Stand Up For California!
"Citizens making a difference"

www.standupca.org

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Honorable John A. Perez
Speaker
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RE: Legislative Working Group - Off Reservation Gaming Policy

Dear Senator Steinberg, Senator De Leon and Speaker Perez,

Stand Up For California writes today asking that the California State Legislature not take up another off-reservation tribal-state gaming compact until it develops a state policy for off-reservation gaming in general, and specifically what the Governor must consider and do before concurring, if at all, in a federal secretarial determination to allow off-reservation gaming. While the California State Legislature have been faced with the ratification of several tribal state compacts since 2000 for parcels that involved newly acquired land for tribes restored by an Act of Congress, a stipulated court judgment, or a settlement of a land claim, until this year, the Legislature has not been presented with a truly off-reservation gaming compact.

When the tribe already has a reservation, the approval of gaming on an off-reservation parcel involves a discretionary process known as gubernatorial concurrence. Such off-reservation gaming is prohibited under federal law unless the Governor chooses to concur in the determinations of the Secretary of Interior that the gaming would not be detrimental to the surrounding community (or neighboring tribes). The Governor has not been given any authority under state law, nor is there any state policy governing approvals of off-reservation gaming. The exercise of this "approval" power by the Governor is unrelated to his power to negotiate tribal-state compacts, which clearly is governed by the state Constitution and statutes.

Indeed, the Indian Gaming Regulatory Act (IGRA) places no standards nor grants a governor any authority to exercise his executive authority to grant concurrence for an off-reservation casino. IGRA simply states that the governor of a state "may" concur. Thus it is up to each state to establish a policy on tribal state compact negotiation and ratification for off reservation casinos.

The Secretary of the Interior's determination must reflect the process for land acquisitions specific for gaming and verify completion of the requirements to consult with the state agencies, other local political subdivisions and affected tribal government of the proposed off reservation casino. However, this is a process that can be challenged by affected parties whose comments prior to the U.S. Supreme Court ruling in *Salazar v Patchak*, were never consulted nor their comments read or considered.[1] A judicial review is the only fair hearing affected parties will ever have.

As stated, the nature of a governor's concurrence is very different. The governor of a state has a constitutional obligation to ensure that state laws are enforced and that longstanding gambling policy ensures the welfare of the public and the good operation of government is free from corruption. Here are questions for your consideration as Senator De Leon's Legislative working group ponders criteria if and when an off reservation compact should be considered.

I. Is the proposed off reservation casino consistent with state gaming policy?

Proposition 1A promised state voters that tribal casinos would only be developed on tribal lands, meaning "on" the reservation. The public was never asked if they would support tribal gaming on newly-acquired lands "off" the reservation. All statewide surveys and there have been a few by various entities since 2000 are consistent in showing 69% to 72% of California State voters oppose off-reservation gaming.

If surveys are relevant, we suggest you look at the actual vote of the public in a few situations.

2005 Yuba County Ballot:

"Should a destination resort/hotel and American Indian gaming casino be located within the sports/entertainment zone on Forty Mile Road in the County of Yuba?"

The "NO" vote won 52.8% to 47.2% and 59% in the district where the casino was proposed.

2005 Amador County Vote:

"Do you approve the establishment of any more casinos in Amador County?"

Amador County citizens gave a resounding 84.5 % NO vote to the casino

[1] Asst. Secretary of Indian Affairs Kevin Washburn is currently involved in a rulemaking process that will include affected stakeholders in fee to trust transactions. However the proposed rule is limited and contrary to the ruling by the Justices.

measure. This vote was in response to two proposed projects in one of California's smallest counties.

2010 Contra Costa County:

"Shall the City of Richmond approve a project including a casino at Pt. Molate provided that this advisory measure is considered in a manner consistent with all the City's legal obligations?"
Citizens of Richmond in 2010, strongly voiced their opposition to an off reservation casino by an overwhelming victory 57.5% No on U.

2011, Feb. Madera County

The Madera County Board of Supervisors held their regularly scheduled meeting, for which Supervisor David Rogers had announced he would introduce a resolution to fight an off-reservation casino, proposed by the North Fork Rancheria of Mono Indians. Prior to the meeting, the resolution was removed from the meeting agenda. March 9th was the deadline for items to be placed on the June election ballot; therefore placement on any subsequent Board of Supervisors meeting would be too late for the June Ballot. This appeared to be an intentional action once again stifling the voice of the voters who are the affected public.

California's gaming policy enacted in State Statue in 1998 established a moratorium on the issuance of new card room licenses. The moratorium has been extended until 2020. Granting concurrence for the establishment of off-reservation tribal casinos flies in the face of state policy of this statutory moratorium on new gaming facilities.

Further, the California Gambling Control Act requires a California Card Club that wishes to expand its current operation by more than 25%, to have voter approval by the affected jurisdiction. Without doubt, granting the concurrence for an off reservation casino, hotel complex that includes 2000 slot machines plus additional table games has a drastically significant impact on affected communities and state gaming policy and should require a vote of the affected electorate.

In short, there is no state policy allowing the expansion of gaming - tribal or non-tribal - and certainly no policy for expanding gaming off-reservation for tribes. The exercise of the concurrence power by the California Governor, giving a final approval to an off-reservation casino, is a legislative judgment that the Governor cannot rightfully exercise without constitutional or statutory authorization, based on a uniform state policy.

II. Has California environmental law been adhered too?

In 2011, the State Legislature passed and Governor Brown signed legislation to ratify two tribal state compacts.[2] Both Assembly Bills cite the existing environmental law CEQA which requires…"a lead agency to prepare or cause to be prepared and certify

[2] On June 13, 2011, Assembly Bill 2010 authored by Assembly Member Chesbro to ratify the Upper Lake Rancheria tribal state compact and on October 2, 2011, Assembly Bill 1418 authored by Assembly Member Hall to ratify the Pinoleville Rancheria tribal state compact.

competition of an environmental impact report on a project as defined, that it proposes to carry out or approve that may have a significant effect on the environment as defined, or to adopt a negative declaration of its finds that the project will not have that effect." Both bills then exempted from CEQA the execution of an intergovernmental agreement. "...between a tribe and a county or city government negotiated pursuant to the express authority of, or as expressly referenced in the tribal state gaming compact ratified by this section.

The State Legislature and the Governor must believe that the law requires the county and city governments to abide by CEQA when negotiating MOU's with tribal government outside of a tribal state compact. The legislation only provides an exemption from CEQA when a tribal state compact incorporates a CEQA-like environmental review process, in deference to tribal sovereignty.

In the two off reservation compacts signed by Governor Brown on August 31, 2012, neither County of Madera nor Yuba adhered to the CEQA process in the development of local agreements. These agreements create part of the controversy. They are simply monetary payments in exchange for local governments to not oppose their projects.

This raises the questions about "What environmental documents meeting "state standards" are there to rely upon to protect the integrity of a governor's decision-making process to concur or not concur or take no action".

III. Have the local governments entered into intergovernmental agreements in a manner that is consistent with state environmental law, is fair, objective and transparent?

The lack of a CEQA process in the development of a mitigation agreement between a county and a city allows the agreement and the impacts it is supposed to address to be developed in a manner that is less than objective, fair or transparent. Agreements negotiated with host counties or cities outside of a tribal state compact are often used as a political tool to enhance the chances of approvals at the federal level. Federal officials do not evaluate if the agreements are mutually beneficial or even address environmental impacts. The presence of an agreement is simply an opportunity to check the box that there is one.

Counties or cities that have supported the development of an off reservation casino have presented the issue to the public as if it is only a federal process. But that is far from the truth. The City of Richmond was required in a settlement with the California Department of Justice, then Attorney General Bill Lockyer to perform a CEQA process and ensure the concerns of the affected citizens were addressed. Both a CEQA and NEPA process ran concurrently. In the end, the City of Richmond could not certify the EIS. The citizens placed the proposal on the next ballot and won a victory of 57.5% opposing the casino project. Nevertheless, the original casino agreement with the tribe and the developers continues to haunt the city of Richmond through costly protracted litigation fees as the developers want their money back for this failed project.

This should be a lesson to all cities and county elected officials, off reservation facilities are not a done deal, they are speculation. In the city of Richmond it was never a shovel read project as it was portrayed.

IV. When to consider, if ever, an off reservation compact

When sending a ratified compact to the Secretary of the Interior for approval, the State is required by federal regulations to certify that the compact has been negotiated and concluded in accordance with California Constitution and State statute. However, neither California's Constitution nor its statutes addresses anything about off-reservation gaming.

Therefore we ask that this Legislative Working group give thoughtful consideration to the development of criteria that provides legislative guidance fostering long standing state policy on the acquisition of new trust lands specifically for a casino. Additionally, it is within the power of the state to require its Governor not to commence negotiations until land is in trust, and certainly not to conclude them before land targeted for a casino is taken into trust by the Department of the Interior.

Since the *Patchak* ruling, the current Secretary of the Interior has developed a new policy on taking land into trust eliminating the self-stay when an appeal to the trust transaction is filed. This presents new concerns for the Governor and State Legislature on when a tribal state compact should be negotiated and considered for ratification. Moreover, whether or not a Governor should conclude a negotiated compact before land is actually in trust.

- Should the Legislature require the Governor to stay his tribal state compact negotiations until land is in trust? Or until an appeal process is complete?
- Should the Legislature stay the ratification of the compact until the litigation is complete on the trust transaction?

What are the potential outcomes?

- A court could decide to remove the land from trust. A court could leave the land in trust but remove its eligibility for class II or III gaming.
- What happens to the ratified compact?

Therefore, we ask that this Legislative Working group give thoughtful consideration to the development of criteria that provides legislative guidance fostering long standing state policy on the acquisition of new trust lands specifically for a casino. These issues are multi-jurisdictional requiring a variety of circumstances to be reviewed and considered.

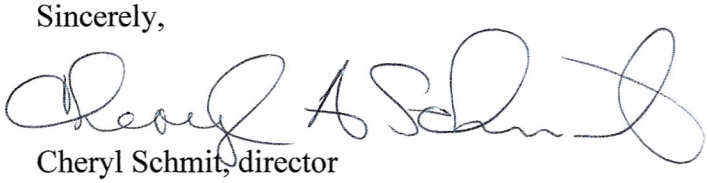
However, when considering guidelines for tribes requesting two-part determinations the State Legislature has new questions to give serious consideration too. Please recall that in 1999 the California Supreme Court addressed the reach of the California Constitution

IV section 19 sub section (e).[3] The Supreme Court found that this section expressly forbids the California State Legislature from taking any action that authorizes casino style gaming like that of Las Vegas or New Jersey and further requires the State Legislature to prohibit any action that purports to do so. It would appear that compact negotiation and ratification of an off reservation casino will require an amendment to the California State Constitution.

The California State Legislature may also wish to consider placing into statute the limitations and restrictions on gubernatorial concurrence or casino location already established in federal court rulings. In the case of *Artichoke Joes vs. the State of California* the location of tribal gaming is restricted to *"carefully limited locations"*. Casino location has a significant impact on communities. The Legislative working group will need to make clear definitions of what this phrase means.

Stand Up For California restates our request not to take up another off reservation tribal state compact until this Legislature establishes a statewide policy on off reservation gaming. I hope you find this helpful information as the working group considers a statewide policy on off reservation gaming.

Sincerely,



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[3] *Hotel Employees and Restaurant Employees International Union v Governor Davis* (1999) 21 Cal.4th 585,605. Holding that class III gaming is gaming of the type prohibited by section 19 (e) Both the off reservation compacts of the North Fork and Enterprise Tribes authorize class III gaming.