suit, affirmed the lower court decision.

On appeal the California Supreme Court (“Court”), distinguishing between tribes and related entities, held that an entity of a tribe invoking sovereign immunity as a defense to suit must show by a preponderance of the evidence that it is an “arm of the tribe” and thus immune from suit. Relying on previous caselaw, including the six factor test articulated by the Tenth Circuit Court of Appeals in *Breakthrough Management Group Inc. v. Chukchansi Gold Casino and Resort*, 629 F.3d 1172 (10th Cir. 2010), the Court crafted its own five factor test to determine whether an entity is an arm of a tribe.

The factors considered under the Court’s new test are 1) whether the entity was created pursuant to tribal or state law; 2) if the tribe intended the entity to share its immunity from suit; 3) whether the entity’s purpose, both stated and actual, is the promotion of tribal self-governance; 4) actual versus nominal tribal control over the entity; and 5) the financial relationship between the tribe and the entity - the degree to which entity liability could impact tribal revenue.

Emphasizing that not one of the five factors is dispositive, but that each must be considered as part of a fact-specific inquiry, the Court looked to both the documentation associated with the creation and operation of the payday lending companies and actual business operations. Examining the record in light of the five factors, the Court found only a nominally close relationship between each entity and tribe or sufficient evidence of actual tribal control and oversight of the companies or of significant financial benefit to the tribes. Superseding the lower court, the Court held that both tribally affiliated payday lending entities failed to establish by a preponderance of the evidence that they constituted arms of a tribe, immune from suit, remanding the matter to the trial court.

*Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District*, 849 F.3d 1262 (9th Cir. 2017).

In an action against local water agencies, the Agua Caliente Band of Cahuilla Indians (“Tribe”) sought a declaration and quantification of its federally reserved water rights to groundwater underlying the Agua Caliente Indian Reservation (“Reservation”). The United States District Court for the Central District of California held that, upon establishment of the Reservation, the Tribe also received an implied reserved water right, which included groundwater.

On appeal, the Ninth Circuit (“Court”) upheld the lower court decision, noting that, pursuant to *Winters v. United States*, 207 U.S. 564 (1908), the withdrawal of lands from the public domain for federal purposes includes by implication a reservation of unappropriated water appurtenant to those reserved lands to the extent needed to accomplish the purpose of the reservation of land. Recognizing that *Winters* had not previously been applied to groundwater rights, the Court determined that water appurtenant to a reservation is not limited to surface water. In the arid Coachella Valley, the Court reasoned, the very purpose for the establishment of the Reservation as a homeland for the Tribe would be defeated unless groundwater were a part of the reserved water rights. As such, the Court held that upon the creation of the Agua Caliente Indian Reservation, the Tribe received a reserved right to groundwater appurtenant to the Reservation, along with an implied use right to water underneath the Reservation.

A writ of certiorari, requesting review of the question whether the *Winters* doctrine preempts California state law regulating groundwater, is pending before the United States Supreme Court.