Stand Up For California!
"Citizens making a difference"
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August 13, 2012

The Honorable Don Young
Chairman, Sub-Committee on Indian
and Alaskan Native Affairs
1324 Longworth House Office Building
Washington, D. C. 20515

The Honorable Ben Ray Lujan
Ranking Member, Subcommittee on Indian
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Dear Chairman Young and Congressman Lujan,

On Thursday, August 2, 2012, the Subcommittee held an Oversight Hearing on: *"Indian Lands: exploring resolutions to disputes concerning Indian tribes, state and local governments, and private landowners over land use and development."* Chairman Armenta of the Chumash Band of Mission Indians testified for his tribal government. He provided the Committee with an 8 page statement and 4 pages of exhibits. The Chairman sets forth his perspective of events within the Santa Ynez Valley regarding the Tribes fee-to-trust acquisition experience.

Stand Up For California! is a statewide organization with a focus on gambling issues affecting California. Because the Indian Gaming Regulatory Act (IGRA) Section 20 provides "limited exceptions" for gaming on "after acquired lands", the fee-to-trust process has become a significant area of controversy.

Stand Up For California! has reviewed the aforementioned statement presented by Chairman Armenta and has viewed the video of the hearing. We believe his statement to the Subcommittee is misleading and in certain instances contains significant omissions of factual information. Collectively, this misinformation and the omissions amount to an incomplete and distorted history of events as presented to the Subcommittee. We respectfully request that our letter be considered a Statement for the Record of the Oversight Hearing of August 2, 2012. If there are additional questions please do not hesitate to contact me.

DISCUSSION

Stand Up For California! will comment on: (1) the Tribe's 6.9 ac. application, complications delays, omissions (2) omissions regarding a local mitigation agreement, and (3) Whether Congressional intervention is necessary.

The Tribe's 6.9 Acre Fee-to-Trust Application, Complications, Delays and Omissions

It is important to point-out Chairman Armenta failed to inform the Subcommittee of the full intended use of the 6.9 ac. This is a serious omission on the part of the Chairman. While clearly stating the intended use would be for a Museum and for Graveyard protection, the Chairman did not inform the Subcommittee of the planned 27,000 square-foot commercial retail building intended to generate revenue.[1] Nor did the Chairman make clear that the application does not mention a "graveyard". Rather reference is to "significant archaeological find on the property" or "village site". There does not appear to be an existing graveyard but rather a "potential" archaeological site. Indeed, the application for the 6.9 ac. is not about gaming and has identified the project as follows:

> "The intent was to develop the site for community facilities that support tribal self-determination. However, because of the significant archaeological find on the property, the Tribe has determined that such a use would not be consistent with its goals. The new plans for the property are anticipated to consist of three components:
>
> 1. A cultural center and museum
> 2. An open community/commemorative park which would focus on the history of the Chumash people and act as a preservation/buffer for the village site, and
> 3. A correlative commercial retail building which would help generates revenues for upkeep of the cultural center and park."

The Chumash submitted its initial application for the 6.9 ac. in 2001. The land in the application is described as "contiguous land". The Bureau of Indian Affairs (BIA) applied 25 CFR 151.10 a regulation for "On Reservation" acquisitions, even though the land is not on a reservation or "Indian lands" under IGRA. Rather the land is held in fee simple under the authority and jurisdiction of the County of Santa Barbara and State of California since Statehood in 1850.

> *The BIA makes it a policy to treat contiguous land outside of the exterior boundary of a reservation as if it were within the exterior boundary of the reservation. What is the justification of this policy? This policy appears driven by the exception for*

[1] See item #21 Fields Devereaux Architects & Engineers 2005 Forecast. Santa Ynez Band of the Chumash Indians Cultural and Retail Center, Santa Ynez Museum, Park, and retail center; estimated construction costs $42M estimated completion in 08. http://california.construction.com/people/toplists/05_TopArch.pdf

gaming found in IGRA, not any statutory authority in 25 U.S.C. Section 465, the principal statute relating to taking land into trust.

Also at the time of the "initial application" the BIA had not promulgated regulations for Section 20 of the IGRA. "Contiguous lands" is one of the limited exceptions for gaming under the Indian Gaming Regulatory Act (IGRA). Rulemaking for Section 20 of IGRA was not complete until May of 2008. Applications prior and during this time were backlogged at the federal level and taking approximately 3 to 5 years or more to complete.

The 6.9 ac. land acquisition of the Santa Ynez Band of Mission Indians while ostensibly for use as a cultural center, museum and commercial retail center particularly as the previous intent focused on "supporting tribal self-determination" can easily be transformed into a 27,000 square-foot gaming facility. Gaming was discussed in the 2001 development plan and application of the Tribe. The point is, once land is taken into trust a tribe can change its mind regarding its use. We call this *"Bait and Switch." Bait and Switch* fee-to-trust transactions have occurred several times in California and elsewhere in the nation. Even the Inspector General of the Department of the Interior, Report of Sept. 1, 2005 highlighted 10 occurrences two of which occurred in California.

At the State level, considering that the Chumash Tribal State Compact allows the Tribe to operate 2 casinos as long as the land is consistent with IGRA raises not only community and local government concerns, but concerns with State Regulators. The Chumash Band of Mission Indians signed a Class III Compact with the State of California which stipulates that land must meet the standards of "Indian lands" under IGRA. Indeed the 1999 Compacts state the following:

> Sec. 4.2 Authorized Gaming Facilities. The Tribe may establish and operate not more than two Gaming Facilities, and only on those Indian lands on which gaming may lawfully be conducted under the Indian Gaming Regulatory Act. The Tribe may combine and operate in each Gaming Facility any forms and kinds of gaming permitted under law, except to the extent limited under IGRA, this Compact, or the Tribe's Gaming Ordinance.

Without regard to whether IGRA itself requires that land is taken into trust for gaming, non-gaming or gaming ancillary purposes the 6.9 ac. contiguous lands acquisition meets the statutory standard for gaming. Thus, as a matter of IGRA the Compact under which the tribe currently conducts gaming provides for gaming on the 6.9 ac. even if the Tribe declares the acquisition is not for gaming purposes.

> Sec.2.8 "Gaming Facility" or "facility" as defined at Section 4.2 of this Compact means any building in which Class III gaming activities or gaming operations occur, or in which the business records, receipts, or other funds of the gaming operation are maintained but excluding offsite facilities primarily dedicated to storage of those records, and financial institutions, and all rooms, building, and areas including (but not limited to) parking lots and walkways, a principal

> purpose of which is to serve the activities of the Gaming Operation, provided that nothing herein prevents the conduct of Class II gaming (as defined under IGRA) there in.

This 1999 compact language has been a significant source of consternation in California. Re-negotiated agreements and new compacts beginning in 2004 make tribal casinos site specific. The site specific language eliminates community and local government concerns over unwanted casino expansion achieved through a bait and switch tactic. This presents a potential state solution to the conflict in Santa Ynez. The Tribe could seek tribal state compact negotiations to remove section 4.2 cited above and replace it with language establishing the current site of the casino as the only location for gaming. This would clearly eliminate fears and speculation of gaming expansion in the Santa Ynez Valley.

At the federal level during the time of the "initial application", the Inspector General of the Department of the Interior began an investigation of the Pacific Regional Office of the BIA. This too contributed to the delay of the processing of the 6.9 ac. fee-to-trust. A number of tribes and that included the Santa Ynez Chumash organized a "fee-to-trust consortium" and developed an MOU with the Pacific Regional Office of the BIA. However, the agreement (MOU) created a number of conflicts, the most grievous allowing the Pacific Regional Office to abdicate its authority as the lead agency over the very tribes whose applications were being processed by employees the consortium members hired, to process their fee-to-trust transactions. This issue was resolved by the development of a new MOU that recognized the BIA as the lead agency and prevented tribes from being involved in the hiring process.

Another Omission: Local Mitigation Agreement

Chairman Armenta, when directly asked by Chairman Young if there had been an effort to negotiate a local agreement to resolve conflicts, made another serious omission of fact. The largest local community group, *Concerned Citizens of Santa Ynez*[2] offered in 2005 to drop their appeal to the 6.9 ac. fee-to-trust application and provided the County of Santa Barbara a proposed draft Memorandum of Understanding[3] (MOU). This community group further urged the County of Santa Barbara to invite the Tribe in for consultation and negotiation of a local mitigation agreement. However, when the deadline for an appeal elapsed and it was too late for the County of Santa Barbara to file, Chairman Armenta declined to negotiate any further on the development of a possible agreement that clearly would have resolved the controversy. Santa Barbara News Press story of August 9, 2005, *Supervisors Move Closer to joining Appeal of Chumash land Annexation by* Nora K. Wallace, quoted the Concerned Citizens President Charles Jackson:

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[2] It is important to note, this community group never challenged the tribes status, the groups focus has been on compatible land use consistent with the Community Plan.

[3] *DRAFT – Tuesday, February 22, 2005* INTERGOVERNMENTAL AGREEMENT Here is a link to the draft agreement - **http://www.standupca.org/tribal-gaming/mous-and-msas/agreements/Draft%20Agreement%20-%20Ex%20Chumash.pdf**

> "Our organization has always said an intergovernmental agreement is necessary to govern not only this annexation request, but future ones," he said. "Naturally, I'm quite disappointed. The extension was to remove the time pressure so negotiations could consummate into a meaningful agreement. I don't think this portends well for their (Chumash) approach to the whole negotiation process."

The Chairman's testimony on August 2nd, laying all blame for 12 years of delay in the fee-to-trust process on the community groups and the Santa Barbara Board of Supervisors is not a fair or accurate statement. Indeed, it is misleading and presents a distorted view of the events in Santa Ynez.

Perhaps not immediately recognized because of the vagueness of the fee-to-trust regulatory process and what seems at times unwritten BIA policy, community groups' participation in the judicial appeal process is often the only meaningful method for affected citizens to participate in the fee-to-trust process. As evidence in the recent United States Supreme Court ruling in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak,*[4] the Secretary of the Interior argued that citizens have no role in the fee-to-trust process and thus have no standing to challenge a Secretarial determination to acquire land in trust for an Indian tribe. Had the United States Supreme Court ruling in *Patchak* been in place in 2005 the Interior Board of Indian Affairs (IBIA) would not have been able to dismiss the appeal of the Concerned Citizens of Santa Ynez as lacking standing preventing review of the legitimate impacts identified in the 6.9 ac. application.

The IBIA ruling left no choice but for the community groups to file an appeal in federal court if they wished to obtain standing and the opportunity to argue the legitimate merits of their comments regarding the fee-to-trust application of the Santa Ynez Chumash Band of Mission Indians in a future appeal.

Clearly, the policy of the BIA to not include or consider the comments of all affected stakeholders in a fee-to-trust transaction is a serious affront to states, local governments private land owners and in this case has created in part the 12 year delay.

One of *Stand Up For California's* primary goals has been to influence the inclusion of judicially enforceable local agreements in tribal state compacts and whenever tribes seek additional lands in trust. These agreements, Memorandums of Understanding (MOU's) or Municipal Service Agreements (MSA's) have become a "device of necessity" for tribes and regional governments. Both groups have recognized the benefits of negotiated agreements for effective delivery of social services, economic development and resource protection. More importantly for tribes and citizens in the surrounding communities, comprehensive agreements define the relationship of the tribal and non-tribal

[4] *Stand Up For California!* organized the participation of 28 California Community Groups in filing an amicus brief in support of Mr. David Patchak. The 8-1 ruling by the Justice's made it very clear that affected community members have standing. Citizen's *"interests whether economic, environmental or aesthetic"* come within the Indian Reorganization Act 465's regulatory ambit. (Pg. 14-18 632 F. 3d 702). June 2012

communities. These agreements foster peaceful co-existence and restore cohesiveness between our communities.[5]

In the immediate situation of the Santa Ynez Chumash, a local agreement that is inclusive of community concerns and mutually beneficial with the County of Santa Barbara will resolve the conflict. There is also the potential of re-negotiation of the Tribe's 1999 Tribal State Gaming Compact which has less than 8 years remaining and could potentially provide a solution to the 6.9 and 5.8 fee-to-trust applications.

The issue of housing on the 1400 ac. presents additional concerns that need further discussion. Chairman Young's suggestion of 150 homes on 2 ac. parcels with the remainder to never be taken into trust has merit. It is certainly worthy of further discussion and something that could potentially be accomplished at the local government level. It is possible that with the development of a local mitigation agreement on the 6.9 and 5.8 ac. properties that local citizens may even work with the County to assist the Tribe in achieving its goal of housing. Some Tribal governments have included restricted-use deeds on properties, established dedicated open-space, placed land in a conservancy and negotiated into their local agreements compliance with local zoning and land use codes. Tribes have even restricted future fee-to-trust transactions in their local agreements. Components regarding land use have not injured or impaired the ability of the tribal governments to effectively exercise tribal sovereignty in determining the needs of their members or government. Indeed, these actions have significantly benefited these tribal governments.

Congressional Intervention: Is the current fee-to-trust process adequate to resolve controversies over compatible land use?

To directly answer the question above, No. The current process creates contentious misunderstandings between all stakeholders. The current process is not objective, fair or transparent. A legislative solution is necessary to provide guidance to the Department of the Interior which has created and sustained the current trust land system. The development of the fee-to-trust land system has been on a case-by-case basis establishing weak procedure and ill-defined substantive standards. Since the Department has a special responsibility to Indians and tribes, and no particular obligations to states, local governments and communities of non-tribal citizens, this explains why objective standards are necessary.

Traditionally, citizens at the local level have worked hard to put in place local ordinances or state laws that restrict the use of land for the "common good." Citizens abide by those restrictions in order to eliminate unreasonable interference by one property owner over another property owners enjoyment of his or her land. Even the Federal Housing Administration and Department of Veterans Affairs have in place policies that reinforce land use planning by not issuing mortgage insurance on properties in high noise areas.

[5] Current Agreements between Tribes and Local Governments: http://www.standupca.org/tribal-gaming/mous-and-msas/agreements this web page list a number of local agreement developed between tribes and local governments. This list continues to grow as new tribal state compacts are negotiated.

The Department of Defense created a policy to protect the sustainability of communities through collaboration with local governments and the surrounding community of citizens. The *Patchak* ruling makes clear that the Secretary of the Interior should be considering compatible uses to the nearby affected neighbors or risk delays as is evidence by the 12 year delay in the processing of the 6.9 ac. fee-to-trust for the Chumash.

The regulation is outdated and does not reflect who tribes and the non-tribal communities are as a people today. The fee-to trust regulations divide us and pit communities against one another.

Chairman Armenta states in his testimony,

> "Unfortunately, some members of local government have become involved in tribal issues in a way that could have a serious impact on tribal sovereignty. Their actions reveal an attitude of, "We respect tribal sovereignty, up until the point you actually seek to exercise it."

The Federal Regulations specifically include the affected local government.[6] However, involvement *is* limited. The fee-to-trust process, and specifically 25 CFR 151.10 requires the BIA to send a notice to the state and affected local governments providing them 30 days to respond as to any potential impacts to regulatory jurisdiction or real property taxes or special assessments. The regulation further invites local governments to appeal a Secretarial determination to acquire the land in trust. Citizens participate in the daily life of their local government and encourage elected officials to represent their concerns. The fact that the County of Santa Barbara and the elected officials of the area of the fee-to-trust transactions may oppose or vote to appeal the federal action should not come as a surprise or be considered an action to attack a tribal governments sovereignty. Elected Officials are voted into office by the electorate to represent and protect community interests for the common good.

There is considerable cost-shifting that occurs when fee land is taken into trust. The loss of property taxes can have a significant impact on the ability of local government to provide social and emergency services to the surrounding community. The loss of property tax affects local school district budgets further affecting the opportunity of quality education. The loss of jurisdictional authority affects a local government's ability to control the equitable sharing of the regions natural resources which include, water, waste water disposal, traffic circulation, law enforcement and emergency services, management of urban sprawl, night sky conservation, pollution, mosquito abatement, conservation of agricultural preserves as well as compatible land uses.

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[6] Citizens, affected private landowners, community organizations or associations are not included in the regulations – the Secretary of the Interior is obligated to accept our letters of comment in the process and is under no obligation to read or consider the comment. The only opportunity for consideration is through judicial review. At times this has also applied to County Governments. Amador County had to sue the Secretary of Interior to require the Secretary to read the County's comment.

Included in Chairman Armenta's testimony, although it was not his intent, his words point out another flaw in the regulation that creates contention in the community. He states:

> "The bad news is that the success has brought with it significant attention from tribal opponents. We've all heard the many complaints from individuals in our communities who are at odds with virtually everything we do. But the constant protests that truly exasperate me are the ones that always surface when we discuss ways to further strengthen our economic position for future generations. The question that continually emerges is: "How much is enough for economic self-sufficiency for tribes?"

The regulation criteria found in 151.10 (b) states: "The *need* of the individual Indian or the tribe for additional land." The word *need* raises all sorts of questions and varying evaluations. The word creates discontent and divides communities. How do we define ***need*** in 2012 as compared to 1934 at the enactment of the IRA? Is need defined in the same manner for all 465 tribes across America? The word not only pits the tribal and non-tribal communities against one another, it is now pitting gaming tribes against non-gaming tribes.

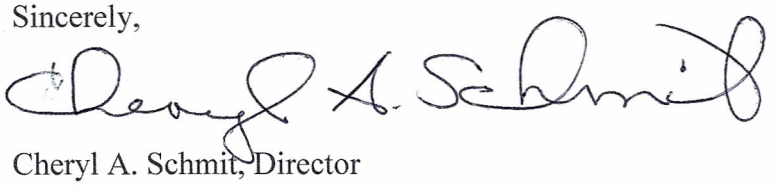
Congressman Lujan's opening statement addresses the criteria of need in the fee-to-trust regulation. He clearly states that, "a tribe's wealth or lack of wealth is not a consideration in acquiring land in trust for a tribe." This begs the question of what are the guidelines and standards, what objective criterion is considered to make a determination of need? *Is need simply we own the land and need it in trust?* The definition of need and its application to fee-to-trust conversion appears to change under each administration. To include criterion so subjective is of no value and only serves to divide communities. What was the congressional intent of need in 1934? Is the 1934 congressional intent of need relevant today?

This Subcommittee and the Full House Committee on Natural Resources has heard significant testimony since 2009, from Governor's, Attorneys Generals, California State Association of Counties, National Association of Counties, Conference of Western States Attorneys Generals, community groups and individual citizens on the failings and flaws of the current fee-to-trust system. These groups and individuals have provided significant testimony detailing necessary reforms to "fix" the fee-to-trust process. This Subcommittee has been favorable to the passage of a "Carcieri Fix". A Carcieri Fix presents an opportunity to this Subcommittee to restore balance between tribes, local governments, surrounding communities of citizens and states in the fee-to-trust process.

It is time for a focused and effective legislative reform of the fee-to-trust process. Reform of the fee-to-trust process must address the unique issues presented by the California Native American governments and the impacts which land acquisition create on surrounding jurisdictions and communities of non-Indian citizens. California and other affected states need a programmatic policy that provides a meaningful, open, fair and transparent process for all affected parties to participate.

We respectfully request that our letter be considered a Statement for the Record of the Oversight Hearing of August 2, 2012. If there are additional questions please do not hesitate to contact me.

Sincerely,



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