

Stand Up For California!

“Citizens making a difference”

www.standupca.org

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November 7, 2014

VIA Email, Fax and First Class Mail

Amy Dutschke, Regional Director
Pacific Regional Office
Bureau of Indian Affairs
2800 Cottage Way, Room W-2820
Sacramento, CA 95826
Fax: 916 978 6099

RE: Off-Reservation Proposal of Los Coyotes Band of Cahuilla and Cupeno Indians

Dear Regional Director Dutschke,

Stand Up For California!¹ and the Barstow Christian Ministerial Association² would like to thank you for extending the comment period on the Notice of Land Acquisition Application pertaining to Los Coyotes Band of Cahuilla and Cupeno Indians' request to have 23.1 acres of real property brought into trust in San Bernardino County by two weeks. We oppose the proposed Barstow casino and urge the Regional Office to determine that the project will be detrimental to the surrounding community. We also urge the Assistant Secretary to determine that the Barstow casino will be detrimental to the surrounding community and reject the project. For the reasons set forth below, the proposed trust acquisition should be denied.

1. *Because California Voters Strongly Oppose the Expansion of Gaming Off-Reservation, the Proposed Barstow Casino Should Be Denied*

The majority of Californians are opposed to the expansion of gaming off-reservation. On November 4, 2014, almost 61% of California voters rejected AB 277 (Ch. 51, Stat. 2013), a bill that ratified two compacts between the State of California and, respectively, the North Fork Rancheria of Mono Indians, and the Wiyot Tribe. AB 277 would have allowed the North Fork to open a casino on lands that are not part of its reservation and provided the Wiyot tribe a share of the North Fork's profits. The compacts also exempted certain projects associated with the compacts from compliance with the California Environmental Quality Act. The North Fork

¹ Stand Up For California! is a nonprofit benefit corporation that acts as a statewide community watchdog on gambling and gambling related impacts.

² Barstow Christian Ministerial Association is a coalition of 40 churches with more than 5000 members in the City of Barstow.

proposal is one of two off-reservation gaming proposals that Governor Brown approved in 2012. Both gaming proposals have been challenged in state and federal court. Moreover, the California Legislature refused to ratify the tribal-state gaming compact the Governor negotiated with one of the tribes—the Enterprise Rancheria of Maidu Indians. There can be no dispute that the California Legislature’s refusal to ratify the Enterprise Compact, combined with the outcome in Proposition 48, are an indictment of the Governor’s approval of off-reservation gaming.

The Department should view the outcome of Proposition 48 as confirmation that California voters consider off-reservation gaming expansion as contrary to the public interest and that a majority of Californians consider the expansion of gaming off-reservation to be detrimental to the host communities. Unless California enacts laws that authorize off-reservation gaming and a clear process to govern such decisions, the Department should cease consideration of any off-reservation proposal in the State of California.

2. *The Department Cannot Rely Upon the Agreement Between the Tribe and the City of Barstow to Conclude that the Proposed Casino Will Not Be Detrimental*

The outcome in Proposition 48 also underscores why the agreement between Los Coyotes and Barstow does not adequately protect the local community from detrimental effects. In the North Fork case, Governor Brown stated in 2012 that, although he was reluctant to allow gambling on land currently ineligible for it, he was convinced that the North Fork casino presented exceptional circumstances and that the casino would not be detrimental to the surrounding community. He relied specifically on guarantees in the now-void compact that revenues from North Fork’s gaming facility would be shared directly with the Wiyot Tribe and that the Picayune Rancheria of the Chukchansi would be compensated for lost revenues. Neither circumstance remains correct, yet North Fork may proceed with at least class II gaming. Further, North Fork may negotiate another compact, which could contain far less favorable terms, or it may simply sue the State, as the Enterprise Rancheria has done after the California legislature refused to ratify its compact.

The Governor’s and the Secretary’s assessment with respect to detrimental impacts on the surrounding community were clearly erroneous, given the overwhelming opposition of California voters. When the California legislature refuses to ratify one compact and the voters reject the other by referendum, neither the Governor nor the Secretary can reasonably claim that there is significant support for either project. With respect to the Los Coyotes’ proposal, it is especially significant that almost 64% of San Bernardino voters rejected Proposition 48—an even greater expression of disapproval of off-reservation gaming than the statewide vote. The resounding defeat of Proposition 48 should preclude Los Coyotes from developing an off-reservation class III gaming facility.

An additional reason to reject Los Coyotes’ proposal is that the intergovernmental agreement between Barstow and the Tribe states that Los Coyotes “will offer Class III gaming.” Municipal Services Agreement (MSA), § 1; *see also* MSA Ex. B (“this Agreement shall require the Tribe to develop a ... casino for Class III Indian gaming”). Although it also addresses optional class II gaming, if Los Coyotes cannot operate class III gaming, the Tribe may claim that it should be relieved of its obligations under the MSA under the doctrine of frustration. The economics of a

class II operation are vastly different from those of a class III. Los Coyotes could also argue the contract is void under the doctrine of impossibility (or even impracticability). Under any of these theories, the MSA would be unenforceable and Los Coyotes would be free to develop class II gaming in Barstow without any of the obligations the City of Barstow negotiated for in the MSA to reduce the detrimental effects of the casino project, including:

- compliance with City ordinances;
- environmental review requirements;
- payments for required additional City police and fire protection services;
- sewer and solid waste disposal fees;
- employment of City residents;
- prohibitions on underage drinking, underage gambling, nude entertainment and other sexually oriented business activities;
- prohibition on the operation of gas stations;
- payments to address problem gambling;
- gaming revenue payments to compensate the City for the loss of tax revenues;
- dispute resolution procedures;
- waiver of tribal sovereign immunity from suit; and
- indemnification protections;

Moreover, the Final Environmental Impact Statement (“FEIS”) is entirely predicated on the enforceability of the MSA. *See* FEIS 5-1. Affected stakeholders have thus been afforded no opportunity—even at this late date—to comment on the impacts of a class II gaming development that would not be subject to the existing MSA. More importantly, the FEIS’s conclusions regarding impacts mitigated under the MSA cannot be relied upon, and therefore provide no basis for any determination that the Los Coyotes proposal will not be detrimental to the surrounding community.

3. *Los Coyotes’ Application Fails Under 25 C.F.R. Part 151.*

Los Coyotes’ proposed off-reservation casino does not satisfy the standards governing trust acquisition, as set forth below.

a. 25 C.F.R. § 151.10 (a): The Department Lacks Statutory Authority Under *Carciere*.

Under the Supreme Court’s decision in *Carciere v. Salazar*, 555 U.S. 379 (2009), the authority to take land into trust under the Indian Reorganization Act extends only to tribes “under federal jurisdiction” in 1934. There is considerable reason to doubt that Los Coyotes meets this requirement, including the questions of whether Los Coyotes constituted a “tribe”—in both the “cognitive sense” and the “more formal legal sense,” Sol. Op. M-37029 at 24—as well as whether Los Coyotes were “under federal jurisdiction” in 1934. Without the requisite statutory authority, the Los Coyotes’ request must be denied.

To begin with, the general history of the California Indians must be considered. Even after Spanish and Mexican colonization and mission building decimated the California Indian population and destroyed tribal structures and continuity, the chaos of the 1849 Gold Rush further reduced populations, destroyed tribal structures and continuity, and displaced remaining Indian populations. In the aftermath, the remnants of disparate tribes coalesced into new communities without regard to prior tribal affiliations and territories, or continuity of community and political structures. *See generally*, Memorandum from BIA Area Director, Sacramento, California to Commissioner of Indian Affairs regarding Services to California Indians (Aug. 18, 1978).

In the case of Los Coyotes, the remnants of at least two distinct tribes, the Cahuilla and the Cupeno, coalesced in the area of what is now their reservation.³ That reservation, however, was not established for a tribal entity, but rather for “the Mission Indians”—the generic term for the Indians of southern California, regardless of tribal affiliation. Executive Order of May 6, 1889. The current reservation was established on June 19, 1900 under the authority of the Mission Indian Relief Act of 1891. That Act, however, did not authorize the establishment of reservations for specific tribes, but rather only for “each band or village of the Mission Indians.” 26 Stat. 712. Similarly, the Executive Order of April 13, 1914 added lands to the “Los Coyotes Mission Indian Reservation” but did not identify any specific tribe. By the early 1900s, white ranchers had begun to settle on the reservation, the original settler serving as reservation Chairman for almost 50 years and his descendants ultimately comprising half of the current reservation population—those descendants claim to have been adopted by Los Coyotes, but that assertion is highly contested by other members of Los Coyotes.⁴ Finally, in 1934, Los Coyotes voted to reject the Indian Reorganization Act (IRA).⁵

Under Solicitor Opinion M-37029, the BIA treats any Indian reservation election under Section 18 of the IRA (regardless of whether the vote accepted or rejected the IRA) as “unambiguous federal actions that obviate the need to examine the tribe’s history prior to 1934” to determine whether a group was a “tribe” and “under federal jurisdiction” in 1934. Sol. Op. at 20-21. This legal interpretation is incorrect and cannot be relied upon to establish that statutory authority exists for the Los Coyotes trust application. BIA must undertake the “fact and tribe-specific

³ <http://www.sctca.net/los-coyotes-band-cahuilla-and-cupe%C3%B1o-indians>

⁴ <http://www.theverifiabletruth.com/2011/10/on-los-coyotes-reservation-theres.html>

⁵ <http://www.doi.gov/library/internet/subject/upload/haas-tenyears.pdf> (Haas Report)

inquiry” (described in the Solicitor’s Opinion at 18-20) to determine if Los Coyotes was an Indian “tribe” and “under federal jurisdiction” in 1934.

Further, the record demonstrates Los Coyotes was established to provide homes for landless Indians. It was often the case that California rancherias housed individual Indians, but not any tribes. It seems apparent that Los Coyotes was acquired without regard to formal organization or tribal status. Historically, tribes were recognized by treaty or executive order of the President, Cohen’s Handbook of Federal Indian Law, § 3.02[4], at 136 (Nell Jessup Newton ed. 2012), and it is clear that Los Coyotes is neither a treaty nor executive order tribe. Alternatively, a tribe may benefit from a government-to-government relationship with the United States through recognition by an act of Congress or by the Department administratively. Whether Los Coyotes was a recognized Indian tribe in 1934 is a substantial question that BIA must address.⁶

b. 25 C.F.R. § 151.10 (b): Los Coyotes Does Not “Need” Additional Lands.

Los Coyotes’ trust application does not support a conclusion that the group “needs” additional lands off-reservation. Los Coyotes already has a land base of *over 25,000 acres* on a reservation located near the town of Warner Springs in San Diego County (approximately 125-150 miles from Barstow). Los Coyotes’ application documents the lack of economic development *on the reservation*, but does not in any way address the needs of the group as a whole. Significantly, Los Coyotes has approximately 340 members, but only about 84 live on the reservation. Los Coyotes has therefore only documented the economic needs of 25% of the group. Los Coyotes must document the economic needs of its off-reservation majority, as well as the economic opportunities available to its members off-reservation, before any determination can be made regarding the need of Los Coyotes as a whole.

Additionally, Los Coyotes must document its reservation budget before any determination of need can be reached. In addition to federal benefits and other sources of income, Los Coyotes receives \$1.1 million per year from the state Indian gaming revenue sharing fund. Without an examination of Los Coyotes’ income and expenditures, BIA cannot determine that Los Coyotes’ sources of income are, even with proper management, insufficient to provide for the needs of its members. In particular, BIA must also consider Los Coyotes’ ability to tax the income of its off-reservation majority to provide for the needs of its on-reservation minority. Without a comprehensive analysis of Los Coyotes’ ability to provide for its members, BIA cannot reach any conclusion regarding Los Coyotes’ “need” for the trust acquisition of the Barstow property for development of a casino.

Furthermore, Los Coyotes has only offered a perfunctory explanation for why its over 25,000-acre land base is useless for economic development: that the area is rocky and steep, and as a result lacks infrastructure. Those very attributes, however, make the reservation highly desirable as a recreational destination. The outdoor recreation economy is a half-trillion dollar per year sector in the western states, and growing rapidly.⁷ The FEIS considered the development of an on-reservation campground, but did not evaluate the potential for high-end residential

⁶ If it is claimed that Los Coyotes was recognized under the IRA or at some time after 1934, it plainly was not a recognized tribe under federal jurisdiction when the IRA was enacted.

⁷ http://graphics8.nytimes.com/packages/pdf/opinion/OIA_OutdoorRecEconomyReport2012.pdf

development of vacation properties. Indian tribes in other desirable locations, such as the Agua Caliente Band in Palm Springs, have enjoyed great success with long-term leases for residential and other development.⁸ Furthermore, the description of the lack of infrastructure on the Los Coyotes reservation is out of date. Since the application was submitted in 2006, Los Coyotes has received and implemented substantial grants for infrastructure development, including a much-improved road system through the reservation.⁹

In short, Los Coyotes may have documented its *desire* for an off-reservation casino, but it has not documented any *need* for additional land. In particular, the strong statutory policy in IGRA against off-reservation gaming demands that BIA conduct a rigorous examination of the true need for off-reservation trust acquisitions for the purposes of gaming. This is especially true where, as here, the proposed location for off-reservation gaming is located far from the Los Coyotes' reservation (approximately 125-150 miles away) and historic and traditional territories. Ethnographic maps of historic tribal group territories reveal that the Barstow location is far from the territory of the historic Cahuilla and Cupeno peoples -- which in turn is greater than the historic territory of any particular tribe within those larger ethnic groups from which Los Coyotes may claim descent.¹⁰ Several tribes have objected to Los Coyotes' attempt to acquire land outside its historic territory, including the San Manuel Band of Mission Indians, the Lone Pine Paiute-Shoshone, and the Picayune Rancheria of Chukchansi Indians. FEIS Response to Comments Chapter 2.0, Tribal Government Letters. BIA must therefore specifically evaluate Los Coyotes' need for land outside of the historic territory of the Cahuilla and Cupeno people.

c. 25 C.F.R. § 151.10 (e): The Impact on the State and Its Political Subdivisions Resulting from the Removal of the Land from the Tax Rolls Has Not Been Fully Evaluated.

The impacts to State and local tax revenues from the proposed acquisition have not been fully evaluated by the BIA or accounted for by the Municipal Services Agreement (MSA) between Los Coyotes and the City of Barstow. To begin with, the loss of tax revenues has been substantially underestimated. As a relevant comparison, an independent report on the fiscal impacts to State and local governments for the North Fork gaming trust acquisition estimated over \$100 million per year in lost revenues to non-tribal businesses and \$1.4 million per year lost to state revenue, greatly reducing the amount of funding to California schools across the state.¹¹ The full magnitude of the potential losses in tax revenues must be evaluated by the BIA, the State, and the local governments affected.

In addition, BIA, the State, and the affected local governments have not considered, and the MSA does not account for, recent regulations proposed and promulgated by the BIA regarding the preemption of state and local taxes on Indian lands. *See* Proposed 25 C.F.R. 169.009, 79 Fed. Reg. 34455 (June 17, 2014) (proposed rule regarding rights-of-way on Indian land); 25

⁸ The Agua Caliente Band reportedly enjoys over \$24 million dollars of lease income per year.

⁹ http://rezta.org/rez1/?page_id=556

¹⁰ *See, e.g.*, <http://users.humboldt.edu/ogayle/hist383/CaliforniaIndians1.png>

¹¹ Blue Sky Consulting Group, A Fiscal Analysis of the Proposed North Fork Rancheria Casino Resort: Estimating the State and Local Fiscal Effects (Aug. 13, 2014), available at: <http://stoppreservationshopping.com/sites/stoppreservationshopping.com/files/Blue%20Sky%20Consulting%20Group%20North%20Fork%20Report.pdf>.

C.F.R. 162.017, 77 Fed. Reg. 72440 (Dec. 5, 2012) (final rule regarding leases on Indian land). The new leasing regulations have already resulted in extensive and ongoing federal and state litigation regarding millions of dollars of annual local tax revenues from leases on the Agua Caliente Reservation. These recent developments must be fully evaluated by the BIA before any determinations can be reached regarding the fiscal effects of the proposed trust acquisition on the State and affected local governments.

d. 25 C.F.R. § 151.10 (f): Jurisdictional Problems and Potential Conflicts of Land Use Have Not Been Fully Evaluated.

For the reasons set forth in our comments dated June 2, 2014 on the FEIS, a supplemental EIS (“SEIS”) is required. There are now additional changes that necessitate preparation of an SEIS. Governor Brown recently approved changes in how California manages scarce water resources, and those changes must be considered as part of the Department’s analysis. Prior to those changes, it was clear that the proposed trust acquisition will create significant jurisdictional issues regarding water resources, to the detriment of surrounding communities. California is currently facing severe drought conditions. Water throughout the state is a very scarce resource that must be properly managed. Given Barstow’s location in the Mojave Desert, water resources are particularly important, yet as noted in the prior comments, the FEIS relied on outdated water resources reports from 2008 or earlier. Consequently, the FEIS did not adequately address water resource impacts for the project. The FEIS estimates that the project will require 201,310 gallons of water per day,¹² which is likely understated.

Since the June 2014 comments on the FEIS, the drought conditions in California have only worsened, with more than half the state now under the highest category of “Exceptional Drought,” and 80 percent of the state under “Extreme Drought.”¹³ Many more California cities have adopted mandatory water restrictions.¹⁴ Governor Brown has declared the current drought to be a state of emergency, prompting the State Water Resources Control Board to adopt emergency regulations pertaining to drought emergency water conservation.¹⁵ Most recently, California voters approved Proposition 1 on November 4, 2014. It is a \$7.5 billion water bond initiative to fund various state water supply infrastructure projects. Proposition 1 allocates money for a variety of programs including water recycling, wastewater purification and groundwater cleanup. The sale of the water bonds will go to support projects including:

- New water storage projects for surface and groundwater—\$2.7 billion
- Water recycling—\$725 million
- Regional water security, climate and drought preparedness—\$810 million

¹² FEIS, Table 2-2.

¹³ See <http://droughtmonitor.unl.edu/Home/StateDroughtMonitor.aspx?CA>.

¹⁴ See <http://www.acwa.com/content/drought-map> for a map of mandatory water restrictions in California.

¹⁵ See

http://www.swrcb.ca.gov/waterrights/water_issues/programs/drought/emergency_regulations_waterconservation.shtml.

- Safe drinking water—\$520 million
- Streams and watershed protection and restoration—\$1.495 billion
- Flood control—\$395 million
- Groundwater cleanup and sustainability—\$900 million

The fact that the largest portion of funds—\$2.7 billion—is devoted to surface and groundwater storage projects highlights the importance of groundwater management during drought conditions.

In addition, California now has an important new water conservation law that requires tribes to participate *on a voluntary basis only*. On September 16, 2014, Governor Brown signed new legislation regulating groundwater use.¹⁶ The new law requires local agencies in fast-depleting basins to draw up and implement groundwater sustainability plans to put groundwater basins on a path to sustainability by 2040. The central feature of the law is that it allows local jurisdictions to assess the conditions of their local groundwater basis and take steps to bring those basins in a state of chronic overdraft into balance. This goal cannot be achieved if a major water user within a particular basin is not obliged to comply with the management objectives, yet the law exempts tribes from participating.

The FEIS notes that there are concerns about groundwater depletion in the project area.¹⁷ The fact that tribes are not required to participate under the new law will create significant jurisdictional issues once the land goes into trust. The surrounding communities will have to comply with the new law, but Los Coyotes will not. State and local jurisdictions will have no oversight on the amount of water used on tribal lands, which will be considerable as a result of the project. For example, the construction phase of the casino requires the watering down of the areas twice daily in order to preserve air quality and daily consumption is conservatively estimated at 201,310 gallons of water per day. It will be very difficult for Barstow and surrounding areas to comply with California's new sustainability requirements in light of the tribal exemption. The existing intergovernmental agreement with Barstow does not commit Los Coyotes to participate in this process, nor reference water usage at all. Indeed, the agreement contemplates the possibility that the Tribe will construct a water park in the middle of the desert, which hardly comports with the new measure for sustainability. The Secretary cannot conclude that the proposed casino will not be detrimental to the surrounding community when there is no agreement to address water usage. A contrary conclusion is simply arbitrary and capricious. Los Coyotes must develop agreements with the surrounding communities to address this issue. Without such an agreement, Los Coyotes cannot demonstrate that the casino will not be detrimental and its application must fail.

In sum, the proposed project will substantially increase water usage in a time of extreme drought and tension over water usage in Barstow. It will also create a jurisdictional dilemma in light of California's new water law, which does not require tribal participation. These issues will harm

¹⁶ The new legislation consists of three separate bills: AB 1739, SB 1168, and SB 1319.

¹⁷ FEIS at 3.9-2

the surrounding communities, were not analyzed in the FEIS, thus requiring an SEIS, and are clear grounds for rejecting the project.

e. 25 C.F.R. § 151.10 (h): The Presence of Hazardous Substances Has Not Been Fully Evaluated.

The applicant has not provided sufficient information to make a hazardous substances determination, as required by 25 C.F.R. § 151.10 (h). The FEIS admits that unknown hazardous material contamination could be discovered during construction earth-moving activities. FEIS § 4.11. The FEIS reveals that the only on-site investigation was a visual inspection of the surface, and no soil sampling was performed. FEIS § 3.11 and Appendix J. Soil contamination is often not apparent at the surface. Unless soil sampling is performed at a depth greater than 12 inches, or the expected depth of construction excavation, whichever is greater, it cannot be determined that undiscovered contamination will not be encountered.

Further, the FEIS assumes that city water supplies are assured and does not consider pollution and contamination threats to that supply. The unincorporated community of Hinkley is approximately 14 miles or less from the proposed Los Coyotes project. The community is commonly associated with the Pacific Gas and Electric legal case with California's EPA. The legal case identified a higher than normal cancer rate and established an ongoing cleanup of contamination of ground water from hexavalent chromium that continues today. This contamination appears to be a widespread problem and not necessarily isolated to the small community of Hinkley. While that pollution plume has been generally migrating west, it has moved unpredictably and it is feared that increased groundwater pumping in the Barstow area could cause the plume to migrate towards Barstow. The FEIS does not consider any possibility that the local water supply could be affected. A Supplemental EIS is necessary to consider recent threats to the water supply of the City of Barstow from perchlorate,¹⁸ nitrate,¹⁹ and hexavalent chromium²⁰ contamination. These recent developments regarding incidents of contamination demonstrate that the information regarding these and potentially other sources of contamination is not completely known, and therefore must be evaluated as required by 40 C.F.R. 1502.22 (Incomplete or Unavailable Information).

f. 25 C.F.R. § 151.11 (b-c): Greater Scrutiny of Anticipated Benefits Is Required.

Under 25 C.F.R. § 151.11(b), BIA is required to give greater scrutiny to the anticipated benefits, and greater weight to State and local government impacts, as the distance between the proposed off-reservation trust acquisition increases from the location of the reservation. The proposed site on Highway 15 is not located "within the exterior boundaries of the tribe's reservation or adjacent thereto" and there is nothing in the administrative record to suggest that the land is

¹⁸ Desert Dispatch, Report reveals extent of perchlorate plume (April 16, 2010), available at: <http://www.desertdispatch.com/articles/report-12788-reveals-barstow.html>.

¹⁹ Barstow City Council Agenda (selection of groundwater remediation contractor)(April 7, 2014) available at: http://barstowcityca.iqm2.com/Citizens/Detail_LegiFile.aspx?MeetingID=1896&ID=1574.

²⁰ Desert Dispatch, More Hinkley homes in toxic plume's path (August 5, 2013) available at: <http://www.hinkleygroundwater.com/more-hinkley-homes-in-toxic-plumes-path/>.

located within a tribal consolidation area or that Los Coyotes already owns an interest in the Barstow property. Here the proposed trust acquisition is *125-150 miles* from the Los Coyotes reservation *as the crow flies* and approximately *167 - 213 miles by highway*.²¹ Although the Department has rescinded the “commutability” guidance memorandum of January 3, 2008, the current guidance memorandum of June 13, 2011 confirms that “all relevant factors” must be considered under the regulations. Although not dispositive, commuting distance is a relevant factor, and the commuting time, even outside of normal rush hours, is *over 3 hours*. Despite documenting only the economic needs of the on-reservation population, it is clear that Los Coyotes can have no expectation of providing employment at the proposed casino to reservation residents.

Los Coyotes claims that from a self-sufficiency perspective, the “problem” with its reservation is its location—that is, it is far too remote and environmentally sensitive to invest in building any normal business venture that could provide the Los Coyotes Tribal Government with the self-sustaining income needed to gainfully employ and educate its tribal members. The Tribe also claims that “it only seems fair that the Los Coyotes people are allotted the same opportunities to grow their social and economic development wings under their own resources as some of the other 108 federally-recognized California Indian tribal bands are doing through successful American Indian businesses like Indian casinos, hotels, resorts.”

But IGRA does not guarantee all tribes lucrative casinos; it guarantees tribes the right to game, subject to federal law. What of tribes located in low population states? Or those located far from economic centers? Should they too be able to travel long distances to gain access to more lucrative markets? Los Coyotes have the right to game on their 25,000-acre reservation, and that is all fairness requires. What Los Coyotes wants is a special privilege, which no notion of fairness supports conferring.

The Department is obligated to evaluate the purported benefits of the proposal closely, including looking at how a casino in Barstow will affect the 25% of members living on-reservation and the 75% of members living off-reservation. How will revenues be distributed and where will services be provided? What percentage of the revenues will the members enjoy, particularly given the development arrangements the Tribe has negotiated?

IGRA requires the NIGC to approve a gaming ordinance, which must ensure that “the Indian tribe will have the sole proprietary interest and responsibility for the conduct of any gaming activity.”²⁵ USC 2710(b) (2)(A). San Bernardino County records indicate that the land is currently owned by LCB Bar West, LLC and an additional 85 acres contiguous to the proposed fee-to-trust lands are also under the ownership of LCB Bar West, LLC. Because the land is not owned by Los Coyotes, the Department must closely examine the development agreements in place to determine whether Los Coyotes will meet the sole proprietary interest requirement under IGRA and whether this proposed casino will benefit Los Coyotes primarily or Bar West.

²¹https://maps.google.com/maps?saddr=Los+Coyotes+Reservation,+San+Diego+County,+CA&daddr=Barstow,+CA&hl=en&sll=34.075412,-117.015381&sspn=3.19387,6.696167&geocode=Fe4Z_AEd4YEN-SmHfCEBNbbbgDETHPsdJ0HC5g%3BFbR3FAIdPXUG-SIVIFRMQ3DEgDF34u8qMyxBGw&oq=Barstow&mra=ls&t=m&z=8

In most cases, tribes use management contracts, which also require NIGC approval, and cannot allocate to the management company more than 40% of net revenues—an amount that itself seems inconsistent with the sole proprietary interest requirement. If there is a development agreement in place—which there would appear to have to be—that agreement likely allocates a separate percentage of revenues to BarWest. The combination of those agreements are very likely to violate IGRA’s sole proprietary interest requirement and certainly calls into question the legitimacy of off-reservation casinos such as this one.

In addition, by a letter dated October 11, 2007 written by BarWest to members of the Tribal Executive Council, it appears that BarWest is not only investing in the potential outcome of a casino in Barstow but they are guiding the process to obtain federal, state and local support and approvals and before they finance the project. BarWest notes that it has already invested \$19 million in Los Coyotes and that payments to the Tribe will end if their agreement is terminated. BarWest is effectively paying the tribe to develop its own casino, with the lion’s share of the profits going directly to it, not to the Tribe.

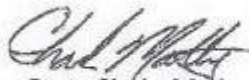
Conclusion

For the reasons set forth in these comments, Stand Up for California! and the Barstow Christian Ministerial Association respectfully request that the proposed trust acquisition be denied.


Sincerely,



Cheryl Schmit
Director, Stand Up for California



Pastor Charles Mattix
President, BCMA



Pastor Joe Green
First Vice-President, BCMA