Stand Up For California!

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May 23, 2006

Blythe City Council
Attn: Mayor Robert A. Crain
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RE: Inconsistency in the Treatment of Promises and Representations by CRIT.

Dear Mayor Crain and Honorable Members of the Blythe City Council:

Stand Up For California writes to this honorable Council today to alert you to serious questions regarding the validity and enforceability of the Municipal Service Agreement (MSA) between the City of Blythe (City) and the Colorado River Indian Tribes (CRIT). I urge you to seek special outside legal council in this matter because: (1) The City may lack the authority to enter into an agreement based on revenue sharing with a tribal government from casino profits (2) the MSA may be invalid and unenforceable, (3) the City may be in violation of the California Environmental Quality Act (CEQA), and (4) CRIT may be in material breach of the MSA signed May 24, 2005, and (5) which may invalidate the agreement.

Lack of County or City Jurisdictional Authority: The Indian Gaming Regulatory Act (IGRA) authorized states to negotiate compacts for gaming with Indian Tribes. California has both Constitutional and state statutes empowering the Governor to negotiate and the state Legislature to ratify gaming agreements as provided by federal law. There is, however, no express constitutional or statutory authorization for cities or counties to enter into agreements with tribal governments for a share of casino revenue without a provision in a tribal state compact. The City has not sought, nor obtained a legal opinion as to the validity of or the ability to enter in to an MSA.

City Non-Compliance of CEQA: City and County governments which have developed agreements with tribes lacking tribal state compacts or land in trust do not know whether, or the conditions under which, class III or class II[1] gaming will be approved for the land in question. The Blythe City Council MSA may constitute a "project" under CEQA. The City MSA contains provisions that purport to legally bind the City to definite courses of

[1] Gubernatorial Concurrence is required on lands acquired after IGRA's 1988 prohibition for Class III or Class II gaming that do not meet one of the exceptions of Section 20 of IGRA.

action that typically involve physical changes to the environment. In entering this agreement, it appears the City may be in general noncompliance with state environmental review requirements under CEQA. Recent City MSA's have resulted in judicial invalidation of agreements by courts. (*Citizens to Enforce CEQA vs. City of Hesperia,* See also: *No Casino in Plymouth vs. City of Plymouth, Amador County vs. City of Plymouth* and *Citizens for Local Gov't Accountability vs. Palm Springs RDA: Settlement Payment)*

<u>Potential Breach of MSA</u>*:* "Whereas clauses" may constitute admissions by the party or parties agreeing to them to be true. (California Law-California Evidence Code section 622.) Facts recited in a written instrument are conclusively presumed to be true as between the parties. It is imperative that the City be certain that these recitals in the "Whereas clauses" are in fact true. For example:

> **Whereas, aboriginal homeland of the Mojave people extended into the Palo Verde Valley and included the area which is now the City of Blythe**

CRIT is not a "historical" Tribe rather it is an administratively grouped population of Indians of various tribal heritages. The Indian Claims Commission was created to adjudicate the boundaries of historic Indian lands by the Act of August 13 1946. The Commission filed its final report September 30, 1978, identifying all of the adjudicated historic lands of the tribes including the Mojave people. As a matter of settled law the City of Blythe contains no adjudicated lands that belong to Mojave people or could even possibly meet the legal test of Indian title to meet the aboriginal claims of the CRIT.

> **Whereas, although the Tribe has approximately fifty-thousand acres of land in trust in California, the Tribe desire to locate a gaming facility in a manner that will maximize the benefits to the local economy, and**

Trust land is a very specific and unique legal status. Where is and can CRIT certify 50,000 acres of California land in trust, evidenced by basic legal documents such as a deed. CRIT's alleged control over <u>any land</u> in California has been the subject of considerable contraversary. *Arizona vs. California* 460 U.S. 605 (1983)

<u>Section 1. Subject Lands</u>

Erecting a casino at this location will entail a multitude of significant and direct impacts. Without the protection of CEQA to fully mitigate the impacts of a casino/hotel resort complex, including the related facilities such as restaurants and parking structures (see exhibit B of the MSA), this project could be both a financial and an environmental disaster for the City. This is especially true when coupled with the Tribe's future plans (section 21) to purchase and take into trust additional contiguous parcels of land. No mitigation has been proposed for these additional facilities and/or parcels. Until this land is in trust, the tribal government and the City must comply with state law and abide by CEQA. Legal counsel will confirm that the tribe's sovereignty does not prevent the enforcement of CEQA on land not held in trust (i.e. owned in fee-simple).

Section 2 - Compliance with City Ordinances

The language of the MSA authorizes the Tribe not the City to determine if there is compliance with the Uniform Building Code. For example:

> **"...the Tribe agrees to contract with the City to provide planning, building and safety, fire prevention, and public works personnel to review any and all construction plans and inspect construction of all improvements on the Subject Lands."**

This section indicates that there will be a future agreement or contract whose terms, obligations and responsibilities are not clearly provided in this document. It appears that the Tribe will make the decisions concerning the identity of the contractor, not the City.

Section 3 - Environmental Review

This section is misleading. A 'detailed Environmental Assessment" report is a lesser standard of report than an Environmental Impact Reports (EIR's under CEQA) or Environmental Impact Statements (EIS's under NEPA). It is unclear what CRIT will be obligated to provide under state policy since CRIT does not have a tribal state compact. Under Federal Law, CRIT will be required to provide an EIS under NEPA; however, NEPA is only a process that identifies impacts. It is not a process requiring mitigation of identified impacts.

> **The Tribe shall consult with the City to develop site- and project-specific terms and conditions and shall act in a manner consistent with CEQA and NEPA to mitigate impacts stemming from tribal development on Subject Lands.**

The Tribe will "**consult" and "shall act in a manner consistent"** with CEQA and NEPA but not "consistent with the policies requirements" of those statutes. This is an off reservation casino – the City has the ability to ask and expect full compliance to CEQA.

It is further unclear if this proposed casino includes the serving of alcoholic beverages. If so, both state and federal law apply. The administrative regulation (25 CFR Section 291.4 (15)) provides that service of alcohol in a class III gaming facility can only follow the tribe's adoption of a liquor ordinance and approval of that ordinance by the Secretary of the Interior. The ordinance is submitted to the Secretary and reviewed. This process is subject to federal criminal law (18 USC Section 1154- Intoxicants dispensed in Indian Country). California State Constitution XX section 22 applies to public welfare at the manufacturing, importing or sale of alcoholic beverages at tribal casinos. Off-reservation impacts of the sale of alcohol may implicate additional City or even County services such as law enforcement, ambulance services, and other unaddressed impacts. It seems the approval of the serving of alcohol may implicate indirect impacts subject to CEQA, but not addressed by the MSA.

Section 4 - Police and Fire Personnel and Services

Services and personnel are to be provided to CRIT **"at the same levels as currently provided to the City and its residents."** Does this mean at the levels provided as of the date the MSA was executed (May 2005) or the levels provided as they may be changed from time to time thereafter? The level of protection will change significantly with the potential added service of alcohol. The word currently should be removed from this section. What if in the future the City experiences a budget shortfall, this contract as worded will require to the City to provide the current level of protection despite the budget shortfall, despite the reduction of services to other residents of the City. The word "currently" places a significant financial burden on the City taxpayers.

The City is precluded from enforcing **"any state or local criminal laws or ordinances against the Tribe".** This section appears to present a conflict with Public Law 83-280. This presents a serious jurisdictional conflict potentially requiring consultation with the Office of the County District Attorney and County Sheriffs Office. Moreover, it appears that if the Tribe's Chief-of-Police (one person) becomes cross-deputized; the MSA provision for police service by the City **"shall expire."**

The Tribe agrees to the purchase of a **"pumper".** The MSA refers only to the pumper and a squirt capacity, and not to any other ancillary fire safety equipment. Is this adequate fire protection or mitigation for the size and scope of the resort complex described in exhibit B? Or will the taxpayers of the City of Blythe be subsidizing this service for the multi-million dollar development of the CRIT? If the Tribe intends to build a multi-story facility a ladder truck is necessary to provide for public safety. The agreement is silent on the height of the development and there is no provision for the future acquisition of a ladder truck.

Section 5 – Payments to the City

In subsection B, CRIT is given veto power over the City's contracting–out determinations. Here again is a transgression of City authority and jurisdiction.

Section 6 - Roads and Traffic Circulation

The Tribe is agreeing to a Traffic Impact Analysis over which CRIT appears to have sole control and will deal only with the **"subject land"** impacts, and not with the off reservation impacts that a development of this size and scope will create. The Tribe agrees to pay for mitigation improvements "***which are reasonable and necessary***", but according to whom? The language needs clarification.

Section 7 – Sewer Service

The sewer connection construction is to be according **"to City sewer infrastructure standards."** Again, who makes this determination of compliance with City Standards?

To state this can be arbitrated is not an answer. The question that must be made clear in the language of any agreement is who has the burden of proof?

Section 8 – Utilities

The section introduces another future 'agreement to agree'. Who are the future parties to agree to on site generation? Is it only CRIT and SoCal Edison, or is the City also one of **"the parties?"**

Section 14 E – Binding Arbitration Procedures

The Federal jurisdiction remedy in the MSA is probably unenforceable due to the special status of tribal governments as domestic dependent sovereigns. It would be more appropriate to say **"any court or competent jurisdiction"** and to include State Courts in Riverside County.

Section 16 – Limited Waiver of Tribal Sovereign Immunity

While the language in this section is a fairly standard provision it still leaves the City with no remedy if the "resort" goes belly-up. That fact more than likely won't be determined until well after the City has expended its funds.

Section 24 – Term

CRIT intends to ask the Secretary of the Interior to process an application pursuant to and in accordance with the provisions of Section 5 of the IRA, 25 U.S.C. 465 and IGRA, 25 U.S.C. 21719 (b)(1)(A). The provision in IGRA is the two-part determination and requires gubernatorial concurrence. Only three two-part gaming determinations have occurred in the last 18 years since the enactment of IGRA. It is the Governor who has the last word.

> **"...if the Tribe is informed by the Secretary of the Interior that the United States will not take the land into trust or that the Tribe may not conduct gaming activities thereon, and all appeals related to such a decision have been exhausted, then this Agreement shall terminate 30 days after the Tribe is so informed."**

Tribes promoting gaming off reservation under Section 20 do not have the legal authority to obligate the governor to concur with the Secretary of the Interior. The Governor's concurrence is an exercise of executive powers on an infrequent and episodic basis. The law merely says that the Governor may concur—if the Governor does not concur the tribe does not get a tribal state compact. The Siletz Tribe sued the Governor of Oregon for refusing to concur. The 9th Circuit Court of Appeals ruled in favor of the Governor. The off reservation Indian gaming policy is purely at the discretion of the Governor.

- **Should the Secretary of the Interior take the land into trust for non gaming activity, the MSA between the City and the CRIT is null and void. The City will receive no compensation for any development the Tribe may establish.**

- **The City in agreeing to support the Tribes land acquisition in an MSA contingent on a gaming operation has neglected to address the serious and critical environmental, taxation and jurisdiction implications of a non gaming development.**

On May 18, 2005 Governor Schwarzenegger made public a Proclamation of State policy regarding off reservation casinos. This proclamation provides four clear criteria that must be met in order for the Governor to consider a section 20 concurrence. There must be widespread support of the off reservation casino demonstrated through a polling or local vote, there must be an 'independent public policy' separate and apart from the benefit of revenue from the casino to the Tribe, City/County or the State or to increase need for jobs.

- **In a letter dated April 27, 2006, Honorable Andrea Lynn Hoch - Legal Affairs Secretary makes it clear there is no independent public policy that would satisfy the Governor's consideration of a Section 20 concurrence for CRIT in the City of Blythe.**

New and evolving federal legislation will affect this MSA.

- Congressman Pombo's federal legislation to rein in **"reservation shopping"** affects this MSA. (HR. 4893)
- United State Senator John McCain's federal legislation **restricting gaming on after acquired lands** affects this MSA. (S.2078)

Further, this MSA is intended to obligate the City to support the tribes land acquisition in return for **"unenforceable promises".** There is a great deal of inconsistency in the treatment of promises and representations by CRIT.

Stand Up For California urges you to seek special outside legal counsel familiar with Indian law, gaming law and environmental law regarding the validity of the MSA, and to discern the enforceability of this MSA.

Absent clear legal direction, it is unclear to what extent, if any; the parties are bound by the MSA. At the very least, there are public policy concerns and financial burdens that may overwhelm the City taxpayers today and into the future.

Sincerely,

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