Stand Up For California!

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standupca.org

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April 21, 2006

Office of Indian Gaming Management
Attn: George Skibine
Bureau of Indian Affairs,
1849 C Street, NW, MS-2070 MIB
Washington DC 20240

RE: Gaming on Trust Lands Acquired After October 17, 1988
25 CFR Part 292

Dear Mr. Skibine:

Thank you for inviting me to attend the tribal consultation session on April 18, at the Radisson Hotel concerning the development of proposed regulations to establish standards for implementing Section 20 of IGRA. I recognize that the meeting was held as part of the Department of Interior's obligation to consult with Tribes. While this policy is acknowledged, there are some issues and this is surely one, which is as much concerned with communities and the public as with any tribal interest.

Tribes, have been notified and invited to these sessions, however, I am quite sure that neither the general public nor local governments who will be greatly affected by these proposed regulations are generally aware that these tribal consultation sessions are public meetings. I urge you to specifically contact representatives of the public and local government to solicit their comments and to refrain from acting on these regulations until such an effort has been made.

Stand Up For California along with other community groups from across the nation have mutually agreed upon this one limited point, "the need for reliable standards and criteria based on hard evidence by which decision-makers and others can rely upon for determinations of restored lands or initial reservations". While the petition we have filed does not address all elements of Section 20 we urge you in the strongest way to utilize the process and standards the petition seeks to deal with the restored lands exception.

Please accept the following comments on the proposed regulations to implement Section 20 of the Indian Gaming Regulatory Act (IGRA). Our letter presents a few additional comments on the proposed rules and presents some of the concerns unique to California.

Federalism (E. O. 13132)

Stand Up For California specifically and directly request preparation of a Federalism Assessment of Section 20 proposed rules before submission to the federal register for public comment.

In reviewing the rules that were submitted back in September of 2000, I noted that in accordance with Executive Order 13132 this proposed rule did not have significant Federalism effects to warrant the preparation of a **Federalism Assessment.** It further stated that, this rule should not affect the relationship between State and Federal governments because actions in this rule apply only to a relatively small amount of land.

Perhaps in 2000 a Federalism Assessment was not necessary. However, only six years later with applications through February of 2006, 9 of the 11 restored lands determinations pending encompass more than 2,622 acres in California. Tribes are seeking lands in metropolitan and urban areas far from their last known or existing Rancherias. Tribes are rewriting their aboriginal histories in order to meet the exception of restored lands to preclude governors, local governments and communities of citizens.

Some of the criteria in the rule as written significantly affect California and its political sub-divisions. For example:

- **292.7(a)(3)(iii) a judicial determination or a court approved stipulated entry of judgment entered into by the United States providing that the tribe's government to government relationship with the United States was never actually legally terminated despite specific action or actions by the Executive Branch purporting to terminate the relationship with the tribe.**

- There are stipulated judgments for some 40+ tribes in California all having the potential to apply for restored lands and initial reservations. (See: *Tillie Hardwick v. United States C-70-1910SW; Scotts Valley v. United States; Daniels v. Andres; Table Mountain vs. Watt).*

How can these stipulations be binding on the State if the State was never a party to the judgment? The court entered without making its own finding a stipulated judgment strictly restoring Rancheria lands to their status prior to the termination. Rancherias are land bases not tribal governments. The parties to the Stipulation were individuals residing on Rancheria land. No tribal party was ever involved in any litigation or any of the stipulations. If there is a stipulation, the court does not render a decision. Nonetheless, the Pacific Regional Office of the BIA misapplied and later treated these stipulated judgments as restoration of federal status of tribal governance. We have neither a court nor administrative finding based on evidence to support restoration of tribal governance. Therefore, the misapplication of the stipulation lacks any basis and does not satisfy Congressional statutes. (See PL No. 103-454, Section 103(3) requiring recognition by act of Congress, requiring CFR 25 Part 83 review or decision by a court)

This misapplication of the stipulation by the Pacific Regional Office of the BIA gives the appearance of an end-run around the recognition process to promote a political agenda of tribal gaming expansion. We now know that in many cases, California Rancheria groups would not have passed the required criteria found in a Part 83 review.

If this rule goes into effect, California with 108 federally recognized tribes faces the potential of having ***75 million acres of land placed into trust.*** There are Tribes making highly questionable aboriginal and historical claims of a nexus to lands far from their Rancherias, or Tribes purporting to be landless because they do no exercise governance over the allotment land on a Rancheria so they seek an initial reservation. This also includes established Tribes who continue to acquire after 1988 contiguous or adjacent lands for gaming expansion never within the boundaries of Indian lands or under the governance of a Tribe. This is approximately the amount of land many Tribes in this State have claimed would have been theirs had the United States ratified the 19th century treaties granting that acreage. Those treaties were rejected by the United States Congress because of the significant impact that granting tribes that amount of land would have had on California in the 1850's. The impact of the loss of taxation and police powers over even a fraction of this land, in the 21st Century is astronomical.

The transfer of land out of the regulatory authority of the State of California under the restored lands or initial reservation exceptions without an inclusive process of notification and an appeal procedure allowing affected parties to put forward factual and legal information on whether or not a tribe meets the criteria of "restored" or land meets the "restored lands criteria" robs a state of the ability to manage the growth and location of gaming. Citizens lose the ability to determine the character of their community.

There must be a procedure that allows all affected parties an appeal process before the Interior Board of Indian Appeals (IBIA). The lack of a procedure and the significant amount of land affected constitutes "federal interference" with the powers reserved to the State in a manner patently at odds with the intent of the Tenth Amendment.

- This proposed rule requires a **Federalism Assessment.**

Unfunded Mandates Act of 1995 (2 U.S.C. 1531 et seq.)

Also, in 2000 the Section 20 rules submitted to the federal register required the application of the Unfunded Mandates Act of 1995. This Act would not take effect unless the federal mandate exceeded $100 million in one year. While in 2000 it was unlikely that a federal mandate exceeding $100 million within one year would occur as a result of this proposed rule – tribal gaming expansion and proliferation over the last six years has changed drastically. This proposed rule does not at least on its face, require that the Federal government incur any obligations whatsoever. On the other hand, it is simply wrong to say that:

"…the overall effect of the rule will be negligible to the State, local or tribal government or the private sector."[Federal Register: September 14, 2000 (Volume 65, Number 179)][Page 55471-55476]

In fact, as of April 2006, 112 complete trust applications have been sent to the State of California as required by the Administrative Procedures notification process. While an application may state non-gaming, there is nothing in federal law to prevent a tribe from using this newly acquired land for gaming once in trust, if the lands meet an IGRA exception, such as contiguous lands. California has already experienced this ***'bait and switch'*** activity of tribal applications. Applications in only the first four months of 2006 are estimated to remove 10,000 acres of land out of the regulatory and political jurisdiction of the State of California. This significantly affects police powers and taxation in each and every community of our State.

It should be pointed out that these proposed rules do not apply merely to a single transfer of land into trust; they apply to ALL such transfers. Further the lack of infrastructure, water, sewage and access and the public health and safety issues created because of large scale facilities being placed in rural and unincorporated areas of counties, adds to the total value of which would conceivably be stratospheric.

One of the Acts major objectives, Sec. 106 (a) (3) is to end the practice of cost-shifting from one level of government to another with little or no benefit to taxpayers. Currently, California taxpayers are subsidizing multi-million dollar casinos operated by Tribes who are refusing to mitigate wholly and fully the impacts created by their commercial developments to the greater regional state agencies, local governments and communities of citizens. Tribes use the services of local government provided by the dollars of non-tribal taxpayers.

- The Unfunded Mandate Act of 1995 must be assessed. Sec.103 (a).

Section 292.6 and 292.7

California is significantly affected by restored lands determinations. Currently the NIGC is tasked with determining if a tribe meets the criteria of a "restored tribe" or the casino proposal meets "restored lands" at the same time. These are two separate questions that require a well-defined and inclusive process that is transparent and provides clear standards for the decision makers. Currently, and as stated in the recent Inspector General Report, such a process does not exist.

- Certainly section 292.6 and 292.7 of the proposed rules are a good beginning at developing reasonable criteria upon which to base a determination, however there is no discussion of "who or how" the decision is to be made. Herein lies the greatest problem as viewed by the non-tribal public, local governments and nearby Indian tribes.

The petition we have filed outlines the proposed guidelines for this process. Briefly summarized the proposed process must be followed by the Secretary as it is the Secretary of the Interior that is able to make a final agency action not the NIGC. NIGC's determination has been termed by the U.S. Attorneys in the Wyandotte case as nothing more than an 'in-house attorney advisory opinion on an internal memo'. Therefore the petition requests:

1. The process provides notice to all affected parties when a tribe seeks a determination of restore lands for gaming.

2. There must be a mandatory public comment opportunity on such requests. Comments from the affected community within a 25 mile radius are satisfactory.

3. The fact that Interior and the BIA have allowed the NIGC to co-opt this process to any extent is unacceptable. BIA and Interior must confirm their jurisdiction on the issue of restored lands and clearly establish a process and standards to guide the Department's review of any request for restored lands including the right of any interested party to appeal a decision to the Interior Board of Indian Appeals.

4. A Tribe must be required to meet and evidence that it has a significant temporal, historical and cultural connection to the proposed trust land to be used for gaming. The tribe must meet its burden of proof that it has lived in commonality and exercised governance over the land and its people at the location of the proposed casino site continuously. In other words there must be clear evidence of established and historic Indian title to the land. Something cannot be "restored" that was never significantly occupied and used, then taken.

The proof must be much more than a real estate option with investors in a modern day service area for health services and financial support. It must be much more than 55% of a tribal government's population living in the service area in an attempt to establish a "modern claim" to the land.

Section 292.4

Also of momentous concern is section 292.4 the *contiguous or adjacent lands exception,* and the *trust-to-trust transfers* which in California are creating unique situations and contentious issues over the development of casinos on allotment lands. There needs to be clarification regarding allotment lands in trust prior to 1988 but not under the governance of a Tribe.

The proposed rule's policy concerning contiguous gives the appearance of being reasonable. Nevertheless, transferring land out of the regulatory authority of the State to promote an activity that is cash intensive and increases the need for law enforcement, ambulance and fire services at the expense of non-Indian citizens certainly has long-term detrimental impacts to the greater community. Tribes must demonstrate a real and immediate need for additional trust lands that are an exception of Section 20.

- Stand Up for California suggest the rule include language requiring lands in trust, such as allotment lands, to be under the governance of a federally recognized tribe prior to the enactment of IGRA, October 17, 1988.

- Stand Up for California further suggests that, lands acquired after 1988, meeting the exception of 2719(a)(1) transferred into trust for non-gaming purposes must

have a contingent requirement that the following regulation will apply if the tribe changes the use for which the land is originally approved for transferred into trust:

- Stand Up For California has long held the position that the Department of Interior must require new land acquisitions comply with 25 CFR section 1.4 (b). This simple regulation would eliminate many of the contentious issues that citizens, local government and the business sectors face.

- All zoning and other local restrictions on land use and signage required by the County/City in which the acquisition is being made.

- All health and safety requirements of the County/City in which the tribe is acquiring land, including regulation, supervision and control of septic and sewage facilities.

- All state and local laws regulating water rights and water use.

Section 292.16 – The Two Part Test

While this Section states that the Secretary of the Interior will evaluate whether the proposed gaming establishment would not be detrimental to the surrounding community, it does not define the criteria or the standard by which the Secretary of the Interior will use to evaluate the information in order to make this determination.

Perhaps, the criteria should be developed through collaboration of affected parties. The rules could provide an opportunity for the Secretary of the Interior upon request by a state or one of its cities, counties or parishes to come together with affected parties early in the decision process. This would provide an opportunity to work out solutions and identify environmental, taxation, jurisdictional and infrastructure problems establishing criteria for a Secretarial determination. As an incentive to working cooperatively a fast-track process could be offered greatly reducing the work load of BIA officials.

Coordination and participation between tribal governments, local governments and communities of citizens is evidenced by the need for and the success of intergovernmental agreements. Tribal governments are now interacting with states and local governments on a day-to-day basis. Intergovernmental agreements are nothing more than working agreements between tribes and local governments that resolve jurisdictional or substantive disputes and recognize each entity's sovereignty. In California these agreements have become a device of necessity, but are not to be confused in any way with a local governments consent or endorsement of a casino site or trust status for gaming lands. That expression must be explicit and regulations should specifically establish this standard.

In 1999 the National Gambling Impact Study Commission released its final Report on Gambling in America. This was a Commission charged by Congress with a very broad and very

difficult task to conduct a comprehensive legal and factual study of the social and economic implications of gambling in the United States. The Commission dedicated an entire chapter to tribal gaming and recommended than that Tribes should:

> **"…enter into reciprocal agreements with state and local governments to mitigate the negative effects of the activities that may occur in other communities and to balance the rights of tribal, state and local governments, tribal members and other citizens." (6-11 National Gambling Impact Study Commission Report 1999)**

Intergovernmental agreements will go a long way to resolve unnecessary disputes. Clearly the lack of infrastructure, water, sewage and access and the public health and safety issues created because of large scale facilities being placed in rural and unincorporated areas of counties, or large scale developments that overwhelm small cities resources add to the total value of financial impacts currently subsidized by local taxpayers -- which plays an enormous part in the national backlash on tribal gambling.

Office of Indian Gaming Management

Mandatory exceptions such as restored lands, contiguous and adjacent lands and the trust to trust transfers, totally avoid the Office of Indian Gaming Management – circumventing the established guidelines and safeguards developed by that office to address environmental protections, involvement of affected governmental and state agencies and other nearby Indian tribes through the two-part test. We recommend that the regulation stipulate that all mandatory exceptions go through the Office of Indian Gaming Management's scrutiny.

Surely the BIA must be aware of the Congressional proposals to completely eliminate the exceptions is a clear statement that the exceptions are not being administered fairly or objectively to communities and the public. If the exceptions survive, and they may not, then your regulation must make them demanding, specific and meaningful, not simply a strategy to avoid section 20.

Should the legislative reforms of either Senator McCain or Congressman Pombo falter, the promulgation of these rules is all the more important and necessary to stave off public backlash against tribal gaming. Such a backlash will be heightened by a broad national concern that the BIA continues to treat this issue as only a matter of Indian policy and tribal rights, without consideration of local governments and communities.

Let us hope that your action on these regulations brings about a new paradigm of relations between tribes, the State, local governments and communities of citizens to broaden the recognition that there must be a tribal and community balance, and establish real standards.

Conclusion

Stand Up For California asks that you carefully consider our comments on the newly proposed regulations concerning Gaming on Trust Lands Acquired After October 17, 1988. We urge you to contact representatives of the public and local government to solicit their comments before acting on these proposed regulations. We ask that you give careful consideration to the

proposed standards and process in the recently filed petition. As you already know, it is being endorsed widely and that support will only grow. The petition provides a guideline for an inclusive and transparent process with fair and objective criteria that all affected parties can rely upon.

Sincerely,

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CC: Honorable Jim Cason – Associate Deputy Secretary of the Interior
Honorable Phil Hogan – Chairman, National Indian Gaming Commission
Honorable United States Senator John McCain
Honorable United States Senator Dianne Feinstein
Honorable United States Senator Barbara Boxer
Honorable Congressman Richard Pombo, Chairman House Resources
Honorable Thomas Gede – Executive Director Conference Western States Attorney General
Honorable Andrea Lynn Hoch – Secretary of Legal Affairs
Honorable Stephanie Shimazu – Deputy Secretary of Legal Affairs
Honorable Robert Mukia – Attorney General – Indian Law and Gaming Unit