# *Stand Up For California!*

**"Citizens making a difference"**

**standupca.org**

**P.O. Box 355**
Penryn, CA 95663

June 30, 2006

Honorable Earl Devaney
Inspector General
U. S. Department of the Interior
Bureau of Indian Affairs
1849 C. Street N. W.
Washington, D.C. 20240
Fax: 202-208-6023

**RE: Certification of Lands for Gaming – Agua Caliente**
**Requested Action**

Dear Inspector General Devaney:

Stand Up for California has been involved with issues associated with Indian gaming for many years. We frequently serve as a resource to policymakers and elected officials at the local, state and national levels. We thank you and appreciate your hard work and thoughtful recommendations produced in the 2005 Report - *Process Used to Assess Applications to Take Land into Trust for Gaming Purposes*.

Stand Up For California writes today with questions for your consideration and a request that your office will once again make thoughtful recommendations, to the Assistant Secretary of the Interior, the Solicitor of the Department of the Interior and to the Chairman of the National Indian Gaming Commission. There is heightened public interest in the answers to the questions below as citizens and local governments are negatively affected by land acquired in trust after 1988 and the failed language of the Agua Caliente Band of Cahuilla Indians (Tribe) 1999 tribal state compact.

**Requested Action**

Stand Up For California respectfully requests of your office to evaluate and determine whether the Department of the Interior administered the Tribe's land acquisition process in accordance with applicable laws and regulations. The answers to the questions listed in this letter will ensure that the certification of the Tribe's casino property in Riverside County in the sphere of influence of the City of Rancho Mirage is in compliance.

California continues to raise unique issues brought about over the expansion of tribal gaming in California for lands transferred into trust after 1988. The Tribe presents a new circumstance involving a trust-to-trust transfer of allotment land acquired after 1988, *within* reservation boundaries acquired for gaming.

- What is the process for allotment lands in trust for an individual Indian *within* the boundaries of a reservation transferred to the governance of a tribe after 1988?

- What triggers the process of notification to state, local governments or other affected parties for a trust-to-trust acquisition? And what applicable regulations must be applied?

- What is the process being conducted for trust-to-trust transfer of lands after 1988 established and approved in accordance with all applicable federal laws and authority?

- What are the guidelines for multiple tribes or affiliate groups on one reservation for gaming? We foresee the need for clarification of ***coequal rights of tribal governance*** to be made clear and guidelines established. *Quinaielt Tribe of Indians V. The United States,* 118 Ct. Cl. 226(1951). "equal rights in the reservation"

## Discussion

### Trust-to-trust Transfer *Within* Reservation Boundaries

The Tribe is located in Riverside County. The Tribe has two casinos. One in downtown Palm Springs and the other located in the jurisdiction of the County of Riverside but at the gateway and in the sphere of influence of the City of Rancho Mirage. Two separate land acquisitions have been processed, one in 1999 and the other in 2004 for the Rancho Mirage location. Both have resulted in gaming and proposed ancillary gaming activity.

### The 1999 Trust-to-Trust Transfer

Agua Caliente purchased 40 acres of restricted allotment land from an Indian in 1999. The purchase price for this interstate highway frontage property was $4.1 million. The transfer of land title to the Tribe was pursuant to 25 CFR Section 152 which grants authority to the Secretary of the Interior to sell or transfer restricted lands. However, the notification process followed by the Palm Springs office of the BIA is unclear, no notifications were sent to the State of California or affected local governments. There is no letter that documents notification or the Secretary's determination for this transfer.

As the result of a FOIA Appeal to the United States Department of the Interior requesting information from 5 documents that were withheld, asking if the documents demonstrated the trust-to-trust transfer was processed as a "gaming or non gaming" land acquisition, the response authored by Darrell R. Strayhorn- FOIA Appeals Officer dated May 25, 2006 stated:

> "The Department has reviewed these five documents and none of them contain any information that addresses "whether or not this was a gaming or non-gaming land acquisition."

It would appear the Tribe withheld or did not make clear or state the purpose of the trust-to-trust transfer.

A request was made for any and all documents/information on whether the BIA, on behalf of the Secretary, notified the State and local governments. Again Ms. Strayhorn responds:

> "As noted above, the BIA has provided you with all of its disclosable documents contained in its files regarding the sale of the land that is the subject of your FOIA request and it does not have any additional documents to disclose to you."

It is not clear whether the BIA has additional documents which they believe they do not need to disclose, or whether there are simply no remaining documents on the matter at all.

It would appear that the Palm Springs Office of the BIA did not notify the State of California. Indeed, the State of California when contacted and asked this same question stated they had no notification of this trust to trust transfer for gaming. Moreover, none of the documents in Stand Up For California's possession acquired through FOIA's indicate notification to the State of California or other nearby local governments for a trust-to-trust transfer for gaming or non gaming activity.

Most importantly and as a matter of federal statute, IGRA's prohibition on gaming in section 20 (25 U.S.C. sec. 2719) applies to "lands acquired by the Secretary in trust for the benefit of an Indian TRIBE after October 17, 1988." (Caps added.) As long as land is acquired for the Tribe after 1988, section 2719 of IGRA applies.

## Non-gaming Trust Acquisition of 2004.

Agua Caliente Band of Cahuilla Indians land acquisition and final determination on June 22, 2004, was an application for trust for 140.41 ac. contiguous to the existing casino. The Agua Caliente has proposed developments ancillary to the casino on this site.

The Department of the Interior, Bureau of Indian Affairs Palm Springs Agency is tasked with processing fee to trust applications directed at recognizing the difference between gaming and non-gaming developments. Nevertheless, in 2004 when the Department issued its 'Notice of Decision', it failed to recognize the land acquisition as gaming or gaming related.

The Agency failed to send the required notice to the City of Rancho Mirage who has jurisdiction over a portion of this land transferred into trust. Therefore, it would be only fair to set aside the trust determination made August 11, 2004 and reopen the fee to trust process allowing the City of Rancho Mirage and the State of California to participate in an application that fully details the intended use for gaming of the land.

## Applicable Authorities – IGRA – IRA -1999 Tribal State Compact

The Tribe signed a Class III Compact with the State of California which stipulates that land must meet the standards of "Indian lands" under IGRA. Indeed the 1999 Compacts state the following:

> Sec. 4.2 Authorized Gaming Facilities. The Tribe may establish and operate not more than two Gaming Facilities, and only on those Indian lands on which gaming may lawfully be conducted under the Indian Gaming Regulatory Act. The Tribe may combine and operate in each Gaming Facility any forms and kinds of gaming permitted under law, except to the extent limited under IGRA, this Compact, or the Tribe's Gaming Ordinance.

Without regard to whether IGRA itself requires that land is taken into trust for gaming, non gaming or gaming ancillary purposes meets the statutory standard, the fact is that the tribe executed – and the Secretary approved—a compact imposing that requirement. Thus, as a matter of IGRA the Compact under which the tribe conducts gaming must meet the standards of IGRA.

> Sec.2.8 "Gaming Facility" or "facility" as defined at Section 4.2 of this Compact means any building in which Class III gaming activities or gaming operations occur, or in which the business records, receipts, or other funds of the gaming operation are maintained but excluding offsite facilities primarily dedicated to storage of those records, and financial institutions, and all rooms, building, and areas including (but not limited to) parking lots and walkways, a principal purpose of which is to serve the activities of the Gaming Operation, provided that nothing herein prevents the conduct of Class II gaming (as defined under IGRA) there in.

Moreover, the compact definitions broadly define what lands may be used for gaming or ancillary gaming activity. The Secretary approved these compacts and thus they have become regulations.

For these reasons, the recent land acquisition in 1999 of 40 ac. parcel upon which the tribe has a casino as well as the additional 140.41 ac should have and still must be considered a land acquisition for gaming and gaming related activities. These acquisitions are potentially subject to the processes imposed on after 1988 land acquisitions. Moreover, the State was ***never notified*** of the 1999, 40 ac. trust-to-trust transfer, and the City of Rancho Mirage was ***never notified*** of the 2004 fee to trust land acquisition application and transfer of lands.

This is very important in California considering the cultural, economic and political impacts on nearby residential and commercial developments. Particularly where the land is being acquired for business purposes, the tribe is required to provide a plan identifying anticipated economic benefits associated with the proposed use. The Tribe must submit a full environmental impact report ***prior*** to land transferred into trust in order to comply with the intent of the regulation which provides affected parties the opportunity to comment on developments. No plan was submitted with the Agua Caliente application. Indeed, the land was transferred into trust as the need to ***bank land*** for future generations. ***"Land banking"*** is the acquisition of land by tribes for some future undisclosed use. This action circumvents the intent of federal regulations to address serious and critical taxation and jurisdictional issues.

This type of acquisition appears contrary to the 1934 Indian Reorganization Act (IRA). The IRA requires tribes to demonstrate an immediate need for the acquisition for the land. Approval of land banking applications appears to constitute federal interference with the powers

reserved to the State in a manner patently at odds with the intent of the Tenth Amendment of the United States Constitution.

Failure to notify affected parties or adhere to administrative procedure requirements such as Environmental Impact Review or a Business Development Plan ***prior*** to the time of transfer significantly affects the political authority and good working order of states, state agencies and political sub divisions of states, ultimately, affecting all inhabitants of the state.

**Coequal rights at Agua Caliente**

Unique federal law in the development of the Mission Indian Reservations in California presents a serious question regarding the Agua Caliente's ***exclusive exercise of governance*** over the entire Reservation that was set aside. Various Indian groups reside on the reservation today which includes Chemehuevi and Cahuilla people. This creates additional questions regarding the 40 acre casino sight.

- Is/was Ms. Diane Loeffler, AKA Diane Karen Voorhees, Allottee PS-74 the former owner of the 40 ac parcel in Section 24, an enrolled tribal member of the Tribe? Historical documents support the view that she may not be.

- Was the Agua Caliente Reservation created to be under the ***exclusive governance*** of the Aqua Caliente Band of Mission Indians? Historical records indicate otherwise.

While the Tribe often recites the boundaries of the reservation were established by Executive Order, no reservation in California can be established by an Executive Order except as specifically authorized by statute due to the statutory limitations imposed on Presidential and/or Secretarial Orders pursuant to the 1864 Four Reservations Act. (Act of April 8, 1864, 13 Stat. 39) The 1864 Four Reservations Act established an undefined Mission Indians Reservation. This Mission Indians Reservation was further defined by Congressional Action in 1891 in the Mission Indians Relief Act. (Act of January 12, 1891, 26 Stat. 712)

This Act appointed a Commission to establish the reservation for the Mission Indians. In many instances, the Commission acquiesced to the boundaries previously outlined in Executive Orders and is detailed in an 1888 Senate Report (50th Congress Report 74, January 23, 1888). This Senate report presents an extensive survey of the 44 groups of Mission Indian in preparation for the Mission Indians Relief Act.

It should be noted that the reason that the Agua Caliente Reservation was deliberately enlarged by the Smiley Commission[1] was so that sufficient land would be available for not only the villages initially settled there but also for other groups of Indians located on private land or grants from which their eventual eviction might be a possibility. The Reservation land is made up of individual allotments to individual Indians, with only certain lands held in trust by the United States for the Agua Caliente Tribe. The report notes:

> "Nearly all of the Indians are settled on Section 14 Township 4 South, Range 4 East, S.B.M."

It is reasonable that some allotments *outside* of Section 14 may not be in trust for only enrolled tribal members of the Agua Caliente Band of Missions Indians and therefore may not have been under the ***exclusive governance*** of the Tribe. A number of the allotments are or have been owned in fee by non Indians. The report so notes:

> "The reservation, as recommended by us, will accommodate at least one hundred Indians more than are now there. Some of the desert Indians must, and all may be compelled to move, if the Salton Sea should rise. In this contingency, this is the place for them **and we recommend that it be set apart, not only for those on the Reservation but for those hereafter to come."**

It is reasonable to conclude that Mission Indians would have ***coequal rights*** within the Reservation. (*Halbert v. United States*, 283 U.S. 753 (1931) Moreover, the phrase "…for those hereafter to come" recognizes both the potential evictions of Mission Indians at the time of the writing of the report and the subsequent consolidation of other tribes on the reservation.

Currently the Juaneno Mission Indians tribal group petitioning for federal acknowledgement is in "active consideration". Certainly, this group of Mission Indians whether it is acknowledged or not have been provided for and may acquire land in compliance with the Mission Indians Relief Act of 1892 at the Agua Caliente, Morongo or Capitan Grande Reservations.

The Smiley Commission Report (52nd Congress Ex. Doc. No. 96, January 26, 1892) makes numerous references to the consolidation of Mission Indians living on grants or ranchos to move to the Morongo, Agua Caliente or Captain Grande Reservations. The enactment of the Smiley Commission report recommendations into Congressional statute makes coequal rights a matter of law. Consolidation of tribes affiliated with Mission Indians would entitle them to equal rights *within* the reservation.

**In Conclusion**

California continues to be an experiment in tribal gaming expansion onto lands acquired in trust after 1988. The recommendation in your September 2005 report requiring tribes to certify all trust lands acquired since October 17, 1988, used for gaming was established and approved in accordance with IGRA and other applicable authority is tremendously helpful. Again, thank you for your hard work and attention to this issue. Stand Up For California looks forward to your thoughtful reply.

Sincerely,

Cheryl A. Schmit – Director
916-663-3207
schmit@hughes.net

CC: Jack L. Rohmer, Associate Director, Office of the Inspector General
Jim Cason, Assistant Secretary, Bureau of Indian Affairs
David Longly Bernhardt – Solicitor, Department of the Interior
Phil Hogen, Chairman, National Indian Gaming Commission
George Skibine, Office of Indian Gaming Management
Andrea Lynn Hoch, Legal Affairs Secretary
Stephanie Shimazu, Deputy Legal Affairs Secretary
Dan Kolkey, Tribal State Compact Negotiator
Robert Mukai, Senior Assistant Attorney General – Indian Law and Gaming Unit
Sara Drake, Supervising Deputy Attorney General – Indian Law and Gaming Unit

[1] The Smiley Commission, named after the lead Commissioner Albert K. Smiley. The 1891 Mission Indians Relief Act required the appointment of a commission to establish Mission Indians Reservations. The report was concluded and submitted to the Secretary of the Interior. An amendment to the Mission Indians Relief Act followed in 1892 accepting the recommendations of the Smiley Commission Report.