Stand Up For California!
"Citizens making a difference"
www.standupca.org

P. O. Box 355
Penryn, CA. 95663

November 12, 2014

Honorable Osby Davis
Mayor of the City of Vallejo
And Honorable Council Members
555 Santa Clara Street
Vallejo, CA. 94590

RE: City of Vallejo - Tribal Casino Proposals

Dear Mayor Davis and Honorable Council Members of the City of Vallejo,

Stand Up For California is a nonprofit public corporation that focuses on gambling issues affecting California, including tribal gaming. Our organization has been involved in the ongoing debate of issues raised by gaming and its impacts for over a decade. Since 1996, Stand Up For California has assisted individuals, community groups, elected officials, and members of law enforcement, local public entities and the State of California with respect to gaming. Additionally, we act as a resource of information to local, state and federal policy makers.

We write today regarding the off-reservation casino proposals recently published in the local news. City Manager Dan Keen was quoted, *"In particular, Keen said city officials would seek policy direction from the council regarding the evaluation and consideration of Indian casinos, which have a unique set of issues and complex process for entitlement."*[1] The off-reservation proposals are critically important issue at the local level. But it is imperative that the affected local governments understand that the steps they take now not only will have local impacts, but will influence efforts by other groups to develop similar projects within the Bay Area and surrounding counties. The actions of the City of Vallejo will impact evolving tribal gaming polices at the state and federal level.

The City of Vallejo should know that the casino development proposals are usually opposed by local voters, and delayed in federal and state approval processes that are rarely successful. The City of Richmond approved a tribal casino at Pt Molate, only to see the federal government and voters ultimately reject it. This experiment to bring in a tribal casino proposal has delayed development at Point Molate for almost 20 years. Moreover, the electorate of California just rejected an off reservation casino by a margin of 60.9% to 39.1%, and ***61% of the voters of Solano County voted No on Proposition 48.***

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[1] Vallejo to hold hearing on Indian gaming, other Mare Island proposals 10-17-14
By Tony Burchyns 10/15/2014 Herald Times

Local governments statewide have learned that understanding the federal and state legal processes are essential to developing sound policies and ensuring that the interests of local government and its many residents are protected. Further, to interact successfully with Tribes in tribal gaming proposals and related Indian law issues, the City must be well-informed regarding sovereignty issues, required federal approvals, and necessary state review processes. Armed with that knowledge, the City can ensure that its agreements with tribes--if any--are enforceable and establish the framework needed to work cooperatively with a sovereign entity for years to come.

This letter is provided, to present you with an array of issues that will require local government attention as you interact with Tribes and the gaming investors, who are in pursuit of taking land out of the regulatory authority of the City, the County and State of California, off of the tax rolls and into trust for the development of a casino.

IMPACT OF RECENT ELECTION – PROPOSITION 48

The majority of Californians are opposed to the expansion of gaming off-reservation. On November 4, 2014, almost 60.9% 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 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 City of Vallejo 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 Californian's 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 City of Vallejo should cease consideration of any off-reservation proposal. Off reservation gaming proposals outside of a Tribes historic lands typically have taken ten years or more and in some instances have yet to construct a casino.

BACKGROUND

FEDERAL ISSUES:

1. Gaming Implications – Reaffirmation

It is important for local government to have concerns about the status of a tribal government and the stability of its membership. One of the proposals made to the City of

Vallejo is from the Lower Lake Koi Nation. This is a Tribe that was *"reaffirmed"* in 2000. California has a handful of Tribes that were "reaffirmed" rather than processed through the Office of Acknowledgment. The Department of the Interior from time to time has stated that under limited circumstances, Indian tribes omitted from a list of Indian Tribal Entities because of an administrative error can be placed on the current list without going through the Federal Acknowledgment process at 25 CFR Part 83. *However, the Department does not have a process for making such determinations, nor a regulation that permits it to "reaffirm" any tribe that has never enjoyed a formal government-to-government relationship.*

In a January 17, 2012 Report, the Inspector General concluded that he could not find any discernible process used by the Assistant Secretary or his staff to reaffirm a Tribe. The Report questioned the legitimacy of the administrative process the Assistant Secretary Indian claimed authority to use:

> "At various times, however, AS-IAs has recognized American Indian groups as tribes without following the Part 83 process, using a practice known as "reaffirmation." Reaffirmation has been used to recognize tribes when a perceived administrative error has resulted in the tribe being left off the Federal Register's official list of federally recognized tribes. The Department's authority for such reaffirmations is not, however, defined in law or regulation, and we have not located any Departmental Manual provisions or other published policy memoranda governing the practice." (*See*- page 2 of IG Report).[2]

The City of Vallejo must be aware that the Lower Lake Koi Nation reaffirmation did not follow the federal acknowledgment regulations. The Department's decision to recognize a tribe creates a trust obligation for the United States and it must be based on a thorough evaluation of the facts. Here, according to the IG Report, reaffirmation does not.

Membership disputes call into question who leads the Tribe and whether that leadership is legitimate. There are serious risks dealing with a tribe whose very governmental structure is in question. Any waivers of sovereign immunity and/or any agreements that are reached are vulnerable to challenge, if it turns out that a constitution was not validly formed and the leadership not constitutionally established.

Ultimately, Federal recognition by an administrative ad hoc process violates the Administrative Procedures Act, 25 C.F.R., Part 83, and is inconsistent with statute in the 1994 Federally Recognized Indian Tribe List Act that only recognizes Tribes through the Part 83 process or IGRA only providing an exception for gaming to newly acknowledged Tribes.

Federal recognition also is the foundation of future fee-to-trust transactions, for a determination that lands qualify for gaming under the Indian Gaming Regulatory Act (IGRA), and the eventual negotiation of a tribal state gaming compact with the State. Generally, gaming is permitted on lands acquired in trust after 1988 under a few exceptions--the settlement of a land claim, the initial reservation of a tribe recognized under 25 C.F.R. part 83, or as the restored

[2] Inspector General Report: http://www.standupca.org/off-reservation-gaming/federal-acknowledgement-process/tribal-groups-in-active-status/jan-2-2012-tejon-tribe-re-affirmed/Tejon_ROI_FINAL_PUBLIC.pdf

lands of a restored tribe. Generally, reaffirmed tribes do not qualify under any of these exceptions, likely because reaffirmation is NOT a sanctioned process.

The BIA appears to be setting a precedent to approve restored lands for reaffirmed tribes contrary to its own rules and regulations. In *Cherokee Nation of Oklahoma v. Norton, et al.*, 389 F.3d 1074, 1087 [2004 U.S. App. LEXIS 23910], the Tenth Circuit rejected a 1996 ad hoc administrative recognition of the Delaware Tribe of Oklahoma determination based on its 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, moreover, 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 Delawares. 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."

In September of 2008, the federal regulations for section 20 of the Indian Gaming Regulatory Act were finally published in the federal register. IGRA specifically provides a "limited exception" for newly acknowledged tribes. IGRA and the 1994 Indian Tribe List Act statutes do not provide an exception for tribal groups who are restored administratively through an ad hoc process before 1988 or after. The Department of the Interior explains in the comment section of 25 C.F.R. 292:[3]

> "Congress's creation of an exception for gaming on lands acquired into trust "as part of the restoration of lands for an Indian tribe restored to Federal recognition." We believe Congress intended restored tribes to be those tribes restored to federal recognition by Congress or through the part 83 regulations. We do not believe that Congress intended restored tribes to include tribes that arguably may have been administratively restored prior to the part 83 regulations.
>
> Moreover, Congress in enacting the Federally Recognized Indian Tribe List Act of 1994 identified "only the part 83 procedures" as the process for "*administrative recognition*". (See- Notes following 25 U.S.C. 479a) **(Federal Register May 8, 2008, Page 29363) (Emphasis added)**

In this instance, BIA's "administrative action" does not follow the agency's own rules for federal recognition. It follows that the Secretary of the Interior lacks authority to acquire land in trust. More to the point, the Lower Lake Koi Nation do not meet the IGRA exception for an acknowledged tribe for after-acquired lands for gaming.

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[3] http://www.standupca.org/gaming-law/federal-rulemaking/notice-of-rulemaking/Final%20Rule%20correction%20for%20IGLS%20Sec.%2020%20regs.pdf (See- Notes following 25 U.S.C. 479a) **(Federal Register May 8, 2008, Page 29363) (Emphasis added)**

2. Gaming Implications – Compact Tribe

The Elem Indian Colony of Pomo Indians of Clear Lake, Lake County has a 1999 Tribal State Compact. This compact expires in 2020. It is unlikely that a gaming investor will enter into a "development agreement" that must be repaid by the Tribe that has less than 7 years. Moreover, it is likely the compact would expire before the Tribe completes the National Environmental Protection Policy or Fee to Trust processes. Gaming investors in accordance with IGRA may take up to 40% of the net gaming revenue for the first 7 years. However, these agreements are generally written for 24% -30% of the net win for 5-7 years. This all depends on the expense of the development, purchase price of the land, time, legal and lobbying fees. IGRA places a sole proprietary requirement on Tribes to own at the very least 60% of the development. It is the task of the National Indian Gaming Commission to ensure the sole proprietary requirement of IGRA is adhere to through a review of management agreements and developments contracts.

The 1999 Tribal State Compacts were sight specific, thus the land for The Elem Indian Colony of Pomo Indians of Lake County, is in Clear Lake. Section 4.2 and Preamble C1 was written to describe the Indian lands for the Tribes that were currently operating casinos, and C2 was written for Tribes that had not yet developed casinos on their Indian lands. The intent was for Indian Tribes to operate casinos on their Indian lands that were identified in 2000.

3. Gaming Implications – Restored Lands or Two-Part Determination

Either of these exceptions will result in a decade of participation in multiple federal processes. The processes require that a Tribe provide evidence of historic and modern connections to the land. Tribes that seek restored land must demonstrate with clear objective evidence that they have resided on the land in question and exercised governance over its people and the land from time immemorial. This is a high standard to meet. I am advised that the subject land to be developed is land fill. That alone is problematic for a claim of restored lands or historic lands. Additionally, I am advised that this area has been a shipyard from very early times. The Fee-To-Trust process requires a significant analysis under 25 C.F.R. § 151.10 (h): the *Presence of Hazardous Substances* and additionally must be approved by the Office of Management and Budget Secretary. This office is more than hesitant to acquire lands in trusts for tribes that have a history of hazardous or toxic substances.

The historic and modern connection requirement for a two-part determination is vaguer. Nevertheless, both of these exceptions have the potential to involve the City of Vallejo in unwanted complex and adversarial litigation. (Suggest you discuss this with the Mayor of the City of Richmond).

STATE ISSUES:

Proposition 1A (California Constitution, Article I Section 19 (f)) enacted in 2000, requires that the Governor only negotiate with "…federally recognized Indian tribes on Indian lands in California in accordance with federal law." The Lower Lake Koi has not been recognized in accordance with federal law as stated above. The Elem Indian Colony of Pomo Indians does not have Indian lands in Vallejo, no former Rancheria or reservation or allotment lands, nor land held in restricted fee status. The Elem Indian Colony of Pomo was organized in

1936. The history of these two tribes both raise the *Carcieri* question; was this Tribe *federally recognized and under federal jurisdiction in 1934*? In turn, this raises significant issues for the State and local government regarding the authority of the Secretary of the Interior to take land out of the regulatory authority of the state for either of these two Tribes.

1. Should or will the state of California oppose a fee-to-trust transfer of land for a casino development without knowing that the Secretary of the Interior has authority to acquire land in trust for a group recognized by an ad hoc administrative process 22 years after the Part 83 regulations were promulgated?

2. Is the Governor of California obligated by federal law to negotiate a tribal state compact for a group federally recognized by an ad hoc administrative process?

3. Does the Secretary of the Interior have authority to acquire land in trust for Tribes organized after 1934?

4. Will the Governor require 1999 tribal state compacts to be re-negotiated? The Governor is currently in discussion with 1999 tribal state compact Tribes to negotiate new compacts.

5. Is the Governor obligated by federal law to negotiate a tribal state compact for an off-reservation casino? No.

LOCAL GOVERNMENT ISSUES:

City and county governments in the early 2000's began developing agreements with tribes lacking tribal state compacts or land in trust. Pre-2004 tribal state compacts did not require judicially enforceable mitigation agreements. Counties/cities in some instances, where Tribes did not have land in trust or were seeking off-reservation casinos developed these agreements as an insurance policy to protect scarce tax dollars of the general fund as well as the ability to control and protect shared natural resources of the county/city. Terminating these agreements can bring about unwanted litigation and delay development for decades.

The proposed agreements, which are known as a Memorandum of Understanding (MOU) or a Municipal Service Agreement (MSA) **not** negotiated under a tribal state compact, constitute a "project" under the California Environmental Quality Act, (CEQA).[4] More often than not, these proposed agreements contain provisions that purport to legally bind the city or county signatory to definite courses of action that typically involve physical changes to the environment. **The City of Vallejo must consider that entering into an agreement with a tribal government or even issuing a letter of support would require a legislative action of the BOS and thus require compliance with CEQA. Further, should the agreement change the human environment in any way, or bind the County to certain future actions without CEQA**

[4] Local government agreements, MOU's or MSA's are only exempt from CEQA when tribes have ratified tribal state compacts. The Tribal State Compact ratifying statute exempts local government from CEQA obligations.

review even if considered a federal activity, it would be occurring on land under the authority of the State, County and the City thus require a full environmental analysis under state standards.

It has become clear that negotiating local agreements without knowing the conditions under which class III gaming will be approved, the specific parcel of land in question or if the land will be taken into trust prevents local governments from engaging in informed decision-making and sound planning. Further, the National Environmental Protection Act (NEPA) evaluation initiated by BIA for proposed tribal projects is inadequate. A NEPA review is only a process that identifies potential significant impacts and affected parties. There can be 200 or more significant impacts that cannot be mitigated and the process will move forward. Local government must also keep in mind that the Bureau of Indian Affairs is only concerned about the evaluation of the parcels of land that is to be taken into trust, not the off reservation impacts of the development of that land on the surrounding community or local government. Of course, additional concerns and questions arise, including:

- California City/County governments are required to comply with the California Environmental Quality Act prior to performing legislative acts to approve projects or enter into binding or questionably binding contracts. Should the County/city initiate its own CEQA review?

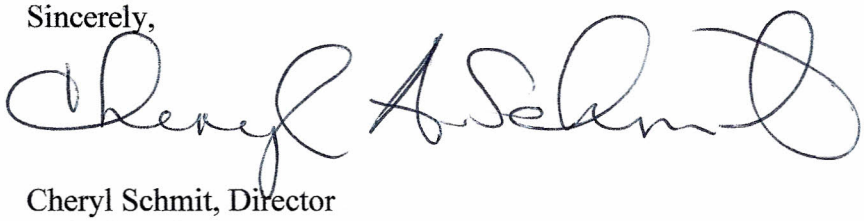
- The California Constitutional (Article I Section 19 (c) raises another question, do County or city governments have authority to enter into government-to-government negotiations for casinos when State Constitution language limits city and county authority to charitable bingo on land that is still under the authority and jurisdiction of the State?

- Is a city or county obligated to negotiate in a government-to-government relationship with a Tribe for land that is clearly under the authority and jurisdiction of the State of California and County of Solano? This is emphatically, no, the County of Solano is not obligated to negotiate an agreement. Nor need it do so early in a Federal review process, before the community has had time to consider the proposal and the County has adequate information from the environmental review processes to know the important issues such an agreement should address. Federally recognized tribes owning fee land must interact and comply with local government as any other private property owner. Only when land is in trust is there a need to enter into government-to-government negotiations.

CONCLUSION:

Stand Up For California! hopes you find this information helpful and useful. As mentioned at the beginning of this letter, we act as a resource of information to local, state and federal policy makers. Please do not hesitate to call upon us.

Sincerely,



Cheryl Schmit, Director
916 663 3207
cherylschmit@att.net
www.standupca.org

CC: County of Solano
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