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April 30, 2013

Speaker John A. Perez
Speaker of the Assembly
State Capitol, Room 219
Sacramento, CA 95814
Via Facsimile: (916) 319-2153

Re: Opposition to AB 277

Dear Speaker John A. Perez:

I am writing on behalf of Stand Up For California, a non-profit public service corporation that acts as a statewide gambling watchdog, to oppose passage of AB 277. AB 277 would ratify the compact between the State of California and the North Fork Rancheria of Mono Indians (North Fork), signed by Governor Brown on August 31, 2012 (the Compact). Stand Up for California opposes ratification of the Compact on a number of grounds, including concerns regarding environmental and land use issues, which are set forth in this letter.

AB 277 would authorize construction of an off-reservation casino and hotel complex for Class III gaming (the Project) on a 305-acre parcel near State Highway 99 just north of the City of Madera. Despite its location more than forty miles from North Fork's existing tribal lands, the United States Department of the Interior recently took this 305-acre parcel into trust for North Fork. The Governor "concurred" in that federal process in August 2012. The Governor has also negotiated a several-hundred page Compact with the tribe that defines the parameters for Class III gaming on the 305-acre parcel. AB 277 would ratify the Compact.

Advocates of the Project tout a lengthy federal process to take the land into trust, environmental review under the National Environmental Policy Act (NEPA), and "concurrence" from the City and County of Madera as evidence that the environmental and land use consequences of the planned Project have been or will be adequately analyzed. On the contrary, the concurrence and Compact processes have gone far astray from the public informational and disclosure purposes of the California Environmental Quality Act (CEQA, Pub. Resources Code § 21000 et seq.). If passed, AB 277 will be the final piece in the puzzle to circumvent well-established land use

planning and environmental review processes set forth under California law. These processes exist for a reason—to provide decisionmakers and the public with the information they need to make sound decisions about allocating California's precious, and increasingly scarce, natural resources.

As the California Supreme Court has aptly observed, "[i]f CEQA is scrupulously followed, the public will know the basis on which its responsible officials either approve or reject environmentally significant action, and the public, being duly informed, can respond accordingly to action with which it disagrees." (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 392.) Thus, as discussed below, the Compact should not be ratified in the absence of a full Environmental Impact Report (EIR) prepared pursuant to CEQA. An EIR serves "'to demonstrate to an apprehensive citizenry that the agency has in fact analyzed and considered the ecological implications of its action.'" (*Ibid.*, quoting *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 86.) An EIR is said to be an "environmental 'alarm bell' whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return." (*County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.) By providing due process and a forum for members of the public to express their opinions and concerns, "[t]he EIR process protects not only the environment but also informed self-government." (*Laurel Heights*, *supra*, 47 Cal.3d at p. 392.)

Here, neither the citizens of Madera County nor the neighboring tribes were afforded a meaningful opportunity for informed participation in this process, and decisionmakers at all levels have moved this Project forward without adequate information regarding its potential environmental costs.

## I. The Compact Improperly Defers Analysis of Environmental Impacts under CEQA

The Compact requires the North Fork to prepare a "tribal environmental impact report" (TEIR) prior to commencing construction of gaming facilities on the site. (Compact, Section 11.0.) The TEIR process set forth in the Compact is similar to the process for preparation of an EIR under CEQA, except the review is conducted by the tribe instead of a state or local agency charged with carrying out CEQA. Thus, the Compact recognizes that construction of the casino and hotel on the site is a "project" that will cause reasonably foreseeable physical changes in the environment (Pub. Resources Code § 21065) but fails to require CEQA analysis for the "project." The problem with the Compact lies in the timing, and also in the punting of CEQA responsibilities to North Fork, which has no experience overseeing a CEQA-like process.

Waiting to prepare a "TEIR" until after the Compact is already complete and Class III gaming is authorized for the site will foreclose any meaningful analysis of alternative sites because the casino site has already been irreversibly selected. (*Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 139 [whether an activity is a CEQA "project" turns, in large part, on whether there has been such a commitment to the features of the activity that meaningful alternatives and

mitigation measures are not analyzed]; see also *County of Amador v. City of Plymouth* (2007)149 Cal.App.4th 1089, 1106 ["[a]n assumption that the project will go forward notwithstanding its environmental consequences violates the principle that an EIR not be used to justify a decision already made"].)

Proponents of the Project will argue the casino is a purely federal undertaking, and the Compact is not a "project" for purposes of CEQA. Courts have generally construed the term "project" broadly, however. (*City of Santa Ana v. City of Garden Grove* (1979) 100 Cal.App.3d 521, 526-527 ["project" has a "sweeping definition"]; *Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, 1188 ["CEQA defines a 'project' extremely broadly...."].) It is well settled that even actions that might be considered mere "governmental paper-shuffling" can constitute projects, so long as they "culminate" in physical impacts to the environment. (*Bozung v. Local Agency Formation Commission* (1975) 13 Cal.3d 263, 277-281.)

In an important recent case, the California Supreme Court concluded that a development agreement could be considered a "project" under CEQA, explaining that the analysis turned largely on "whether, as a practical matter, the agency has committed itself to the project as a whole or to any particular features, so as to effectively preclude any alternatives or mitigation measures that CEQA would otherwise require to be considered, including the alternative of not going forward with the project." (*Save Tara*, *supra*, 45 Cal.4th at p. 139.) In that case, the development agreement included a condition requiring future CEQA compliance. The court explained "[a] CEQA compliance condition can be a legitimate ingredient in a preliminary public-private agreement for exploration of a proposed project, but if the agreement, viewed in light of all the surrounding circumstances, commits the public agency as a practical matter to the project, the simple insertion of a CEQA compliance condition will not save the agreement from being considered an approval requiring prior environmental review." (*Id.* at p. 132.)

Here, as in *Save Tara*, the Compact's requirement that North Fork conduct a CEQA-like analysis and prepare a TEIR in the future, prior to building the Project, does not "save" the Compact from the requirement to conduct CEQA review before the Compact is approved. Rather, by postponing CEQA-like review until after the Compact is ratified, the State loses control over the CEQA process, and "runs the risk of succumbing to a financial momentum that provides a strong incentive to ignore environmental concerns which could be more easily dealt with at this early stage of the process." (*County of Amador*, *supra*, 149 Cal.App.4th at p. 1106.)

The legislature should not ratify the Compact because it represents an end-run around the requirements of CEQA, and sets a precedent for similar projects throughout California to avoid meaningful environmental review. For example, the Governor recently signed another compact with the Enterprise Rancheria of Maidu Indians of California for an off-reservation casino in Yuba County. More such off-reservation casino will certainly follow throughout the state if these compacts are ratified. Further, every large-scale project developer in California will look at this process as a way to avoid CEQA review and contemplate putting their land into trust for a

handpicked group of Native Americans prior to developing their properties. To avoid the rigors of CEQA, developers might well consider adding a casino to every strip mall, suburban subdivision, energy project, or surface mine, just to name a few.

## II. There Are Known Environmental Impacts of the Project That Require Analysis in an EIR Before the Compact Can Be Ratified.

The Bureau of Indian Affairs (BIA) prepared an Environmental Impact Statement (EIS) for the Project site under the National Environmental Policy Act (NEPA). The EIS disclosed environmental impacts of the Project as identified by the BIA. Courts have repeatedly observed that NEPA is merely a "procedural" statute. (See *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.* (1978) 435 U.S. 519, 558.) By contrast, CEQA plays a "substantive" role in government decision making, and does not allow approval of projects with significant impacts when there are feasible alternatives or mitigation measures that could substantially avoid or lessen those impacts. (Pub. Resources Code § 21002.)

The BIA's EIS is no substitute for CEQA analysis. Rather, the EIS provides substantial evidence of the Project's significant environmental effects that must be addressed in an EIR prepared pursuant to CEQA. (Pub. Resources Code § 21080, subd. (d) [an EIR must be prepared when there is substantial evidence that the project may result in a significant effect on the environment].) Several such effects are highlighted below by way of example. Citations are to the 2009 Final EIS (FEIS). (http://www.northforkeis.com/documents/final_eis/report.htm [last visited April 27, 2013].)

### A. Agricultural Resources

The Project site contains more than 60 acres of prime and unique farmland, and the majority of the site is farmland of local importance. (FEIS, p. 4.8-32; FEIS, Appendix Q.) The California Department of Conservation estimates that more than six thousand acres of prime farmland in Madera County has been converted to non-agricultural uses since 1984. (See *Madera County 1984-2010 Land Use Summary* (2007) California Department of Conservation <http://redirect.conservation.ca.gov/dlrp/fmmp/county_info_results.asp> [last visited April 25, 2013].)

An EIR is needed to evaluate the impacts of the Project's conversion of farmland to urban uses in the context of cumulative loss of farmland due to development within the County. The EIS downplays the importance of farmland loss, calling it less than significant. (FEIS, p. lxviii.) The only mitigation suggested by the EIS to rectify this negative impact is placement of an agricultural conservation easement "if feasible," which in effect is not mitigation at all. (See FEIS, pp. lxviii, 5-75.) Furthermore, an EIR must evaluate the effect of the Project on neighboring agricultural properties. By converting the site to urban uses, the Project could result in conflicts with operations on neighboring agricultural lands. This analysis was not done in the

context of the FEIS. An EIR must be prepared to evaluate and identify mitigation for these impacts to agricultural resources.

B. Air Quality

Madera County is in "nonattainment" status under the Clean Air Act for ozone and particulate matter. (FEIS, p. 3.4-7.) The Project would result in significant air quality impacts related to construction and operation of the Project, odors from the potential on-site wastewater treatment plant, toxic air contaminants, and greenhouse gases. (FEIS, Section 4.4.2.) These Project-specific impacts also contribute to cumulative air quality effects, many of which cannot be mitigated below a level of significance. (FEIS, pp. 4.11-17 through 4.11-24.) No additional mitigation is proposed for these cumulative effects that remain significant. (FEIS, pp. lxxxvii-xc.) An EIR must be prepared to evaluate air quality impacts and impose all feasible mitigation.

C. Biological Resources

The California Department of Fish and Wildlife (CDFW, formerly known as the California Department of Fish and Game) submitted comments on the Draft EIS. (FEIS, Comment Letter L-12.) CDFW raised concerns regarding the Project's potential impacts to special status species and their habitats. Specifically, CDFW provided information about a potential San Joaquin kit fox occurrence near the Project site (the kit fox is listed as State Threatened and Federally Endangered). CDFW also raised concerns regarding impacts to Schmidt Creek and its related aquatic habitats due to discharges from the potential wastewater treatment plant to be constructed on the Project site. In addition, CDFW raised concerns regarding potential impacts to burrowing owl, bald eagle, and other bird species.

The BIA minimized CDFW's concerns and made only a few revisions to the discussion of biological resources for the Final EIS. (See FEIS, Responses to letter L-12.) An EIR must be prepared to more thoroughly analyze the Project's impacts to biological resources as identified by CDFW.

D. Traffic

The Project site is located adjacent to Highway 99 just north of the City of Madera. The EIS identified several intersections and roadway segments operating at unacceptable levels of service under existing conditions. (FEIS, pp. 3.8-13 through 3.8-15.) Additional intersections and roadway segments were identified with unacceptable levels of service under 2010 conditions without the Project. (FEIS, pp. 4.8-4 through 4.8-9.) With Project traffic, The EIS identified impacts to additional intersections and roadway segments, with a total of five freeway segments, one roadway segment, and ten intersections operating an unacceptable levels of service with the Project. (FEIS, pp. 4.8-14 through 4.8-21.) Under 2030 cumulative conditions plus the Project, the EIS identified unacceptable levels of service at six freeway segments, one roadway segment,

and seventeen intersections. (FEIS, pp. 4.11-34 through 4.11-42.) These impacts must be analyzed in an EIR.

An MOU between North Fork and the County of Madera includes payment of some fair share contributions for roadway and intersection improvements. (See FEIS, Appendix C.) Without a complete CEQA analysis, there is no way to know whether the proposed mitigation is sufficient to mitigate the impacts to state and local standards, or whether additional feasible mitigation may be available.

E. Water Resources

Like much of the Central Valley, the Project site is located in a groundwater basin that is overdrafted. (See FEIS, p. 3.3-8.) The Project would utilize on-site groundwater resources for its water supply. (FEIS, pp. 4.3-2 through 4.3-3.) North Fork has reached an agreement with Madera Irrigation District to fund groundwater recharge efforts off-site. However, the EIS acknowledges that groundwater recharge may not be sufficient to compensate for localized drawdown effects caused by pumping, and wells on nearby properties may be affected by the lowered water table. (*Ibid.*) An EIR and Water Supply Assessment (pursuant to Water Code section 10910 et seq.) must be prepared to fully analyze the impacts of supplying the Project with water. (See *Vineyard Area Citizens For Responsible Growth v. City of Rancho Cordova* (2007) 40 Cal.4th 412 [explaining CEQA's requirements for analyzing water supply for new development].)

In addition, the Project includes a potential treatment plant to process wastewater for the site instead of connecting to the City sewer system. (FEIS, pp. 2-14 through 2-17.) If constructed, the wastewater treatment plant would include onsite leach or spray fields to allow processed wastewater to percolate back into the water table. (*Ibid.*) An EIR must be prepared to study the potential effects of the percolating treated wastewater on potable water supply for the site and surrounding area wells.

Based on these and other environmental effects of the Project, the Legislature should not pass AB 277 and thereby ratify the Compact without the informational and public participatory benefits of an EIR.

## III. The Compact Should Not Be Ratified While Litigation Challenging the Governor's Concurrence is Ongoing

Multiple lawsuits are currently pending in state and federal courts challenging the legality of the Governor's concurrence and the taking of the land into trust by the federal government:

- *Picayune Rancheria of Chukchansi Indians v. Edmund G. Brown, Jr.,* et al., filed November 30, 2012 in Sacramento County Superior Court.

- *Stand Up For California! v. Edmund G. Brown, Jr., et al.,* filed March 27, 2013 in Madera County Superior Court.

- *Citizens for a Better Way, et al. v. Salazar*, filed December 20, 2012 in U.S. District Court for the District of Columbia.

- *Stand Up For California! v. Salazar*, filed December 19, 2012 in U.S. District Court for the District of Columbia.

On April 26, 2013, the Sacramento Superior Court heard oral argument on several demurrers in the case of *Picayune Rancheria of Chukchansi Indians v. Edmund G. Brown, Jr., et al.*. In that case, Petitioners argue the Governor's concurrence with the federal process of taking land into trust for North Fork was subject to CEQA. Among other things, Petitioners cite the lack of a CEQA exemption for this action by the Governor (in contrast to provisions that generally exempt actions by the judiciary and legislature), as well as the principle that an individual government official can be an "agency" for purposes of CEQA. Although the court's tentative ruling on demurrer was in favor of Respondents, the matter is currently under submission. Petitioners' arguments are compelling, and the matter will likely ultimately be decided by a higher court.

Any one of those lawsuits may well unwind earlier stages of this process. Thus, it is premature to move forward with ratification of the Compact until those lawsuits are resolved.

In short, it is incumbent upon this Legislature to stand up for the environmental and planning laws that it has enacted for the benefit of this state; stand up for its constituents who have not had a meaningful voice during this process; Stand Up For California by rejecting AB 277.

Thank you for your consideration of these matters. Please feel free to contact me if you have any questions.

Very truly yours,

Tina A. Thomas

Cc: Assemblymember Isadore Hall (916-319-2164/fax)