Stand Up For California!
"Citizens making a difference"
www.standupca.org

P. O. Box 355
Penryn, CA. 95663

August 19, 2011

California Tribal Court/State Court Forum
Judicial Council of California
Administrative Office of the Courts
455 Golden Gate Avenue
San Francisco, California 94102

RE: Proposed Legislation for the Recognition and Enforcement Of Tribal Court Civil Judgments

Dear Honorable Members of the California Tribal Court/State Court Forum,

Stand Up For California! is a statewide organization with a focus on gambling issues affecting California, including tribal gaming, card clubs and the state lottery. We have been involved in the ongoing debate of issues raised by tribal gaming and its impacts for over a decade. Since 1996, we have assisted individuals, community groups, elected officials, and members of law enforcement, local public entities and the State of California as respects to gaming impacts. We are recognized and act as a resource of information to local, state and federal policy makers.

Our organization wishes to express a number of concerns with this proposal. The most serious being: (1) inadequate notification and comment period (2) inadequate grounds for objection, (3) often difficult multi-jurisdictional issues, (4) potential impact of tribal state gaming compact language on patrons, employees, and affected local governments, (5) the need for additional safeguards for civil defendants in tribal court, (6) Reciprocity- agreed-upon respect between two sovereigns and, (7) Treatment as Sister-State judgments - expands tribal sovereignty over non-Indian citizens. Additionally, we would like to make suggestions that in our view would greatly improve the proposed legislation.

DISCUSSION

Before the discussion begins, there is a need to correct information in the very first paragraph of the "background information" of the "Invitation to Comment." California and Oklahoma according to the 2010 census have 25% of the nation's 3,151,000 individuals of Indian ancestry. While the 2010 Census identified citizens of "Indian ancestry" it is unlikely that it is this population that would use tribal courts. Rather, it is California's 108 tribal governments that will be involved or participate in a tribal court. California Tribal governments have the "smallest population" of enrolled tribal members nationally. This legislation is thus being created to

address the needs of approximately 34,000 individuals who are enrolled tribal government members in the State of California, and the very few tribally established courts. This said it is even more problematic in your request for comments to suggest, that California Superior courts should recognize tribal court civil judgments from states other than California.

It is stated that, tribal court judges have reported that the Uniform Foreign-Country Money Judgments Recognition Act (Civil Procedure section 1713-1724) provisions are inadequate, that the act does not cover the range of issues and that in some instances matters that have been fully litigated in tribal court must essentially be re-litigated in state court in order to obtain recognition under these provisions. Arguably, civil defendants will tell you that tribal courts are courts of unfamiliar jurisdiction, that there was not *due process* of law, civil rights were ignored and the tribal court was biased. Clearly, the Uniform Foreign-Country Money Judgments Recognition Act provides restrictions and safeguards for civil defendants. Justice is not always neat or efficient or an effective use of judicial resources.

I. Inadequate Notification and Comment Period

We have reviewed the proposed legislation that seeks to clarify and simplify the process by which tribal court civil judgments are recognized and enforced in California. We appreciate the efforts of this prestigious committee whose hard work encompasses two years. However, we would request that the comment period of 60 days be extended to 90 days or preferably, more. Citizens currently involved in tribal court actions are now only learning of this proposed legislation and wish to comment. This proposed legislation affects a wide array of multi-jurisdictional issues and public policies that directly and indirectly affect the greater public in ways that perhaps the committee has not been made aware. We especially ask the committee to give judicious consideration to an extension of the comment period so that proper comments can be submitted.

II. Inadequate Grounds for Objection

The grounds for objection to the recognition of a tribal court judgment while standard, still fail to provide adequate protections for civil defendants. The proposed legislation (1735 (a)-(c)) places the burden of proof on the respondent to demonstrate why superior court should not recognize the tribal court judgment. Then the respondent is further limited by an inadequate list of criteria for objection.

The ability of civil defendants to object under the concept of *"due process"* is shackled by the limited definition in section 1732(1). Due process as defined in 1732(1) is unduly constrained, leaving respondents with an impossible burden. Ultimately, this significantly affects the civil rights of non-tribal citizens under both the California and United States Constitutions.

"Due process" is a common law concept. It is essentially "judge created" law that has evolved and continues to evolve. Different jurisdictions differ as to what is included in the concept of "due process." California's concept of "due process", as interpreted by its judges is more protective of individual rights than is the United States Constitution's as interpreted by the United States Supreme Court. One example dates back to 1961, the United States Constitution required states for the first time to exclude illegally obtained evidence in criminal trials.

California already had that rule in place, voluntarily as an interpretation of the California Constitution since 1955. Similarly, the United States Supreme Court promulgated the "Miranda" rule in 1966 requiring that arrestees be advised of their constitutional rights. California had that rule in place for several years prior to 1966. In short, Californians enjoy greater protective rights than do citizens in other states.

How will this limited definition of *"due process"* affect California respondents objecting to the enforcement of a tribal court order against them? Californians as stated above, enjoy greater due process rights than do citizens of other states because of the liberal nature of the California Constitution. Citizens of *all* states have due process rights that differ from those of tribal members, because the United States Constitution applies to all states but not to tribes or in some cases, tribal members in Indian Country. Accordingly, tribes and tribal members in the tribal courts can obtain judgments under procedures and circumstances that might not be permitted either in California or in other states.

A perfect example of a tribal court obtaining judgments under procedures and circumstances not permitted in California Court is the Colorado River Indian Tribes (CRIT) who reside in Arizona along the east side of the Colorado River. The issues along the Lower Colorado River are extremely complex and evolve around the questionable Western Boundary of the CRIT Reservation. As a matter of federal statutory law the "Disputed Area" is not reservation, nor is it trust land. Nevertheless, the CRIT tribal court continues with evictions, unlawful detainer actions, nuisance abatement orders, and money judgments against unfortunate non-Indian citizens. The CRIT Tribal Court with impunity seizes profitable businesses, modular homes, boats and jet skis. The current list of objections and the definition of due process will further harm these citizens and their families.

- States should not enforce tribal court judgments if a tribe has refused to be sued under the Civil Rights Protections Act.

III. Difficult Multi-Jurisdictional Issues

Without doubt, tribal court jurisdiction is a complex determination. California as you know is a Public Law 280 state. Thus, jurisdiction often will be in both the state and tribal courts. For example, consider contracts between off-reservation non-Indian businesses and tribes or tribal members involving services on the reservation. When a tribal member orders goods to be delivered to an on-reservation home address, the tribal court will frequently have subject matter jurisdiction and will have personal jurisdiction over the off-reservation business *if* that business has a sufficient number of contracts with the reservation.

It must be remembered that a tribal court is not a court of familiar jurisdiction to non-Indian defendants. Moreover, many businesses, small and large, dealing with tribes are simply unaware of the concept of tribal sovereign immunity. Tribes have not gone out of their way to advise non-tribal business of the existence of such immunity. Nor is the general public aware that even in tribal court a tribe can shield itself with immunity to civil liability.

In June of 2005, the NINE Group of Palm Springs, a limited liability company of Delaware learned this lesson the hard way. The NINE Group operated an upscale nightclub restaurant at the Morongo Casino. A lease dispute erupted and the NINE Group learned that tribal corporations also share in a tribe's immunity to civil liability and cannot be sued under the federal diversity statute, 28 U.S. C. 1332 (a)(1). The federal court simply had no jurisdiction. While this was not a tribal court judgment, it demonstrates that even sophisticated businesses are unaware of tribal sovereign immunity.

Waivers of immunity should be reciprocal, so that judgments against tribes and/or tribal members could be enforced in the same way the judgments in favor of tribes and/or tribal members would be under the proposed legislation. Where litigation and enforcement is involved, the scales of justice must be level, and not tilted in favor of tribal interests.

When a similar form of legislation was introduced in the State of Iowa, a lobbyist for the Iowa Bar Association, Jim Carney, opposed the legislation stating, "…the proposal has far-reaching implications for anyone who does business with the tribe. Every time you sign a contract for a phone or cable or banking, there's a clause that says what law applies. If you are dealing with the tribe, you won't know what law will be applied to your case."[1] The reasoning is that the tribal courts have not yet developed a body of common law that establishes a precedent. Further, tribal courts often interpret both written laws and unwritten laws with consideration given to tribal norms, customs and practices, unknown to the civil defendant hauled into tribal court.

An issue closer to home is occurring in San Diego County where an allottee in 1960 conveyed out of trust his property and sold the fee-land to non-Indians. The Rincon Band of Mission Indians has placed concrete barricades at the entrance of the property claiming it as reservation and alleging the property is a health and environmental hazard and ordered it cleaned up. The property owner states the land is not subject to the tribe's jurisdiction or laws. There are reasonable arguments since local and state taxation applies to the land. Moreover, the history of the establishment of Mission Indian Reservations in federal statutory language presents facts that have not been litigated. Likewise, federal statutes prevent the blocking by tribes of Indian Reservation Roads.

In an attempt to determine jurisdiction the property owner filed in federal court against tribal officials saying that tribal rules do not apply on his property because it is private land.[2] The court dismissed the case instructing the property owner to follow-through with the tribal court process. This appears to be a multi-jurisdictional issue that will require broader grounds for objection to the recognition of a tribal court judgment than offered in the proposed language.

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[1] *Critics say it don't provide an adequate way to challenge verdicts*, by Jennifer Jacobs, Des Moines Register, March 29, 2007

[2] Last Stand at Rincon www.stevenandsuzanneslaststandatrincon.com/

IV. Potential impact of tribal state gaming compact language on patrons, Employees and affected local governments

On its surface this legislation does not appear to be related to California tribal-state gaming policy, but it does. In 2007/08, then Governor Schwarzenegger included in the Aqua Caliente tribal state compact and a few others, the following language:

> **Section 10.2 (d) (v) Patron Tort Claims:**
> (v) At such time that the Tribe establishes a tribal court system, the Tribe may give notice to the State that it seeks to renegotiate in good faith this subdivision (d), in which case, the State shall be obligated to negotiate in good faith the arrangements, if any, by which the tribal court system will adjudicate claims of bodily injury, property damage, or personal injury covered under this subdivision (d). In so negotiating, the State shall give due respect to the sovereign rights of the Tribe, and due consideration to the due process safeguards established in the tribal court system, the transparency of the tribal court system, and the appellate rights afforded under the system.

The Agua Caliente Compact 'obligates' the State to negotiate in *good faith* the arrangements by which a tribal court system will adjudicate claims of bodily injury, property damage, or personal injury covered under its Compact. This component expands tribal sovereignty over non-Indian citizens in California. This is an expansion of tribal sovereignty that is not supported by federal law. If the state refuses the terms of the tribes proposed court system, will the tribe then challenge the State in a *bad faith* negotiation and seek a court mediated agreement to provide tribal authority over non-Indian citizens? Will the tribe use the litigation as leverage for the development of state legislation to further expand its authority and jurisdiction over non-Indian citizens, local governments, state agencies and the State itself?

Tribal Casino patrons need greater civil protections that those afforded in tribal court. Here are two examples of tribal tort ordinance language typical of tribes that have 1999 tribal state compacts.

> In the Barona Band of Mission Indian's tort ordinance Section IV-B: The Barona Ordinance does not waive immunity for any judicial action in any court other than the Barona Tribal Court. Thus, there is no right of appeal from the Tribal Court's decision to any state or federal court.
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> In the San Manuel's tort ordinance Section 14.11 Principles of Law Applicable to Determination of Claims, it states: "Any claim brought under this ordinance shall be determined in accordance with Tribal Law. Further, while not subject to state jurisdiction, claims under this Ordinance shall be determined generally in accordance with principles of law applicable to similar claims arising under California state laws to the extent that they are consistent with tribal law and established by Constitution, ordinances resolution, customs, traditions and other sources of tribal law.

- **Where does one find customs, traditions and other sources of tribal law in print?**

V. The Need for Additional Safeguards for the Defendants.

There are no stated requirements in the draft concerning either the qualifications of tribal court judges, the right to trial by jury, or an objection based upon misapplication of state law. There are no guidelines for the principle of comity or reciprocity.

In 2010, Congress passed the Tribal Law and Order Act (TLOA) which amended the Indian Civil Rights Act and provided additional protections for law enforcement, but more to the point authorized tribal courts to rule on offenses subject to greater than 1 year imprisonment or a fine greater than $5000.00. The TLOA lists in –"Tribal Court Sentencing Authority" Section 234 (d) (2) through (5) requirements that provide protections to criminal defendants. We suggest that the honorable members of this committee review this section of the TLOA and consider developing similar requirements that tribal courts must meet in order to meet state court principales of comity in civil cases. For example:

1. Require that the judge presiding over the proceedings has sufficient legal training to preside
2. That the judge be licensed to practice law in at least one state jurisdiction
3. Prior to any proceeding, all court rules and tribal laws are made public and available including regulations and interpretative documents, rules of evidence, and rules governing the recusal of judges in appropriate circumstances of the tribal government
4. That the court maintains a record of the proceeding including an audio or other recording of the trial proceeding.
5. An assurance that rules governing the admission of evidence in civil cases are roughly comparable to those governing state courts in California
6. A guarantee of a fair and impartial tribal appellate process

Clearly, if there were more time to comment additional and necessary safeguards could be developed. Developing guidelines for tribal courts in order to meet the principles of comity is a mutually beneficial action. Stronger guidelines for comity will help improve the tribal court system. Likewise a tribal court system is beneficial to the state if the protections are strong and like that of a state.

VI. Reciprocity - Agreed-Upon Respect Between Two Sovereigns

The Act should include a provision to limit reciprocity to only those tribal courts that have reciprocal provisions recognizing California Court judgments. The principles of comity are designed to allow a foreign forum's decree to operate as a matter of agreed-upon respect between two sovereigns. A condition of comity recognition should be that the tribe allows suit (i.e., waives sovereign immunity) for violations under the United States Constitution.

A recent California Watch Report, both written and broadcast on KQED and NPR, *Native American tribes shield parents from child support*, August 5, 2011, by Kelley Weiss, reported

that: "Mothers around the state are finding it almost impossible to collect child support from some Native American fathers because tribal governments and businesses are shielding them from court ordered payments, records and interviews show."

California Tribal governments should be enacting ordinances to garnishee casino stipends to pay child support; rather tribal courts must reciprocate California State Orders. Citizens were promised that support for tribal gaming would lift Native Americans off of the welfare rolls and voters responded in 2000 with an overwhelming 64% on Proposition 1A. Tribal governments because of their lack of political will to act are forcing mothers and tribal children, the future of the tribes, onto state welfare rolls at the expense of the non-Indian taxpayers. Tribal interests argue that more California tribes should establish tribal courts in order to resolve this issue. In an August 15, 2011 article on Turtle Talk citing 18 GTB Code section 1609, established by the Grand Traverse Band (GTB) requires per capita gaming payments to be used to satisfy child support obligations first. The GTB ordinance states:

> § **1609 - Child Support Obligations**
> The Tribal Council shall establish a program to ensure that, if the GTB has knowledge that any recipient of a per capita benefit is delinquent with respect to a duty of support under an order issued by the court of any state or Indian Tribe, such per capita benefit shall be allocated to the satisfaction of such support obligation in priority over any distribution or allocation of such benefit otherwise provided for under this RAO. Such program shall include cooperation with federal, state, and Tribal governments under the Uniform Reciprocal Enforcement of Support Act, the Social Security Act, and similar statutes. Nothing in such program shall create a duty of financial obligation on the part of the Tribe to any support obligee or third party. **History:** Revenue Allocation Ordinance adopted by Tribal Council on December 27, 1994; as amended by Tribal Act #98-16.635, enacted by Tribal Council in Special Session on August 31, 1998; as amended by Tribal Council in Special Session on May 31, 2000; as amended by Tribal Council in Special Session on June 1, 2000.

There are less than a handful of tribes in California that have developed such an ordinance. Developing the ordinance and enforcing it does not require the establishment of a tribal court. It does require "political will" and the administrative action of a tribal government. Garnishment of casino stipends could be resolved through a "memorandum of understanding" developed between a tribe and the local District Attorney for the collection of child support payments.

VII. Treatment as Sister-State Judgments - Expands Tribal Sovereignty Over Non-Indian Citizens

The Act should not give greater weight to tribal court judgments than to sister-state judgments. This component expands tribal sovereignty over non-Indian citizens in California. The proposed legislation would, at least in part, subordinate the rights of non-Indians to those of Indians in California's judiciary. The existing system of comity provides some protection for those rights, which the proposed legislation would degrade for all the reasons cited regarding the inadequate definition of *"due process"* and the narrow list of objections in the proposed language.

For example, judgments from existing sister-states can be presumed to have been rendered under a system affording at least minimal constitutional rights. But the United States Constitution does not apply in Indian country, and judgments of tribal courts cannot be assumed to have afforded any such rights. Moreover, the California Constitution, in some areas, affords greater rights than does the United States Constitution. California litigants including those who seek to register foreign state judgments in California are bound by those rights. Tribal court litigants are not.

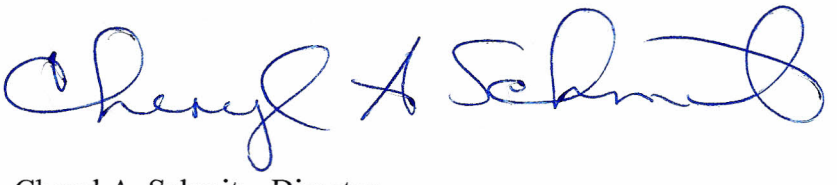
VIII. Conclusion

The proposed legislation is extremely broad in scope. Perhaps, the suggestion of only recognizing tribal court judgments under existing specific statutory mandate for full faith and credit or statutory procedures for recognition of tribal court judgments or orders is appropriate for the "initial trial period." Limiting the scope of judgments to only "California Tribes" is also prudent for an initial trial period to determine how the procedures are working.

What period of time will the trial period cover and how will the effectiveness of the procedures be evaluated? The trial period and proposed methodology of evaluation is not discussed in the text provided for comment. The Court must be careful not to create unintended consequences or harm to citizens that will be difficult if not impossible to resolve.

We hope our comments are useful and helpful to the committee. We believe our comments add the perspective of how tribal judgments affect ordinary citizens and a state's public policy. Should there be any further questions regarding our comments or the committee would like to talk with individuals who have experienced or are currently involved in tribal court actions first-hand, please do not hesitate to contact me.

Sincerely,



Cheryl A. Schmit – Director
916-663-3207
cherylschmit@att.net
www.standupca.org

CC: Honorable Jerry Brown, Governor of the State of California
Honorable Kamala D. Harris, Attorney General of the State of California