Stand Up For California!
"Citizens making a difference"

www.standupca.org

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October 28, 2014

Chairwoman Leticia Perez and
Kern County Board of Supervisors
1115 Truxtun Ave.
Bakersfield, CA. 93301- 4636

RE: Proposed Casino by Tejon Tribal Government and Cannery Row Owned by Millenium Gaming of Las Vegas, NV.

Dear Chairwoman Leticia Perez and Honorable Members of the Kern County Board of Supervisors,

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 proposed Kern County casino by the recently reaffirmed Tejon Tribe and Cannery Row, owned by Millenium Gaming Inc., a Las Vegas based company.[1] The proposed casino project is a critically important issue to Kern County and a test of the County's leadership. To make the best decisions for the County's future, it is imperative that the County understand that the steps it takes now not only will have local impacts, but will influence efforts by other groups to develop similar projects within the County, as well as impact evolving tribal gaming polices at the state and federal level.

EVOLVING POLICY

Currently on the November 4th ballot is Proposition 48, which tests the power of the Governor to negotiate a gaming compact for an off-reservation casino. This measure, while specifically addressing a specific proposed off-reservation casino in Madera County, is as close as citizens can get to voting on whether they want tribal gaming to move off-reservation and whether the Governor alone is able to make such critically important decisions. Current law does

[1] http://www.indianz.com/IndianGaming/2014/027940.asp

not give the Governor such extraordinary power. In fact, in 2000, Proposition 1A allowed Tribes to operate slot machines, but only on established reservations. If the ratification of the North Fork compact goes uncontested, it will open the floodgates to "reservation-shopping" and off-reservation gaming in local communities throughout California. The Governor's concurrence in the North Fork casino (and the Enterprise Rancheria casino) not only concentrates power in the State Executive, it breaks the promise Tribes made to voters in 2000 and incentivizes Tribes that, for the past dozen years, have played by the rules set forth in Proposition 1A to reconsider a move off-reservation to more lucrative locations in the midst of more densely populated areas.

The outcome of Proposition 48 should be a concern to Kern County, particularly because in May of this year, the Secretary of the Interior announced proposed rules to loosen the criteria for petitioning groups to achieve federal recognition. California has 80 groups seeking federal recognition. **Kern County could see four additional tribes seeking casinos if these new rules become law, as well as Tribes located in other counties seeking land within Kern County for casino development.** California will have at least 34 new tribes on top of the 109 that we already have. There is the potential for 22 new casinos on top of the 70 that currently exist. These changes significantly affect the political power of local government officials to protect the very citizens that elect them to office, as well as their ability to provide essential services to their constituents. These changes will affect the general plans of county government, revenue generation, and the equitable sharing of natural resources such as water. These impacts must be considered, as well as the reserved rights to water that Tribes have upon lands being taken into trust.

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

This letter is provided to outline a few of the issues that will require Kern County's attention as you consider the proposal by the Tejon Tribal government to have land removed from the regulatory authority of the County and State, the State and local tax rolls, and placed into trust for the development of a casino.

BACKGROUND

FEDERAL ISSUES:

1. Tribal Government and Membership

On January 3, 2012 Secretary of the Interior Larry Echo Hawk "reaffirmed" the Tejon Indian Tribe's Government-to-Government Status. In a letter to the Chairwoman Kathryn Montes Morgan, Asst. Secretary Larry Hawk explained that"[u]nder 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."

The Department, however, 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 fact, the Secretary's reaffirmation of Tejon prompted the Office of Inspector General (IG) to initiate an investigation of the decision, which appears to be a largely political--not legal--determination. In its January 17, 2012 Report, the Inspector General concluded that he could not find any discernible process used by the Assistant Secretary or his staff in selecting the Tejon Tribe for recognition above the other American Indian groups with historical, genealogical and ancestral claims to the original Tejon Indians. 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]

Clearly, the Tejon's 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, it was not.

In fact, one of the undesirable consequences of failing to comply with the formal acknowledgment process is the lack of a clearly defined tribal membership and/or leadership, which has occurred with the Tejon Tribe. The decision to reaffirm Tejon has led to serious membership disputes that call into question who leads the Tribe and whether that leadership is legitimate. By circumventing the regulatory process, which requires all members to be listed to determine social and political relationships, the Secretary's reaffirmation has left the Tejon in turmoil. 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 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.

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[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

2. Gaming Implications

Federal recognition also is the foundation of future fee-to-trust transactions under the Indian Reorganization Act (IRA)--to the extent that the acknowledged tribe was under federal jurisdiction in 1934--and for a determination that lands qualify for gaming under the Indian Gaming Regulatory Act (IGRA). 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 lands of a restored tribe. Reaffirmed tribes do not readily qualify under any of these exceptions, likely because reaffirmation is not a process authorized under the Department's regulations. Further, the State need only negotiate a compact with Tribes that will ultimately be able to have lands that will qualify for gaming.

Yet 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 Delaware's. 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 IGRA 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).

[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).

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 Tejon do not meet the IGRA exception for an acknowledged tribe for after-acquired lands for gaming.

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 Tejon have not been recognized in accordance with federal law as stated above. This raises significant issues for the State and local government.

1. Should the State of California allow 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 34 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. Is the State of California obligated to pay out of the Revenue Sharing Trust Fund (RSTF) the 1.1 million for a group recognized by an ad hoc administrative process?

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.

The proposed agreements, which are known as a Memorandum of Understanding (MOU) or a Municipal Service Agreement (MSA), are not negotiated under a tribal state compact, and therefore constitute a "project" under the California Environmental Quality Act, (CEQA), and requiring CEQA review to be legally permissible.[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. **Kern County 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**

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

the County to certain future actions without a CEQA review even if considered a federal activity, it would be occurring on land under the authority of the State and the County and 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 the Department of the Interior for proposed tribal projects is often inadequate under CEQA standards. A NEPA review is only a process that identifies potential significant impacts and affected parties. It is a procedural statute only and does not require an agency to deny a project when impacts are substantial, such as all-important water impacts in California. 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 Department 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 County governments are required to comply with the CEQA 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?

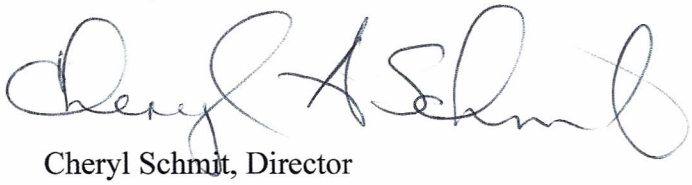
- Is a city or county obligated to negotiate in a government-to-government relationship with a Tribe for land that is clearly under the authority and jurisdiction of the State of California and County of Kern? <u>This is emphatically, no, the County of Kern is not obligated to negotiate an agreement. 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.</u> 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 will continue to collect additional information on the Tejon Tribe and is more than happy to share this information with you. As time progresses, Cannery Row and the Tejon Tribe may announce a NEPA review of the subject land and the proposed casino. It will be important to participate in this process. The NEPA process will be followed with a Fee-to-Trust application under 25 C.F.R 151. Kern County needs to take its time to review all of the potential impacts.

Off-reservation gaming is an issue of great public import that has many impacts on private property owners and local businesses that are without recourse. I plan on being in Kern County in the near future and would appreciate the opportunity to meet with you and members of the Board of Supervisors and/or staff to discuss these issues further.

Sincerely,



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www.stopreservationshopping.com - NO on 48

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Honorable Barbara Boxer, United States Senator
Honorable Kevin McCarthy, Congressman - House Majority Leader
Honorable Shannon Grove, California State Assembly Member
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Kern County Development Services Agency
Kern County Grand Jury
California State Association of Counties (CSAC) – Tribal Working Group
County Counsels Association of California (COCO)