

Stand Up For California!

“Citizens making a Difference”

www.standupca.org

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June 15, 2021

Honorable Henry Stern,
California State Senator
Chairman, Senate Natural Resources and Water Committee
Room 5046, State Capitol,
Sacramento, CA 95814

RE: Opposition to AB 379

Dear Senator Stern,

Stand Up For California! (Stand Up) is a statewide organization with a focus on Tribal issues affecting California, including fee-to-trust applications, gaming compacts, card clubs and the state lottery. Over the last two decades, our organization has participated extensively in the comment process established in federal regulations for both “On” and “Off” reservation land acquisitions. Our comments have included various environmental concerns, land-use, easements, trespass, public access to trails, civil tort issues, law enforcement, fire and emergency service concerns, pollution, utility issues, well-water interference, and water rights.

While the State is understandably taking long-overdue steps to increase equity for long-marginalized California Tribes, Stand Up is concerned that there has not been adequate analysis or discussion on the complexities of how federal law affect these efforts. Specifically, we are concerned that without a rigorous legal framework in place, the transfer or sale of natural lands that are currently held in trust for the public could result in the loss of state jurisdiction over future land use decisions, public access, and development activities on those lands.

AB 397 would authorize the Wildlife Conservation Board (WCB) to provide grants, loans, contracts, and co-management agreements to California tribes, to the same extent they currently extend those services to public agencies, non-profits and private entities. The bill would also authorize the WCB to sell, exchange or transfer real property in fee, if a written easement is recorded to maintain the property as wildlife habitat in perpetuity. However, because of the complexities of federal law, federally recognized Tribes are not like any other public or private entity, due to the important issue of Tribal Sovereignty. The bill fails to address how the state will retain its jurisdiction over lands taken into trust once a Tribe has fee title. Similarly, contracting with a federally-recognized tribe is quite different from contracting with any public or private entity. This is an important consideration that does not appear to have been addressed in previous analyses of the bill.

The original goal of the 1947 Wildlife Conservation Law was to ensure that suitable state lands would be set aside for certain wildlife-related purposes. The State Legislature over time has developed many additional conservation laws such as: The California Endangered Species Act, the California Environmental Quality Act, the Coastal Act, the Porter Cologne Act, and the entire Fish and Game Code. These laws have ensured that the

environmental benefits provided by natural lands and wildlife population are available to and enjoyed by all members of the public, that State Parks and hiking trails remain open, that the public has access to coastal beaches and harbors, clean water for wildlife and recreational use, conservation areas for migratory birds, fish and game, and most importantly state and private water rights are secure. None of these laws will be applicable to any lands taken into trust for the Tribes by the federal government. It is particularly important for this committee to note that State law exempts tribal trust lands from the Sustainable Groundwater Management Act (SGMA).

Governor Newsom's 2020 Policy Statement reaffirmed Governor Brown's previous Executive Order B-10-11, while additionally directing state agencies to:

"...support California tribes' co-management of and access to natural lands that are within a California tribe's ancestral land and under the ownership or control of the State of California," and also to "...work cooperatively with California tribes that are interested in acquiring natural land in excess of State needs." (Emphasis added)

While Stand Up supports the concept of Tribal co-management, as well as Tribal access to public funding through grants and loans, and enhanced access to public lands for traditional ceremonial and gathering practices etc., the bill's provisions addressing sale or transfer of land could result in unintentional consequences with far-reaching implications for the shared resources of the state and public access.

SALE OR TRANSFER OF PUBLIC CONSERVATION LANDS

Once land is owned in fee, any federally recognized Tribe may seek to have the Federal government hold the land in trust for the Tribe. The process is known as fee-to-trust. The federal government requires that all encumbrances be removed from the land before transferring into trust. The state may comment on the fee-to-trust application, but the process heavily favors the Tribal applicant. Once accepted, Trust land is then removed from the State's primary jurisdiction. Federal law (25 CFR 1.4) provides that none of the laws, ordinances, codes, resolutions, rules, or other regulations of any State or political subdivision will apply. Even when a tribe's land remains in fee status with the tribe, the nature of tribal sovereignty may apply to a tribal business or tribal governance on the fee-land, thereby allowing a Tribe to claim authority and jurisdiction – meaning that the Tribe may potentially be immune to State laws, even for lands not taken into trust.

Stand Up suggests that the Committee amend the bill to strike the references to fee title transfers of public lands before passing the bill out of committee or hold the bill until these concerns can be adequately addressed in the next legislative session.

CONTRACTING FOR SERVICES OR CO-MANAGEMENT OF PUBLIC CONSERVATION LANDS

In order to be bound by a contractual agreement, such as a conservation easement, federally recognized tribal governments must pass a resolution to waive its sovereign immunity in favor of the contract. Certain criteria must appear in the resolution to ensure that it will be judicially binding and enforceable. Contracts that encumber tribal land in any way require the approval of the Secretary of Interior, must be renewed every seven years, and include the approval of the Secretary of any restrictions of land use.¹ Contracts for services of a

¹ Four key points: 1. In order to properly authorize a waiver of the Tribe's sovereign immunity from lawsuit, a tribal resolution must specify all matters arising under the terms of the contract subject to the waiver. 2. The Resolution must be adopted in a manner consistent with a Tribe's Constitution and ordinances. If a Tribal Constitution does not authorize the Tribal Council to waive immunity (and some tribal constitutions do not), then it may require a vote of the entire tribal membership (generally known as the General Council) in order to waive the Tribe's immunity from unconsented lawsuits. 3. The Resolution must identify who is to sign the agreement or authorize the entire Council to sign the Agreement 4. **If the Contract encumbers the tribal land in any way,**

federally-recognized tribe also may require approval of the Secretary and clearly raise questions of liability, enforcement, and ability to sue the tribe in court for damages or specific performance.

Stand Up suggests that the Committee analysis acknowledge any loan, agreement or contract for co-management of either state lands or tribally-owned land requires: (1) a waiver of tribal sovereignty², (2) liability insurance to protect the public safety while under tribal jurisdiction, (3) state law enforcement jurisdiction, (4) a requirement that any and all contract disputes are resolved in state court – not Federal courts or the unfamiliar jurisdiction of individual Tribal Courts.

In closing, Stand Up suggests that the WCB work cooperatively with tribes through a public process to develop a legal framework to define and identify what “natural lands” may be subject to the provisions of this bill. The framework should include definitions of precisely whom the WCB is contracting with; whether a federally-recognized Tribe, a non-federally-recognized Tribe, individual tribal members or some other arrangement of such as an association or corporation. Each of these groups require different legal terms and provisions to protect the interests of the State and the public.

To reiterate, Stand Up has no objection to the underlying intent of this measure. Tribes should be afforded the same opportunity as other entities to participate in the stewardship of California’s precious natural land and waters. But in order for it this bill to be implemented in the spirit it was introduced, it must account for the unique and complex legal relationship between the federal government, the state, and the tribes, so that public trust resources are continuing to be protected as the public expects.

Sincerely,



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Assembly Member James Gallagher

exceeds seven years and limits a tribal government's authority over the use of the land, it then requires a review by the Secretary of the Interior. This may require the signature of the Secretary of the Interior. (25 CFR Part 81).

² A waiver of tribal sovereignty is a business standard for Tribes whether they operate successful businesses, hire consultants or attorneys.