Stand Up For California!

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Ms. Paula Hart,
Acting Director, Office of Indian Gaming
Office of the Deputy Assistant Secretary
Policy and Economic Development
1849 C. Street, NW, Mail Stop 3657 – MIB,
Washington, D. C. 20240
Fax: (202) 273-3153

RE: Class III Tribal State Gaming Compact Process (73 FR 37907) – 1076-AE99

Dear Ms. Hart:

Stand Up For California! welcomes the opportunity to comment on 25 CFR Part 293 establishing a process for submitting Tribal State Compacts and Amendments to the Secretary for approval or disapproval. Clearly California Tribal State Compacts submitted in the Fall of 2007 created an uproar at the Department of the Interior, as did the negotiated and not ratified tribal state compact from the State of Florida. The lack of clarity in the submission process was well documented due to the missing California Tribal State Compacts and the court cases that followed in the State of Florida.

There are five sections of concerned to *Stand Up For California!* (Sections, 293.4, 293.6, 293.9, 293.11 and 293.12) These sections affect the issue of "Separation of Power" in the gubernatorial negotiation, and ratification through state legislative action. This affects the timing of when a tribal state compact should be sent to the Secretary of the Interior and/or accepted as qualifying for the 45 day period to be approved, deemed approved or deny.

Section 293.4 – While this section is concerned about a submitted compact or amendment being **legally entered into,** there should be concern as well as when the legally entered into compact is **"in effect".**

It would appear that in 2007, the Secretary of the Interior deemed approved Tribal State Compacts that were "entered into" but not "in effect". In California the Compact Amendment between the Sycuan Band of Mission Indians and the State of California was legally entered into but was not in effect as the Tribe did not pass a resolution binding the Tribe to the Amendment. In the State of Florida, the Governor negotiated the agreement but the State Legislature never ratified it. Both cases raise serious questions about the process of entering into an agreement and when or how it legally takes effect. **Will the Secretary of the Interior review the processing**

of these two Compacts? Affected parities should not be burdened with the expense of a court action to correct an error on the part of a federal department.

California is in the minority of states that have had the foresight to include the Legislature in the Tribal-State Compact ratification process. Out of the states with tribal casinos there are only a handful that have placed into statute the requirement of legislative ratification. However, even when language was not placed in state statute courts have upheld that "Separations of Powers" as noted in the following discussion:

Questions have arisen in a number of court cases on the issue of "Separation of Power". In general, Legislative power is the power to make, amend or repeal laws. The executive power is the power to enforce the laws, and the judicial power is the power to interpret and apply the laws to actual controversies. The separation of Power is a threshold issue in determining who has the authority to enter into compacts and how a state is bound to the terms of the Compact.

This threshold issue has not been limited to nonfederal forums. There have been at least two disputes that have begun in state court, where a definitive construction of state law was secured and then were taken into federal court by a tribe dissatisfied with the state court determination. *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546 (10th Cir. 1997); *Narragansett Indian Tribe v. Rhode Island*, Nos. 94-0618-T, et al., (D.R.I. Feb. 13, 1996); see also *Kickappoo Tribe v. Babbitt*, 43 F.3d 1491 (D.C.Cir. 1995) (because state was indispensable party, complaint by tribe challenging Secretary's refusal to approve compact dismissed without prejudice).

The following cases have upheld the 'separation of Power' and the role of Legislative ratification even when language was not expressly stated in a states statue or constitution.

In *State ex rel. Stephan v. Finney*, 251 Kan. 559, 836 P.2d 1169 (1992}, the Supreme Court of Kansas addressed the question of whether the Governor of Kansas "had the authority independent of statute to negotiate [a tribal-state gaming] Compact and bind the State terms." The Court answered this question in the negative, holding that "the Governor had the authority to enter into negotiations with the Kickapoo Nation, but, in the absence of an appropriate delegation of power by the Kansas Legislature or legislative approval of the Compact, the Governor has no power to bind the State to the terms' thereof." 836 P.2d at 1185.

> "It is noteworthy, we believe, that a number of other jurisdictions have considered the question of whether a governor has the authority to bind a state to an Indian gaming compact, and in every state whose constitution does not grant residual powers to the executive, the litigation resulted in a declaration that the compact is void and unenforceable absent legislative concurrence." *(see, Jicarilla Apache Tribe v. Kelly, 129 F3d 535, 537; Kickapoo Tribe of Indians v. Babbitt, 827 F Supp 37, 46, revd on other grounds 43 F2d 1491; McCartney v. Attorney General, 231 Mich App 722, 727-728, 587 NW2d 824, 827, lv denied 460 Mich 873, 601 NW2d 101; Narragansett Indian Tribe of R.I. v. Rhode Is., 667 A2d 280, 292 [RI]; State ex rel. Clark v. Johnson, 120 NM 562, 574, 904, P2d 11, 23; State ex rel. Stephan v. Finney, 251 Kan 559, 582-583, 836 P2d 1169, 1185)."*

In the State of New York, *Saratoga County, Chamber of Commerce Inc. v. Pataki, 293 AD2d 20, 24. [2003]*, the appellate court wrote:

> "Unsurprisingly, every state high court to consider the issue has concluded that the State Executive lacks the power unilaterally to negotiate and execute tribal gaming compacts under IGRA. New Mexico, Kansas and Rhode Island have each concluded that gaming compacts incorporate policy choices reserved for the Legislature *(see State ex rel. Clark v Johnson, 904 P2d 11 [NM 1995]; State ex rel. Stephan v Finney, 836 P2d 1169 [Kan 1992]; Narragansett Indian Tribe v Rhode Island, 667 A2d 280 [RI 1995]; see also McCartney v Attorney General, 587 NW2d 824, 827 [Mich App 1998], appeal denied 601 NW2d 101 [Mich 1999]* ["[T]he Governor has the ability to enter into compacts with Indian tribes, subject to the approval of the Legislature"]). Today we join those states in a commitment to the separation of powers and constitutional government."

Section 293.6 - This section should add one more criterion.

(e) Proof of State Ratification of a Tribal State Compact, an enacted and chaptered bill or evidence of a legislative action which includes the date and place of adoption and the result of any vote taken by a state legislature, a document that certifies that the state has adopted the tribal state compact or compact amendment in accordance with applicable state law or acted on it in such a way as to demonstrate the *separation of powers* between the governor and the state legislature. Moreover, clearly specified should be the date by which the Compact or amendment ratification takes affect.

Section 293.9 - Considering the lost compacts from the State of California, the Office of Indian Gaming Management should have a <u>"unique date and time stamp"</u> from all other departments of the Department of the Interior.

Tribal State Compacts represent a significant economic benefit of revenue for both tribes and states. The proposed rule may wish to require that the compacts be treated similarly to cash received as through an overnight deposit bag or envelop in the banking system. In the banking system, such deposits are only opened by two individuals ensuring each others actions. Opening envelops clearly marked as Tribal State Compacts by two individuals, "in a double custody process", would ensure the proper date and timed stamp.

In addition to the date and time stamp, the initials of both persons receiving the compacts should be written near the date and time stamp. Treating the compacts like cash protects the employees of the Office of Indian Gaming from being wrongly accused should a document go missing. I for one would like to believe, that no compacts in the future will ever be misplaced, but just in case, a unique date and time stamp and initials of the persons receiving the documents would help to resolve where and why the documents may have been misplaced.

Section 293.11 – a criterion needs to be added here. In the event that a tribal state compact is found not to meet the criteria in Part 293 being <u>legally entered into</u> and <u>legally in effect</u> and accidentally published in the federal register, the Secretary of the Interior must withdraw the

federal notice in order to clarify the record and ensure that the Tribal State Compact receives the proper scrutiny before being published.

Section 293.12 – a criterion needs to be added here:

(d) if it is determined that the submitted compact or amendment has not been legally **"entered into"** or that the compact or amendment is **"not in effect".**

Again, thank you for the opportunity to make comment on this proposed and necessary rule. We hope you find *Stand Up For California's!* comments useful.

Sincerely,

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