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August 10, 2012

The Honorable Jerry Brown
Governor of California
State Capitol
Sacramento CA 95814
Attention: Jacob Appelsmith, Senior Advisor

Re: The Governor's Concurrence in the Proposed North Fork Rancheria of Mono Indians Off-Reservation Casino Project Must Be Based on An Environmental Document That Complies with CEQA.

Dear Governor Brown:

On behalf of our client, the Picayune Rancheria of the Chukchansi Indians (Picayune Rancheria), we respectfully request that you consider the important legal issues raised by this letter about the complete failure of the agency decision making process to date to follow the California Environmental Quality Act ("CEQA") (Public Resources Code sections 21000 et seq.) and the need for you to consider an environmental document that meets CEQA requirements before you decide whether to concur in the Secretary of the Interior's September 1, 2001 Determination. The Secretary's Determination approved the North Fork Rancheria of Mono Indians of California's ("North Fork") development of extensive casino gaming activities and related resort facilities at a 305-acre site in the unincorporated area of Madera County ("the Madera site"). If you concur with the Secretary's Determination, the Secretary will then take steps to have the Madera site taken into trust status for North Fork and become Indian lands for purposes of the Indian Gaming Regulatory Act. Thus, your concurrence in the Secretary's Determination will effectively allow the Madera site to become Indian lands and to be developed into the proposed casino complex, whereas your refusal to concur will terminate further federal and state consideration of the project.

Under these circumstances, there is no question that CEQA compliance must be an important part of your decision. Decision-making regarding whether to allow presently *off-reservation* fee land (as here) to become a part of a sovereign tribal nation where it can then be developed for gaming or other uses with little control by state government, is vastly different from the more typical decision that you and other state officials commonly confront regarding *on-reservation* gaming activities proposed to take place on already-existing tribal sovereign lands, when you and the State Legislature have limited power or ability to control gaming and other uses.

In the fee-to-trust application presently pending, your decision is essentially the *sine qua non* of whether gaming development will be permitted on the Madera site that has little or no connection to the North Fork tribe's historical lands. North Fork is proposing to acquire and develop the new site simply because it perceives that location as a profitable one on which to locate a large gaming establishment. As described in our previous letters and elsewhere in the administrative record, Picayune Rancheria would be greatly impacted by the North Fork tribe's proposed off-reservation casino development at the Madera site.

Among other adverse impacts, according to the figures developed by the North Fork tribe's own economic consultant (the Innovation Group) using pre-2008, pre-recession data, Picayune Rancheria would experience a decline of at least, 20.4 percent in gross revenues from its existing on-reservation casino located approximately 30 miles from the proposed Madera site, as the new casino "cannibalizes" the area's and the Picayune Rancheria's existing gaming market.[1] Picayune Rancheria believes that the Innovation Group figures substantially understate the adverse economic impacts the proposed North Fork off-reservation casino would have on its existing on-reservation casino and that a more realistic projection in the current economy would be closer to a 50% decline in the existing casino's revenues. Nonetheless, accepting those Innovation Group figures for the sake of argument, they translate into a projected loss of 570 full time employees (including about 100 Picayune Rancheria members), or almost half of the Picayune Rancheria casino's 1,300 full time employees. Our previous correspondence has described how the proposed off-reservation casino project's adverse socioeconomic impacts may also result in placing Picayune Rancheria's casino close to violating its loan covenants with its investors, and, in a worst case scenario, could lead to a default. It would certainly restrict Picayune Rancheria's ability to distribute future casino revenues to its tribal government and community.

Notably, to date, there have only been four Secretarial Determinations in the entire history of the Indian Regulatory Gaming Act allowing acquisition of new tribal lands for the purpose of allowing gaming. Your needed concurrence here would allow such an approval to occur in our state without your first having complied with California's important state

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[1] According to the Appendix R of the federal EIS prepared by the Innovation Group for the Bureau of Indian Affairs, more than half of the revenues at the proposed off-reservation casino at the Madera site would come from reductions in revenues at the existing Picayune Rancheria on-reservation casino and other existing Indian gaming facilities operating in the market.

environmental laws, most significantly without considering an environmental document that complies with CEQA.[2]

This letter describes the legal need for your pending concurrence decision to comply with CEQA. A separate letter will detail many of the profound deficiencies in the federal environmental impact statement (EIS) prepared by the Bureau of Indian Affairs pursuant to the National Environmental Policy Act (NEPA) with respect to its possible use as an environmental document in lieu of a CEQA-prepared environmental impact report (EIR).

A. CEQA's Broad Reach Encompasses the Governor's Concurrence At Issue Here.

Without question, the broad reach of CEQA applies to the Governor's concurrence in the Secretary's Determination. Section 21001(d) of CEQA sets forth the Legislature's declaration that, under CEQA, it is the state's policy "to ensure that the long-term protection of the environment…shall be the guiding criterion *in public decisions*." Further, pursuant to CEQA, the state's policy is to "require *governmental agencies at all levels* to develop standards and procedures necessary to protect environmental quality" and further to "require *governmental agencies at all levels* to consider qualitative factors as well as economic and technical factors and long-term benefits and costs in addition to short-term benefits and costs, and to consider alternatives to proposed actions affecting the environment." CEQA, sections 21001(f) and (g). Implementing these broad policy declarations, the State CEQA Guidelines sweepingly provide that "CEQA applies to *governmental action*." Further, "CEQA applies in situations where *a governmental agency* can use its judgment in deciding whether and how to carry out or approve a project." CEQA Guidelines, section 15002(b).

Despite these broad statutory pronouncements, some may argue that the Governor is nonetheless not a governmental agency or a public agency that must comply with CEQA. They might contend that CEQA applies only to "public agencies" and that CEQA defines "public agency" as "any state agency, board or commission any county, city and county, city, regional agency, public district, redevelopment or other political subdivision." CEQA section 21063.

Notably, however, both the State Legislature and the "court of this state" have been expressly carved out of CEQA's application (CEQA, section 21063; CEQA Guidelines, sections

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[2] The Secretary also recently approved purchase of a 40-acre off-reservation site for a proposed casino in south Yuba County. That purchase, like this one, involved a proposed casino to be located nearly forty miles from the developer-tribe's existing lands on a site with which the tribe has no apparent historic connection.

15378, 15379), but the Governor's Office has not. Further, the Legislature has commonly included the Governor within the definition of "public agency." See e.g., California Public Records Act, Gov. Code, section 6252(f) (defining "public agency" to include "every state or local agency" including all "state offices [and] officers" except the legislature and the judiciary).

When California courts are confronted with the question of whether CEQA should apply to a particular decision by a particular agency or official, the California Supreme Court long ago declared that CEQA must be interpreted so as to afford "the fullest possible protection to the environment within the reasonable scope of the statutory language." *Friends of Mammoth v. Mono County Board of Supervisors* (1972) 8 Cal. 3d 247, 262. In construing CEQA's reach with respect to all levels of state and local government, the Supreme Court has further declared that CEQA's purpose is "not to generate paper, but to compel *government at all levels* to make decisions with environmental consequences in mind." *Bozung v. Ventura LAFCo* (1975) 13 Cal.3d 263, 283.

Accordingly, the Governor's concurrence determination is well within the ambit of CEQA. Further, his concurrence determination clearly constitutes the Governor's "approval" of a "project" that, under CEQA, must be the subject of the CEQA environmental review process.

- The CEQA Guidelines broadly define "approval" as "the decision by a public agency which *commits* the agency *to a definite course of action in regard to a project* intended to be carried out by a person…." (CEQA Guidelines, section 15352(a). Here, there is no question regarding whether the Governor's concurrence is an "approval," because it commits him and the entire state government to signing off on the proposed acquisition of the off-reservation site as the location of a very sizable gaming resort complex. See *City of Vernon v. Board of Harbor Commissioners* (1998) 63 Cal.App.4th 677, 688 ("the agency commits to a definite course of action…by agreeing to be legally bound to take a course of action"). Indeed, once the Governor's concurrence is promulgated, future CEQA environmental review is thereafter foreclosed, because the site will then become qualified for on-reservation gaming and the Government Code exempts the later negotiation and approval of a tribal-state on-reservation gaming compact from CEQA environmental impact review. Gov. Code, sections 12012.5(f) and (g).

- CEQA also broadly defines "project" as "an activity which may cause either a direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment." CEQA, section 21065. The CEQA Guidelines provide that "project" means "the whole of an action," and "refers to the activity that is being approved and that may be subject to several discretionary approvals by governmental agencies." CEQA Guidelines, sections 15378(a) and (c). See *Azusa Land Reclamation*

Co. v. Main San Gabriel Basin Watermaster (1997) 52 Cal. App.4th 1165, 1188 ("CEQA defines a 'project' extremely broadly"); *McQueen v. Board of Directors of the Mid-Peninsula Regional Open Space District* (1988) 202 Cal.App.3d 1136, 1143 ("[a] narrow view of a project could result in the fallacy of division…that is, overlooking its cumulative impact by separately focusing on isolated parts of the whole"). In *Natural Resources Defense Council v. City of Los Angeles* (2002) 103 Cal.App.4th 268, the Court described the "first principles of CEQA" that mandate a comprehensive, coordinated and transparent process in making one or more governmental decisions with potentially significant environmental impacts.

> The CEQA process is intended to be a careful examination, fully open to the public, of the environmental consequences of a given project, covering the entire project, from start to finish. This examination is intended to provide the fullest information reasonably available upon which the decision makers and the public they serve can rely in determining whether or not to start the project at all, not merely to decide whether to finish it. The EIR is intended to furnish both the road map and the environmental price tag for a project, so that the decision maker and the public both know, before the journey begins, just where the journey will lead, and how much they -- and the environment -- will have to give up in order to take that journey.

Id. at 271-72.

Nor has the Governor's Office somehow been expressly exempted from CEQA's requirements in making the concurrence decision. As noted above, the Legislature has expressly exempted the *later* potential negotiation and approval of an *on-reservation* state-tribal gaming compact from CEQA's broad reach. Gov. Code, sections 12012.5(f) and (g). But the Governor's *earlier* concurrence action at issue here with respect to whether an *off-reservation* site should be the location of the proposed large gaming resort has *not* been exempted from CEQA. Where the Legislature has exempted one of a series of project approval decisions from CEQA, California courts have specifically ruled that the limited exemption cannot properly be extended to cloak the rest of the decision-making activity from CEQA review. *Sierra Club v. State Board of Forestry* (1994) 7 Cal.4th 1215, 1230-31 (an agency must comply with "those provisions of CEQA from which it has not been specifically exempted by the Legislature"); *Western Municipal Water District v. Superior Court* (1986) 187 Cal.App.3d 1104, 1112-13 (a reviewing court must apply "close judicial scrutiny of each element" of a legislative exemption in accord with the judiciary's basic policy of "construing CEQA to afford the maximum possible protection of the environment").

B. **Under CEQA, When a Federal EIS Is Prepared Pursuant to NEPA, the State Decision-Maker May Consult and Use the EIS "In Lieu Of" and a CEQA-Prepared EIR, But Only If the EIS Fully Complies with CEQA's Requirements.**

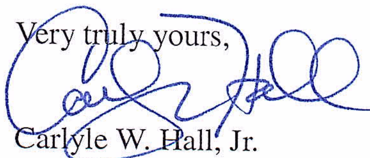
Where a project requires both an environmental impact statement (EIS) prepared under NEPA and an EIR prepared under CEQA, CEQA encourages the preparation of a joint EIS/EIR. CEQA Guidelines, section 15222. California decision-makers may use an EIS "in lieu of" an EIR *only* if the federally prepared environmental document "complies with" CEQA and the State CEQA Guidelines. CEQA, section 21083.5. In such cases, the California decision-making authority is mandated to "consult with the federal agency" that is preparing the EIS early in the preparation process to ensure that the resulting environmental document fully complies with CEQA. CEQA, section 21083.7; CEQA Guidelines, section 15223.

Notably, to the extent that the Governor may propose to use the federally prepared EIS "in place of" an EIR here, he must first give notice that he intends to do so and that he believes that the EIS "meets the requirements of CEQA." This notice must be given to the various concerned state and local public agencies and the general public in the same manner that a Notice of Preparation of an EIR is given. CEQA Guidelines, section 15225(a).

The EIS prepared by federal officials here was clearly produced without any apparent consideration of its being used by state officials as a CEQA-compliant decision-making environmental document. For example, in the EIS's list of "Regulatory Requirements, Permits and Approvals" that are "expected to be required" for implementation of the proposed off-reservation casino project, the Governor's concurrence decision is not even listed. Nor is any other decision by any state or local official or body. See North Fork Casino EIS (the EIS), at p. 1-14. Moreover, despite the requirements of CEQA, the Governor's Office does not appear to have adopted any "objectives, criteria and procedures for implementing CEQA" with respect to the Governor's concurrence decisions. In this regard, CEQA mandates that every public agency must adopt its own "objectives, criteria, and procedures for the evaluation of projects" within its decision-making responsibilities that "shall be consistent with" CEQA and the CEQA Guidelines. CEQA, section 21082. Consequently, it is not surprising that the EIS prepared here falls far short of being a legally adequate environmental document that complies with CEQA.

As explained earlier, the wide variety of important and obvious defects in the EIS as a CEQA decision-making document will be addressed in a separate letter.

Very truly yours,



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