Stand Up For California!
"Citizens making a difference"

www.standupca.org

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July 18, 2014

The Honorable Jon Tester
Chairman
Senate Committee on Indian Affairs
383 Hart Senate Office Building
Washington, D.C. 20510

The Honorable John Barrasso
Vice Chairman
Senate Committee on Indian Affairs
838 Hart Senate Office Building
Washington, D.C. 20510

RE: Oversight Hearing on Indian Gaming Matters – July 23, 2014

Dear Chairman Tester and Vice Chairman Barrasso:

Stand Up For California!, is a nonprofit corporation and serves as an advocate and information resource for community groups, local, state and federal policy makers trying to understand and respond to the complexities surrounding the expansion of tribal gaming in California. We do not seek to impede the economic progress and advancement of California's native peoples; rather we seek regulatory reforms that we believe are in the best interests of all the inhabitants of this State. We believe that it is possible to promote responsible growth of tribal gaming and at the same time address the legitimate concerns of the communities in the vicinity of casino operations. But this possibility heavily depends upon all sides recognizing the duties and responsibilities that we all have to each other.

Your oversight hearing to revisit the importance of ensuring the integrity and vitality of Indian gaming comes at a critical time in California. Tribal gaming in California has been highly successful. California has 109 federally recognized tribes operating 71 gaming facilities. These facilities operate both class II and class III gaming machines. California tribes reaped 7.2 billion dollars in 2012, more than 25% of the nation's 27.9 billion dollar tribal gaming industry revenue reported by the NIGC in 2013. California's gaming Tribes share gaming revenue through a tribal state compact component with the remaining non-gaming tribes (1.1 million annually paid in quarterly payments).

In the short span of two decades and a half, IGRA has achieved a goal of economic self-determination for California Tribes previously not thought possible. Nevertheless, these

achievements have not been without consequences. Legitimate concerns over private property rights, fiscal impacts on and complications over resource management by local governments and state's rights have developed. While some of these impacts can be and have been resolved through comprehensive tribal-state compacts and judicially enforceable local agreements, there are still many concerns that require Congressional action to resolve.

Yet since 2011, the Bureau of Indian Affairs (BIA) has only increased pressure on state and local government and exacerbated the existing concerns by establishing several new policies that are not consistent with Supreme Court precedent and are not supported by Congressional action. The Department's aggressive efforts to minimize opportunities to participate in the fee-to-trust process, reduce the ability of parties to be heard in administrative appeals, lower the legal standards applying to tribal acknowledgment, modify the rehearing process for previously denied petitioners, expand acknowledgment to Hawaii, extend trust acquisition to Alaska, and authorize off-reservation gaming are destabilizing to state and local governments having to deal with the numerous proposed changes, potentially harm tribal investments and tribal relationships with state and local government, and will ultimately harm state and tribal sovereignty.

The scope and rapidity of the Department's proposed regulatory changes are exceptional and require a time-out. The Department must extend existing deadlines for the various comment periods that it has imposed and should come before Congress to explain its apparent wholesale revision to its regulations governing trust acquisition in the lower 48 states and Alaska, tribal acknowledgment regulations, rehearing processes, acknowledgment in Hawaii, and other changes that States, local governments and stakeholders are trying to process.

DISCUSSION

With respect to gaming specifically, there are three major areas in which the integrity and vitality of tribal gaming is threatened by BIA agency actions in California: (1) determinations made by the BIA regarding exceptions for gaming under Section 20 of IGRA (2) virtually guaranteed approval of all fee to trust transactions, and (3) the revision of regulations through notice and comment rulemaking expanding BIA's discretion and reducing opportunities for public participation to minimize challenges. The following discussion will identify these troubling issues and hopefully expose what appears to be a BIA bureaucratic culture bent on ignoring agency rules, regulations and federal statue.

I. Determinations made by the BIA regarding exceptions for gaming under Section 20 of IGRA

a. IGRA – Two-Part Determinations

In 2011, Assistant Secretary Washburn issued 2 letters requesting concurrence from California's Governor for two-part determinations for gaming, one for the North Fork Mono Indians of Madera County and the second for the Enterprise Rancheria of Yuba County. Both of these Tribes were approximately 40 to 50 miles off of their established Rancheria lands. In both these instances, despite significant opposition and in the case of Enterprise a countywide vote of opposition (52.8%), Governor Brown granted concurrence for gaming.

Assistant Secretary Kevin Washburn issued his determination to acquire the land in trust within five months of the Governor's concurrence. Federal court challenges were immediately pressed against the determination of the Secretary of the Interior. In both instances the federal government took more than a year to produce the administrative record to support his decision or, in the case of the North Fork Rancheria decision, effectively admitted to the court that BIA failed to comply with the Clean Air Act (CAA), seeking a remand (without vacating the trust decision) to "fix" its violation of the CAA. Moreover, in both instances, suits had to be brought against BIA to force them to comply with the Freedom of Information Act (FOIA). BIA--in fact-- regularly ignores its obligations under the FOIA, leaving the public in the dark regarding the agency's decision-making processes. Both of these gubernatorial concurrences sparked state court challenges against Governor Brown. The California Constitution does not authorize the Governor to concur in a Secretarial determination under 25 U.S.C. § 2719(b)(1)(A).

BIA's disregard for state concerns is exemplified by Mr. Washburn's treatment of the North Fork Compact. The North Fork Compact was deemed approved and published in the Federal Register. Yet soon after the Compact was ratified by the State Legislature, Stand Up qualified for a referendum vote scheduled for a November 4, 2014. Polling has been consistently more than 60% of the electorate are opposed to off reservation gaming. The Secretary of the State of California sent a letter to Mr. Washburn indicating that the Compact was not in effect due to the referendum challenge and that is should not be approved yet Mr. Washburn did not reject the Compact. Instead, for purposes of federal law, it is now in effect.

The North Fork Compact has yet to be entered into consistent with California state law due to the suspending of the tribal state compact ratification language through the referendum process, thus the Secretary of the Interior has violated IGRA.

b. <u>IGRA - Restored Lands Exception After Acquired Lands</u>

In September of 2008, the federal regulations for implementing section 20 of IGRA were finally developed and published in the Federal Register. IGRA specifically provides "*limited exceptions*" for newly acknowledged tribes. IGRA and the 1994 Indian Tribe List Act statutes do not provide an exception for tribal groups who are restored administratively through an *ad hoc* process before 1988 or after. The Department of the Interior explains in the comment section of 25 C.F.R.292:

> "Congress's creation of an exception for gaming on lands acquired into trust as part of the restoration of lands for an Indian tribe restored to Federal recognition. We believe Congress intended restored tribes to be those tribes restored to Federal recognition by Congress or through the part 83 regulations. <u>We do not believe that Congress intended restored tribes to include tribes that arguably may have been administratively restored prior to the part 83 regulations.</u>
>
> <u>Moreover, Congress in enacting the Federally Recognized Indian Tribe List Act of 1994 identified "only the part 83 procedures" as the process for administrative recognition".</u> **<u>(See- Notes following 25 USC 479a) (Federal Register May 8, 2008, Page 29363) (Emphasis added)</u>**

An IGRA land determination was issued qualifying the after-acquired land purchased with money from the Department of Housing and Urban Development for the Karuk Tribe as restored lands for gaming. Karuk was "*administratively recognized*" in 1979 several months after the regulations for Part 83 were adopted. The BIA did not follow the regulations for federal acknowledgment. Additionally, the restored land opinion is contrary to IGRA. The Department's decision creates a trust obligation for the United States and must be based on a thorough evaluation of the facts. Here, it was not. Moreover, the decision results are compelling the Governor of the State of California to negotiate a tribal state compact. These are all indisputable violations of the Administrate Procedures Act, 25 C.F.R. Part 83, the 1994 Federally Recognized Indian Tribe List Act and IGRA. California, in fact, has five Tribes that have been recognized through illegal "reaffirmation," three of which are proposing gaming: Karuk awaiting a compact ratification, Ione and Jamul in federal court challenges, Tejon, the subject of an Inspector General Investigation - just announced a casino proposal on I-5 near Bakersfield, and Lower Lake Koi last proposed a casino in Oakland, the Bay Area. Yet, the BIA appears to be setting a precedent to approve restored lands for tribes administratively recognized contrary to its own rules and regulations.

Section 20 of IGRA has no legislative history. IGRA did not promise a casino to every tribe. Yet, in California, there is a push, by gaming investors from out-of-state to expand tribal gaming beyond Indian lands to practically anywhere in the State. ***Gaming investor's goals* to create an *"emerging jurisdictions"* in urban and metro areas of California will have a souring impact on the integrity and vitality of the tribal gaming industry.** It is highly doubtful this was the intent of Congress as it struggled to find a balance between the rights of tribes, states and the federal government to address the unresolved questions of defining tribal lands eligible for constructing a gaming facility.

II. Fee-to-Trust Transactions

BIA records indicate approximately 45 applications have been submitted by California Tribes to acquire land in trust, representing more than 10,000 acres of land since 2011 to present. Prior to 2011, there were approximately 135 applications representing more than 15,000 acres of land to be taken into trust. The BIA has long failed to recognize the interest of private citizens germane to the decision to convert fee land to trust land. The conversion of land into trust immediately affects where people live and enjoy outdoor recreation. The conversion of land into trust diminishes the local tax base impacting local services. Further, it creates complex multi-jurisdictional conflicts complicating the administration of justice and the ability of lawmakers and law enforcement officers to resolve ordinary disputes.

The 25 C.F.R. Part 151 regulations do not require the BIA to read or consider the comment of private property owners. The only time private property owner comments are considered is in a judicial review and that is only if the private property owner(s) have the ability to make a challenge through the Interior Board of Indian Appeals and into federal court. ***This creates an adversary process and sours the public's view of tribal gaming whether it is a gaming or non-gaming acquisition. While a tribe may say today that gaming will not occur on land that is taken into trust, it does not mean that in the future the tribe may change its mind.***

Theses frustrations and unresolved social, environmental and financial conflicts are created by the BIA and NIGC not following agency rules, regulations or statutes.

a. California Fee-to-Trust Consortium

The *California Fee-to-Trust Consortium* is a workgroup of approximately 60 California tribes and BIA personnel who since 1998 have worked it appears from outside of formal rulemaking to streamline the process by which tribes can secure landholdings that are protected by trust status. In 2000, the BIA allowed the salaries of its employees to be paid by the California Fee-to-Trust Consortium. BIA employees thought they were employed by the Tribes. Not surprisingly, a 2006 Inspector General's investigation found that tribes that put in the most money got the fastest fee-to-trust results. The goals of the Consortium is to manage tribal trust applications in a more timely and consistent way. However, considering the many legitimate challenges by private parties, county governments and even the State of California in the last several years to the fee-to-trust process, it would appear that the Consortium is creating delays and unwanted challenges by not abiding by the agencies own regulations and statute.

Draft minutes of the April 2013 meeting of the California Fee-to-Trust Consortium say "tribes that pay into the Consortium get priority on their applications," this is clearly inconsistent with BIA policy, statute and regulations. Further, member tribes were advised how to keep documents secret — even if requested under the Freedom of Information Act. The Consortium determined that Freedom of Information Act (FOIA) requests were taking up too much time of the Consortiums employees. The Consortium's solution was to have tribes write *"Confidential"* on documents that tribes or the Consortium did not want to share.

The notion of tribes writing "*confidential on documents*" is inconsistent with the FOIA regulations in at least two ways: (1) Tribes have no authority to determine what can or cannot be shared under the FOIA guidelines; and (2) the Consortium is a mix of tribes and BIA personnel. Clearly a third party that cannot seek a Government benefit at the expense of other applicants or affected parties.

b. AES

Analytical Environmental Services (AES) has been contracted by the BIA to evaluate the environmental impacts in a number of fee-to trust transactions in California and nationally. Many of these evaluations are extremely controversial and flawed. Many are for off-reservation gaming projects. Correspondence between the BIA, AES, tribal or gaming representatives indicates that the environmental documents prepared by AES go far beyond the role legally permissible for an environmental consultant. Moreover, in several instances it appears that the BIA has abdicated its supervisory role over the review process, leaving all of the drafting and the vast majority of the major decision-making to AES, Tribes and their gaming investor.

Also concerning is the revolving-door between employees of the BIA and AES. BIA employees leave federal employment to work for AES then return again to work for BIA on the same projects that they evaluated as an AES employee.

III. Rulemaking

Responsible rulemaking requires balancing the authorities and rights of the tribal and non-tribal communities, local, state and federal government. The new policies and rules developed since 2011 do not meet this standard and thus endanger the integrity and vitality of tribal gaming.

a. New Fee-to Trust Guidance July 2011

Since 2011, the BIA has established new policy on taking land into trust. Secretary of the Interior Jewell publicly announced a goal for the taking 500,000 thousand acres of land into trust this year. *"My goal is to take 500,000 acres of fee lands into trust and I encourage the Tribes to continue to submit their applications and emphasize this administration's commitment to processing these applications," said Jewell. (April 24, 2014 Kitsap Peninsula, Washington Dept. of Interior Press Release)*

This policy has significantly affected the two-part determination approval process in IGRA. From the inception of IGRA in 1988 to 2008 there have only been 5 approved and gubernatorial concurred two part determinations (20 year span). Three of those were situations in which Tribes started gaming facilities without first going through a two-part determination process. These ended up in federal court with settlements between the tribes, the affected state and the federal government. But since 2011 to 2014 (2 1/2 years), there have been 5 additional two part determinations. This new policy flies in the face of IGRA's general prohibition on off reservation gaming.

How does setting a goal to take land off of a state's tax roll and out of the regulatory authority of a state adhere to the 25 C.F.R. 151 process? Setting a goal seems contrary to the intent of the Indian Reorganization Act. Does this mean disregard the environmental impacts, the fiscal concerns of counties and states in order to meet an arbitrary goal?

b. Patchak Patch

In order to achieve this goal of 500,000 acres, new rules were developed for the Part 151 process pushing back on a recent United States Supreme Court ruling *Match-E-Be-Nash-She Wish Band of Pottawatomi Indians v. Patchak 132 S. Ct. 2199 (2012),* in which citizens were found to have standing to challenge Secretarial Determinations for the taking of land into trust. Assistant Secretary of Indian Affairs Kevin Washburn proposed the new rule that ostensibly seeks to clarify the process by which affected parties may challenge the final determination for the taking of land into trust. The rule instead adds administrative obstacles and significant costs for potential litigants contrary to the U.S. Supreme Court ruling. The rule raises U.S. Constitutional issues and private property rights by authorizing the "taking" of land into trust without judicial review of the Secretary's decision. The new rule authorizing the taking of land into trust prior to a judicial review compromises a litigant's ability to achieve due process and a fair and impartial hearing.

c. Part 83 Relaxing the Criteria of Federal Acknowledgment

Most recently, the Assistant Secretary has issued proposed regulations for the revision of the Federal Acknowledgement process. These newly proposed regulations would lower historic stands for federal recognition for Indian government. While our organization supports changes

in the process to eliminate inefficiency and increase transparency, these proposals either eliminate or substantially reduce criteria, which has been the foundation of nation policy for at least 36 years. While these changes could have a damaging impact in California, the federal government, i.e. ***the Assistant Secretary has provided absolutely no analysis of the projected effect of these changes on our state or the communities that would be directly affected, or our states historic Tribes***.

California has a total of 81 petitioning groups, more than any other state in the nation. Sixty eight are active petitions. The proposed changes have the potential of creating 34 new Indian tribal governments in California potentially resulting in 22 new **casinos in high-density urban areas such as Los Angeles, Orange, San Francisco and Kern Counties.**

Besides the impact on communities, local government and the state, these proposed rules raise serious issues about the very nature of tribal sovereignty. This proposed rule is an affront to California's historic tribes.

IV. Conclusion

Our nation was established on the foundation of the ***"rule of law".*** Today the very integrity and vitality of Indian gaming in California is dependent on ensuring federal enforcement of the gaming law and all associated regulations. ***Congressional action is required to resolve these issues.*** Otherwise, enforcement is left to affected parties and the courts. Congress is much better skilled at establishing a policy that promotes balance between tribes, states, and the federal government.

Sincerely,

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