Stand Up For California!
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June 3, 2019

Ms. Amy Dutschke
Pacific Regional Director
Bureau of Indian Affairs
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RE: "DEIS Comments - Redding Rancheria Fee-to-Trust and Casino Project"

Dear Ms. Dutschke,

The following comment is being submitted on behalf of *Stand Up for California* (Stand Up) regarding the gaming application of the Redding Rancheria ("Tribe") for certain lands in Shasta County, California, referred to as "Strawberry Fields" and additional parcels, approximately 232 ac. of land to be taken into trust. Please include this letter as part of the Administrative Record. Stand Up's comments focus on federal Indian policy regarding the taking of land into trust and tribal government gaming. The environmental, fiscal and jurisdictional issues are addressed by the affected local governments.

In October of 2017, the Department of the Interior ("Department") issued proposed changes to the fee-to-trust process seeking to establish a two-step process to reduce the burden on tribal applicants. Stand Up viewed this effort as a necessary action by the Department to reform the fee-to-trust process providing greater fairness, balance and transparence. While no rulemaking has occurred, this gaming application provides a test of the proposed draft criteria.

The Tribe is identified as a restored Tribe which is not in dispute. It was restored by a stipulated agreement resolving the *Tillie Hardwick v. United States* case. However, there are a couple of questions that must be answered prior to the Record of Decision, 1) does a stipulated agreement authorize the Secretary of the Interior to acquire land in trust for the Tribe under the Indian Reorganization Act ("IRA"), 2) Does the stipulated agreement violate the California Rancheria Act? Consider the limitations in section 10 of the California Rancheria Act - *"all statutes of the United States which affect Indians because of their status as Indians (are) inapplicable"*. Congress terminated its relationship with the Indians on the Redding Rancheria at the request of the Indians living at Redding Rancheria. On October 15, 1955, the group passed a resolution requesting the Government give them fee title to their assignments of land. They asked that each person have a legal description of their land and all liens be forgiven.

It is required that the Department provide an analysis of whether the Tribe was *"federally recognized and under federal jurisdiction in 1934* under the reasoning in *Carcieri v. Secretary of the Interior*, U. S. Supreme Court Feb. 24, 2009 and/or the M-Opinion: *Reaffirmation of the United States' Unique Trust Relationship with*

Indian Tribes and Related Indian Law Principles, issued January 18, 2017.[1] This issue must be thoroughly addressed prior to the Record of Decision. The Secretary of the Interior lacks the authority to take land into trust for Tribes that do not meet the Carcieri reasoning.

Stand Up recognizes the legitimate need of the Tribal government to obtain land for housing and economic development, but we cannot support an abuse of Administrative Procedures, Regulations, Department Manual rules or an intentional misinterpretation of the Indian Gaming Regulatory Act ("IGRA"). On December 11, 2010, then Assistant Secretary Indian Affairs Secretary Larry Echo Hawk in an 8 page detailed and well-reasoned letter explained to the Tribe why Strawberry Fields could not be considered restored lands or eligible for gaming under IGRA. The letter further detailed that the 292 regulations did not support an exemption for gaming as after acquired lands.

Transaction Creates Precedent

This gaming transaction *should be treated* as a two-part determination by the Department of the Interior ("Department"). Not treating this transaction as a two-part determination will create precedent by processing and approving the Redding Rancheria gaming application on after-acquired lands as *"restored lands"* in order to re-locate an existing casino. This action affects the relationships of Tribes to other Tribes, to their non-tribal neighbors, and significantly disrupts long-established community plans.

Since 2003 the Redding Rancheria has been focused on acquiring certain lands in Shasta County, California, referred to as "Strawberry Fields". In 2009 the Tribe sent a request to the Office of Indian Gaming Management seeking a determination of restored lands under regulations set forth in 25 C.F.R. Part 292. In 2010, the Tribe amended its application to include an additional 80 acres for gaming and gaming ancillary purposes. In December of 2010, Assistant Secretary Indian Affairs Larry Echo Hawk sent a detailed 8 page denial letter to Chairman Jason Hart of the Redding Rancheria explaining why the proposed trust acquisition did not meet the specific criteria of a restored lands exception.

Undeterred, the Tribe challenged the Secretary of the Interior and Assistant Secretary of the Bureau of Indian Affairs in federal court. The Tribe asserted that the Department did not take into consideration the Tribe's alternative offer to move all gaming to the new casino and close its original casino on after-acquired lands for which the Tribe previously used the restored lands exception. The 9th Cir ignored the *temporal and geographic* limitations of the regulation and directed the Department to reconsider the application with the alternative of the re-location of the casino.

The Department did not perform a thorough analysis of the impact relocation of an existing casino would have on federal policy, other Indian Tribes or the surrounding community of non-tribal citizens prior to the development of the MOU. There appears to be no consideration if IGRA provides for a restored lands determination to be transferable. Rather, former Principal Deputy Assistant Secretary Indian Affairs Larry Roberts created the new precedent by signing an MOU with the Tribe. There is nothing in IGRA or the 292 regulations that states, alludes, or instructs Secretarial discretion **providing for a restored lands exemption to be transferable.**

In a more recent letter dated February 28, 2019, Principal Deputy Assistant Secretary Indian Affairs John Tahsuda writes to United States Senator Dianne Feinstein and states, *"It is unlikely that the MOA will serve as a precedent for other restored tribes."* The precedent is the MOU that chooses winners and losers,

[1] https://www.doi.gov/sites/doi.gov/files/uploads/m-37045.pdf

this MOU was for relocation of an existing tribal casino. Mr. Roberts signed several MOU's/MOA's asserting overreaching federalism disrupting California communities.

Recent Federal Court Rulings have Occurred that Directly Affect the MOU and Fee-to-Trust Transaction

The Memorandum of Understanding granting restored lands between the Department and the Tribe was signed on October 3, 2016 by Principal Deputy Assistant Secretary – Indian Affairs Larry Roberts. Mr. Roberts had authority to fill the position of former Assistant Secretary Kevin Washburn for only 210 days. Mr. Roberts's authority had expired in early August 2016. In a recent federal case, Judge Wilson (*Anne Crawford-Hall, et al. v. United States, et al.*, No. 2:17-cv-1616-SVW (C.D. Cal.)) ruled on the limited authority of the Principal Deputy Secretary-Indian Affairs reversing the land into trust decision by Mr. Roberts.[2] This ruling raises significant questions regarding the legal authority of the Memorandum of Understanding aside from creating an unprecedented new exception for the transfer of restored lands for gaming.

The MOU and Mr. Roberts' Action Did Not Comply With the Departmental Manual

In another California casino case in U.S. District Court, the Department has argued that Mr. Roberts' authority to act in place of the Assistant Secretary—Indian Affairs (and the Secretary) can be found in a provision of the Departmental Manual that provides for the Principal Deputy Assistant Secretary to assume the authority of the Assistant Secretary in the "absence" of the latter.[3]

A recent decision by the U.S. District Court of the District of Columbia, involving the Consumer Financial Protection Board ("CFPB"), is highly critical of a broad reading of "absence" when an Executive Branch vacancy occurs.[4] This case involves a dispute over whether a Presidential appointee, Mick Mulvaney, or the current Deputy Director of the CFPB, Leandra English, is properly the Acting Director of the agency.

In siding with the Trump Administration's legal analysis, the Court evaluated certain provisions in the Dodd Frank Act, which is the statute establishing the CFPB. The pertinent language states that the Deputy Director of the CFPB serves as the acting Director of the agency "in the absence or unavailability of the Director."[5] The Court looked to various dictionary definitions and found that "absence" is defined as "a failure to appear, or be available and reachable, when expected."[6] The term *"available"* was defined as *"immediately utilizable"* or "capable of use for the accomplishment of a purpose."[7]

The Court agreed, that these two words indicate a "temporary condition, such as not being reachable due to illness or travel."[8] These circumstances were distinguishable from the resignation of the CFPB Director, Richard Cordray, which was a permanent condition.[9] The Court also found that the absence of the term "vacancy" in the statute was a conscious act by Congress, as it used the term in other parts of the Dodd-Frank Act.[10]

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[2] In *Stand Up For California v DOI* in the Wilton issue made the original challenge in 2018, however, the Judge ruled in favor of the government. This ruling will be appealed.
[3] *See* 209 DM 8.4.B.
[4] *English v. Trump*, 2018 U.S. Dist. LEXIS 4571 (D.D.C. Jan. 10, 2018).
[5] 12 U.S.C. § 5491(b)(5)(B).
[6] *English* at *32.
[7] *Id.*
[8] *Id.*
[9] *See id.* at *33.
[10] *See id.* at *32.

The facts are very similar here. The last Assistant Secretary—Indian Affairs, Kevin Washburn, resigned from his position on or around December 31, 2015. Mr. Roberts, as the "first assistant" in the office, assumed the responsibilities of the Acting Assistant Secretary for 210 days, as permitted by the FVRA. On or around August 1, 2016, Mr. Roberts reverted back to his former position as the Principal Deputy Assistant Secretary—Indian Affairs.

Like the circumstances in the CFPB case, the Assistant Secretary—Indian Affairs was not *"absent"* for a temporary period, as a result of sickness or out-of-town travel. Mr. Washburn resigned and a vacancy was created for almost 13 months, until January 20, 2017. Any argument that Mr. Roberts was delegated authority for 13 months in the "absence" of the Assistant Secretary is an overly broad and unreasonable interpretation of this language in the Departmental Manual, given the permanence of Mr. Washburn's resignation and the length of time—more than a year—of the vacancy in the Assistant Secretary's Office.

In the waning days of the Obama Administration, the then-Principal Deputy Assistant Secretary—Indian Affairs Larry Roberts executed an MOU creating a new precedent for the transferring of trust status from one parcel of land to another. Mr. Roberts relied on an incorrect interpretation of the IGRA. He ignored Administrative Procedures and Department Manuel guidelines and Regulations to justify his decision. The Department must recognize that the MOU has no force of law. Mr. Roberts lacked the authority to make a determination of restored lands.

The IGRA provides "limited exceptions" to gaming on after-acquired lands.

In order for the regulations in Part 292 to be consistent with IGRA's principals of cooperative federalism, the Act recognizes the rights of states and narrowly applies the criteria which include temporal and geographical limitations for restored lands. While the Tribe meets some of the criteria in 25 C.F.R. 292.12, it cannot meet the temporal limitation as was pointed out in the December 2010 denial letter. The regulation criterion is clear on how a tribe establishes connections to newly acquired land for the purposes of "restored" lands exception.

> 292.12(c) (1) "The land is included in the tribe's ***"first request"*** for newly acquired lands since the tribe was restored to Federal recognition; or
>
> (c) 2 the tribe submitted an application to take the land into trust within 25 years after the tribe was restored to Federal recognition ***and the Tribe is not gaming on other lands.***

Redding Rancheria has already used the restored lands exception on its *"first" request.* The Tribe is and has been gaming on other lands.

IGRA's exceptions were enacted so that newly acknowledged tribes and restored tribes would not suffer prejudice in seeking economic independence. ***Congress in its wisdom did not intend for the restored land exception to be used over and over again to allow Tribes to re-locate existing casinos off-reservation.*** Such an interpretation of IGRA circumvents the need for state approval and meaningful consultations with affected local government and the surrounding community of citizens. Such an interpretation is out-of-balance with the spirit of cooperation between states and the federal government.

The Department in review and consideration of the many comments submitted during Rulemaking in 2008 for the development of Part 292 made specific responses to suggestions to 292(c) 1 and (c) 2 stating:

> **"…the temporal limitations effectuate IGRA's balancing of the gaming interests of newly acknowledged and/or restored tribes with the interests of nearby tribes and the**

surrounding community." (Federal Register/Vol.73 No.98 Tuesday, May 20, 2008/Rules and Regulations page 29367)

What is the Complete Vision of the Tribes Plans that Affect the Human Environment?

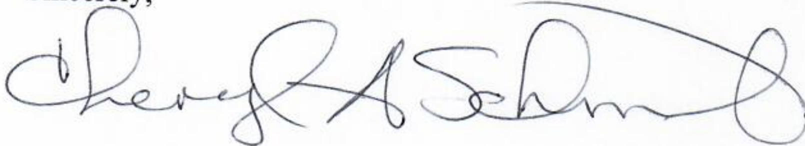
The Tribe has several additional fee-to-trust transactions – 89.74 ac. that are contiguous identified as the Riparian Lowry parcel. Contiguous lands are eligible for gaming. 11.07 ac. that are on-reservation identified as North and South Parking lots, and 13.29 ac. identified as the Mini-Mart Hilton Property. These trust applications are pending as of April 2019. There has been to my knowledge no statement of the larger planned development by the Tribe or an analysis of the cumulative impacts to the surrounding community or local government.

Conclusion

In 2000, California voters were asked to amend the State Constitution to provide an exception to legalize slot machines and casino style gaming on Indian lands primarily in remote rural parts of the state. The voter pamphlet clearly stated in rebuttal to claims that Proposition 1A would put casinos in urban areas; ***"Proposition 1A and Federal law strictly limit Indian gaming to tribal land. The claim that casinos could be built anywhere is totally false…"*** As time has evidenced, Tribes, tribal attorneys and gaming investors have ignored a clean and clear reading of federal law and regulation seeking ever-clever ways to move tribal gaming or relocate existing tribal casinos closer to more lucrative urban markets.

To restate our position, Stand Up recognizes the legitimate need of the Redding Rancheria Tribal government to obtain land for housing and economic development, but we cannot support an abuse of Administrative Procedures, Regulations, Department Manual rules or an intentional misinterpretation of the Indian Gaming Regulatory Act.

Sincerely,



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