

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

P. O. Box 355
Penryn, CA. 95663

March 20, 2013

Honorable Noreen Evans
California State Senator
Chair of the Judiciary Committee
State Capitol Room
Sacramento, CA. 95814

RE: OPPOSE AS DRAFTED SB 406

Dear Senator Evans,

Please list *Stand Up For California!*¹ in opposition to SB 406 as it is currently drafted.

Our organization wishes to express a number of serious and far reaching concerns over this proposed legislation. It is clear the purpose and intent of the legislation is to create a procedure by which the California Courts may apply and enforce a tribal court civil judgment. However, this legislation fails to fully analyze and anticipate the inherent complexity of comity between tribal and state courts as well as unintentional consequences on the non-tribal public of California.

This bill allows the enforcement of tribal law, custom, and culture on non-Indian citizens living and working outside of reservation boundaries without the protection of the Bill of Rights, Civil Rights under the U.S. Constitution and the California Constitution. Tribes are domestic dependent sovereigns that existed prior to the creation of these documents. Therefore the civil protections within these documents do not apply to tribal governments, tribal courts, or tribal tribunals.

¹ *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.

Section 1732(g)(1) A money judgment, including judgment in a civil action or proceeding, **to enforce civil regulatory laws of the tribe.** (Emphasis added)

I. Impact of Tribal State Gaming Compact Language on Patrons, Employees and Affected Local Governments

On its surface Section 1732(g)(1) does not appear to be related to California tribal state gaming policy, but it is. 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: 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.

Likewise, Governor Brown has included in his recent tribal state compacts language addressing tribal courts. **However, Governor Brown clearly recognizes the need to protect the civil rights of California citizens in a tribal court of unfamiliar jurisdiction.** For example, please see the language in the Graton Tribal State Compact:

10.0 Patron Dispute (d). At such time that the Tribe establishes a tribal court system or chooses to participate in an intertribal court system, the Tribe may give notice to the State that it seeks to renegotiate this section 10.0, in which case the State and the Tribe shall be obligated to negotiate in good faith the arrangements, if any, pursuant to which the tribal court system or intertribal court system will adjudicate claims covered under this section. In so negotiating, the State shall give due respect to the sovereign status of the Tribe, and due consideration to the due process, transparency, and appellate rights afforded under the tribal court or intertribal court system and to the independence of the tribal court or intertribal court system. Notwithstanding the foregoing, nothing herein shall be construed to require the State to agree to amend this section 10.0 to provide that the tribal court or intertribal court system may adjudicate patron disputes.

Tribes requesting Money Judgments presents additional concerns related to the industry of gaming. Tribes in the last few years have attempted to pass legislation that would allow them to collect gambling debts from patrons. While tribal law, custom and tradition may provide for that type of collection, the State of California does not. Suing in court to collect on a gambling debt is detrimental to the wellbeing of the public. **Language should be included in this legislation to bar/ban money judgments for gambling debts.**

Tribes in the last several years have also expanded their business into Pay Day Loans. There are 12 tribes in California now involved in Pay Day Loan operations. In the news some of these lending operations have charged as high as 700% interest. Unaware the lender was a tribe with immunity to civil liability or that they could be dragged into a tribal court of unfamiliar jurisdiction, citizens have borrowed money in good faith only to find out later how difficult it is to pay back a loan at an outrageous rate of interest. **Language in section 1734 (B) MUST include language that limits the amount of interest to be accrued identical to the State of California.**

II. **SB 406 Overburdens California Courts**

The fact sheet for SB 406 cites that California is home to more people of *Indian ancestry* than any other state in the nation. However, the fact sheet fails to inform Legislators and interested parties those individuals of *Indian ancestry*, who are often referred to as “urban Indians,” are individuals from tribes from almost anywhere in the nation, who have integrated into the greater population of California. This is not the population of people that will be utilizing tribal courts. The Fact Sheet correctly states that there are 110 federally recognized tribes in California. The Fact Sheet correctly identifies 22 tribal courts operating in California. But the Fact Sheet fails to state that the California population of “*enrolled tribal members*” includes only about 34,000 persons, with approximately another 32,000 non-Indian or non-tribal members living on California Indian lands. The legislation is not limited to California Tribal Courts or even California Indians but rather all 567 Tribes across the nation to have their civil judgments applied and enforced in California.

California State Legislators MUST ASK, why are we enacting legislation for tribes in other states? This language overburdens California Courts.

Section 1731. (a) “This title governs the procedures by which the superior courts of the State of California recognize and enter tribal court judgment of **“any”** federally recognized Indian tribe.

Section 1732. (f) **“Tribal Court” means “any” court or other tribunal of “any” federally recognized Indian Nation , tribe, pueblo, band, or Alaska Native village, duly established under tribal or federal authority including Courts of Indian Offenses ...”**

Section 1733 (b) (2) **“If respondent is not a resident any county in this state.**

Section 1733 (b) (2) is really unjust. In other words the Applicant, the party with the complaint, can file anywhere in the State of California against the respondent that may not even live in California. This on its face alone is a burden on the California State Court System and the taxpayers of California who fund this necessary and honorable system.

Moreover, the Fact Sheet singles out “evictions” as a civil action in which tribal courts are trying to enforce and therefore need this legislation. Tribal parties and governments already have the necessary process and procedures to enact an eviction. Civil jurisdiction for such actions as tribal evictions of non-Indians from tribal land is provided for at Section 4 of Public Law 280, and it states as follows:

Section 1360. [of PL 280] State civil jurisdiction in actions to which Indians are parties (a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State. (California is listed on the Table)

(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section. (Added Aug. 15, 1953, ch. 505 §4, 67 Stat. 589; amended Aug. 24, 1954, ch. 910, §2, 68 Stat. 795; Pub. L. 85-615, §2, Aug. 8, 1958, 72 Stat. 545; Pub. L. 95-598, title II, §239, Nov. 6, 1978, 92 Stat. 2668; Pub. L. 98-353, title I, §110, July 10, 1984, 98 Stat. 342).

California State Legislators MUST ASK, if federal law provides for evictions to be resolved in State Court, why is this legislation necessary?

III. The Need for Additional Safeguards for the Defendants

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. However, there are no stated requirements in this legislation concerning either the qualifications of tribal court judges, the right to trial by a jury of one’s peers, or an objection based upon misapplication of state law. There are no guidelines for the principles of comity or reciprocity. Moreover, considering the broad definition of “Tribal Court” at 1732 (f) this legislation is void of protections to the civil rights of defendants.

Section 1732. (f) “Tribal Court” means “any” court or other tribunal of any federally recognized Indian Nation , tribe, pueblo, band, or Alaska Native village, duly established under tribal or federal authority, including Courts of Indian Offenses ...”

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. Relevant to this legislation, 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 principals of comity in civil cases. For example:

1. Require that the judge presiding over the proceedings have sufficient legal training to preside.
2. That the judge be licensed to practice law in at least one state jurisdiction, preferably California.
3. Prior to any proceeding, all court rules and tribal laws are made public and available including regulations and interpretive 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 state courts in California.
6. A guarantee of a fair and impartial tribal appellate process.

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 Section 1737(b) (1-4) and 1737(c) (1-4) 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 in section 1732 (c). Due process as defined 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 the United States Constitution 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.

California State Legislators MUST ASK, 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. States should not enforce tribal court judgments and particularly those from another state if a tribe has refused to be sued under the Civil Rights Protections Act or refuses to waive sovereignty to necessary causes of action limiting a respondent's defense.²

IV. **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 existences of such immunity. Nor is the

² The Colorado River Indian Tribe would not waive sovereign immunity to the question of reservation boundary or status of the land beneath the Water Wheel Resort in Tribal Court or in Federal Court litigation. Refusal to this request significantly limited the defense of the defendants. The non-Indian was evicted from his property, a multi-million dollar resort he had operated for some 30 years. CRIT used the Tribal Court to basically nationalize the resort for its own interests. The resort sits on California land, not tribal trust land, tribal fee land or reservation.

general public aware that even in tribal court a tribe can shield itself with immunity to civil liability.

V. Reciprocity/Comity – Agreed upon Respect Between Two Sovereigns

The original language sent out by the Judicial Council included language for reciprocity. Should and amendment for Reciprocity be included, such an amendment must provide 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 foreign forums' a 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 or State of California Constitution.

VI. Grandfather Clause

Section 1739 (b) appears to be a clause to grandfather in all tribal court judgments of the last "ten years". Section 1739 MUST be removed from this legislation. It again overburdens the California State Court system. Should this legislation be amended to include the requested safeguards to protect the civil and property rights of all citizens of California, it is unclear how 10 years of tribal court judgments can possibly be reviewed in a manner that is fair and just to the respondents.

VII. Conclusion

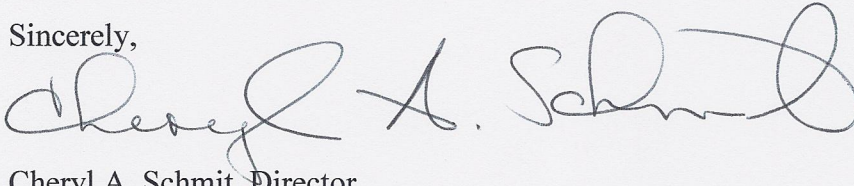
This proposed legislation while extremely broad in scope fails to address the necessary safeguards to protect defendant's civil rights. The legislation seeks to expedite tribal court judgments without consideration of the long term and far reaching impacts of this legislation on all citizens of California. Our organization suggests limiting the scope to only "California Tribal Courts", California Indian Tribes and California Indians. Further, adding the suggested language establishing safeguards ensuring the protection of the civil and property rights of all the citizens of this State. Limitations on money judgments for gambling debt and interest rates accrued for settlements as well as for Pay Day Loans.

The original language circulated by the Judicial Council of California suggested a trial period. A trial period would provide an opportunity to evaluate and determine the effectiveness of the procedures. Moreover, courts could alert the Judicial Council to unintended consequences that occur or were not fully and accurately analyzed. This would provide an opportunity to remedy the Tribal Court Civil Judgment Act should this legislation move forward without necessary amendments to protect the civil rights of all citizens of California.

I hope you find these comments and suggestions useful and helpful to improving upon the proposed legislation. Until then, please list *Stand Up for California!* in opposition to this legislation as it is currently drafted.

Oppose SB 406

Sincerely,

A handwritten signature in cursive script that reads "Cheryl A. Schmit". The signature is written in black ink and is positioned above the typed name.

Cheryl A. Schmit, Director

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CC: Judicial Committee and Staff

Jacob Appelsmith, Sr. Advisor to the Governor

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