Stand Up For California!

"Citizens making a difference"

www.standupca.org

P.O. Box 355
Penryn, CA 95663

October 13, 2008

Honorable Dirk Kempthorne
Secretary of the Interior
U.S. Department of the Interior
1849 C. Street N. W.
Washington, D. C. 20240
Fax: 202-208-6956

RE: Request a Formal Opinion from the Department's Solicitor as to whether the Departments authority to acknowledge tribes can be exercised by the Assistant Secretary of Indian Affairs.

Dear Secretary Kempthorne:

Stand Up For California! requests your formal opinion on the Departments authority to acknowledge tribes and can that authority be exercised by the Assistant Secretary of Indian Affairs outside of the regulations? Does the establishment of 25 C.F.R Part 83 regulations preclude acknowledgment by a simple administrative action? It would appear that such an administrative action violates the Administrative Procedures Act.

This is now a pressing matter in California due to a memorandum written by former Assistant Secretary of the Interior Carl Artman on September 19, 2006 which is contrary to an Indian Lands opinion by the National Indian Gaming Commission issued October 7, 2008, and the new (September 2008) Section 20 regulations for after acquired lands. Indeed, Assistant Secretary Artman's memo authoring an Indian Lands opinion for the Ione Band of Miwok, is in direct conflict with the new regulations for Section 20 after acquired lands and a recent Indian lands opinion issued by the National Indian Gaming Commission on the Lower Lake Koi, a tribe that like the Ione Band of Miwok was reaffirmed.

Under the current circumstances, the reaffirmation of the Ione Band of Miwok and the internal opinion supporting its eligibility as a "restored tribe eligible for restored lands at a specific sight" has given the in-house attorney opinion a practical affect of a final agency action. This opinion has become the guiding document of the information gathering and documentation for the Administrative Record of Decision (ROD). This is all being done without an opportunity for third parties to comment on the reaffirmation or the opinion for restored tribe or restored lands.

Mr. Artman's opinion did not provide a thorough review of the claims of the Ione Band of Miwok representing court precedents and past department decision which pre-date the acknowledgment regulations and have established the principle that ancestry from a once

recognized tribe does not by itself give the Department authority to recognize a group of descendants as a sovereign entity absent the groups continuing existences as a distinct political community.

It appears that Mr. Artman's opinion may violate the findings in a 10th Circuit case ***Cherokee Nation of Oklahoma vs. Gale Norton*** ("Cherokee Nation") (November 16, 2004) in supporting the placement of a reaffirmed group on the federal recognition list, supposedly in compliance with the 1994 John McCain Legislation.

- In Cherokee Nation, the 10th Circuit rejected the 1996 determination regarding the Delaware's finding that Indian tribes may be recognized only by (1) an Act of Congress, (2) the Part 83 acknowledgment process or (3) a decision of a federal court. The court stated: "Agencies ... must follow their own rules and regulations. The DOI used a procedure heretofore unknown to the law – 'retract and declare' – to purportedly re-recognize the Delaware's. In so doing, the DOI's actions were arbitrary and capricious. The agency simply elected not to follow the Part 83 procedures for recognizing an Indian tribe and, furthermore, did not even properly waive application of those procedures. See 25 C.F.R. § 1.2. We accordingly hold unlawful and set aside the DOI's 1996 final decision. 5 U.S.C. § 706(2)(A). Any action taken on the agency's 1996 final decision is void. 'Further comment on this case is unnecessary.' [citing an 1894 Supreme Court decision]"

The Technical Corrections Act of 1994, Section 5, Pub. L. 103-263, 108 Stat. 707 (May 31, 1994) does not allow acknowledgment to be met.[1] The hasty action of the Pacific Regional Office in moving land base groups to federal recognition is causing havoc in California and has initiated the proliferation of off-reservation gaming. (Also see: ***United Houma Nation vs. Bruce Babbitt*** (October 28, 1996) Whatever the intent, the BIA has misconstrued the amendment and avoided the application of the required criteria for acknowledgement.

It would appear, that the Ione Band of Miwok ROD for an off reservation fee-to-trust gaming application is being seriously flawed due to the corrupting perspective of the Mr. Artman's opinion.

1) How will the Department verify that a restored lands determination is based on objective criteria if the entire ROD is not based on objective criteria beginning with whether or not the Assistant Secretary of Indian Affairs has authority to administratively reaffirm a tribe beyond the Administrative Regulations for Acknowledgement of a Tribe?

2) How does a court provide a thorough judicial review if a complete and extensive Administrative Record of a tribes federal recognition, and the authority of the Assistant

[1] Before the BIA published its Proposed Findings on United Houma Nation's (UHN) petition, Congress enacted the Technical Corrections Act of 1994 amending section 16 of the Indian Reorganization Act of 1934, 48 Stat. 987 (June 18, 1934). UHN construes these amendments to preclude the BIA from making any regulatory distinctions between historic and non-historic tribes, thus rendering void the criteria that trouble its petition in 25 CFR part 83 7(e). However, the BIA interprets the amendments to have no effect upon the acknowledgment process.

Secretary of Indian Affairs to administratively recognize a group beyond the Administrative Regulations is not available?

3) Mr. Artman's Memo lacks objective criteria, indeed it pales in comparison to the recent NIGC land opinion for the Lower Lake Koi which gives extensive background and cites court cases and congressional record. Because this is, has been and continues to be an extremely contentious and controversial application, the memo is viewed by some as an effort by the Department to manipulate the ROD and at the same time potentially lay the ground work to frustrate future judicial review of the Ione application?

As previously stated, this issue has heightened importance to a great many in California. *Stand Up For California!* respectfully request the Solicitor's prompt attention to these matters. Additionally, if your office determines a basis upon which the Assistant Secretary of Indian Affairs has authority beyond the regulation of 25 C.F.R. Part 83 to administratively reaffirm a tribal group and determine it is a restored tribe eligible for restored lands, *Stand Up For California!* would sincerely appreciate a response advising us of the basis for that conclusion or an assurance that the ROD has been properly supplemented. Thank you in advance for your assistance.

Sincerely,

Cheryl Schmit –director
Stand Up For California
916-663-3207
cherylschmit@att.net

CC: David Longly Bernhardt – Office of the Solicitor
Fax: 202-208-5584
James E. Cason –Associate Deputy Secretary of the Interior
Fax: 202-208-187
George T. Skibine – Interim Assistant Secretary of Indian Affairs
Fax: 202-273-3153
R. Lee Fleming – Director- Office of Acknowledgement
(202) 219-3008
Phil Hogen – Chairman, National Indian Gaming Commission
Fax: 202-632-7003
Jack Rohmer – Office of Inspector General
Fax: (303) 236-8279