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June 30, 2015

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Chairman David Couch
Kern County Board of Supervisors
1115 Truxtun Avenue
Bakersfield, CA 93301

Re: June 2, 2015 Meeting Regarding Tejon Indian Tribe

Dear Chairman Couch and Supervisors Gleason, Maggard, Perez, and Scrivner:

I am writing on behalf of Stand Up for California! to provide additional information relating to the June 2, 2015, Regular Meeting discussion of an agreement between the County and the Tejon Indian Tribe. Representatives of the Tribe stated during the meeting that an agreement with the County would be necessary for the Tribe's gaming project to proceed. A number of questions were raised during the meeting about the federal decision making process for gaming-related trust acquisitions. The following discussion is intended to provide the County with preliminary information about the processes that apply, the County's role under each process, and background on intergovernmental agreements.

1. The Federal Decision Making Process for Gaming-Related Trust Acquisitions

In most "fee-to-trust" requests, there are three primary statutes that are triggered when a tribe asks the Bureau of Indian Affairs (BIA) to acquire land in trust for gaming: the Indian Reorganization Act (IRA), 25 U.S.C. § 465; the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2710 *et seq.*, and the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.*[1] Each of these statutes establishes independent requirements and each has distinct participatory rights.

a. Trust Land Acquisition Process Under the IRA

Trust acquisition is authorized for certain tribes under section 5 of the IRA, 25 U.S.C. § 465, and the implementing regulations, 25 C.F.R. Part 151. The role of local government under Part 151 is actually very limited. With respect to local governments, the regulations only require BIA to evaluate (1) the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls; and (2) jurisdictional problems and potential conflicts of land use. 25 C.F.R. §§ 151.10 (e-f), 151.11(d). Accordingly, under Part 151, the role of the County would be to describe the impacts a trust acquisition would have on those two interests.

State and local governments have, in fact, long complained about the limited role the regulations accord them. Just last month, the House Subcommittee on Indian, Insular and Alaska Native Affairs

[1] In some cases not relevant here, a settlement act or restoration legislation may separately provide for the acquisition of land in trust.

held an oversight hearing titled "Inadequate Standard for Trust Land Acquisition in the Indian Reorganization Act of 1934."[2] During that hearing, the California State Association of Counties ("CSAC") described the trust land process as broken, complaining that the process was not balanced or transparent.[3] CSAC objected that the trust land process lacks objective criteria, considers only minimal information regarding the impacts to local communities, and has no requirement to balance the benefit to the tribe against the impact to the local community.[4] Thus, the County should understand that its role under the trust regulations is limited.

b. Gaming Eligibility Determinations Under IGRA

IGRA does not necessarily provide any role for local governments either. IGRA generally prohibits gaming on lands acquired in trust after 1988, but establishes several exceptions and exemptions. 25 U.S.C. § 2719. If an exception or an exemption applies, the statute and implementing regulations do not give state and local government any participatory rights. 25 C.F.R. Part 292 ("Gaming on Trust Lands Acquired After October 17, 1988").

In fact, the only time that the regulations provide for the participation of affected state and local government is when a tribe has to seek what is called a "two-part determination" under 25 U.S.C. § 2719(b)(1)(A). As the representatives of the Tribe described during the hearing, that process is much more protective of local government interests and provides more robust commenting opportunities for local governments.[5] However, the Tribe has also asked the Department to conclude that the Mettler parcels qualify for gaming under the "last recognized reservation" exemption, 25 U.S.C. § 2719(a)(2)(B). If the Department issues a favorable determination to the Tribe, the County will have no participatory rights under IGRA at all.[6]

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[2] House Subcommittee on Indian, Insular and Alaska Native Affairs, "Inadequate Standard for Trust Land Acquisition in the Indian Reorganization Act of 1934" (May 14, 2015) (Fee to Trust Hearing), available at: http://naturalresources.house.gov/calendar/eventsingle.aspx?EventID=398481.

[3] Testimony of David Rabbit on behalf of the California State Association of Counties (May 14, 2015), available at: http://naturalresources.house.gov/uploadedfiles/rabbitttestimony.pdf.

[4] *Id.* at 9. Assistant Secretary for Indian Affairs Kevin Washburn admitted that trust land applications are rarely denied, claiming that problematic applications are simply delayed indefinitely or the tribal applicant is asked to withdraw the application. Fee to Trust Hearing at 53:24 - 56:22.

[5] Under 25 U.S.C. § 2719(b)(1)(A), the two-part process requires a determination by the Department of the Interior that gaming on the newly acquired lands would be in the best interest of the Indian tribe and its members, and "would not be detrimental to the surrounding community." The regulations governing the two-part process provide for more extensive consultation with local governments than the trust land regulations, and require a much more detailed consideration of detrimental impacts to the surrounding community. 25 C.F.R. §§ 292.19-.20. In addition, the two-part determination is subject to concurrence by the Governor. 25 U.S.C. § 2719(b)(1)(A).

[6] Although the Tribe's December 22, 2014 letter to the Board addressed the two-part process, it did not mention that the Tribe was pursuing an exemption that would make the two-part process inapplicable. It does not appear that the Tribe has abandoned its request. In a June 1, 2015 letter to the Department of the Interior, it provided additional argument regarding why the Mettler parcels qualify under the "last recognized reservation" exception.

c. The Environmental Review Process Under NEPA Versus CEQA

NEPA will certainly apply to the Tribe's fee to trust request, and NEPA does allow affected local governments the opportunity to comment and potentially to participate as a cooperating agency. However, it is important to understand that NEPA is different from CEQA in a few key respects.[7]

The most crucial distinction between the statutes is that NEPA is a purely procedural statute, whereas CEQA has substantive requirements. Under CEQA, an agency *must* adopt feasible mitigation measures or alternatives that would substantially lessen the significant effects of a project. NEPA does not include any such requirement. By contrast, NEPA only requires agencies to *evaluate* a reasonable range of alternatives and their impacts. A federal agency does not have to choose the environmentally preferred alternative; indeed, it can choose the alternative with the most severe environmental consequences. Moreover, NEPA does not require an agency to adopt feasible mitigation measures. In making trust decisions, BIA does not *require* mitigation and will not enforce any mitigation commitment. Thus, a federal agency may comply with NEPA, but such compliance does not guarantee that significant impacts will be avoided or mitigated, even when there are environmentally preferable alternatives or mitigation measures are feasible.

Thus, while NEPA does provide a significant commenting role for the County and the public regarding the environmental impacts of an action, the statute does not provide the same protections that CEQA does.

2. Intergovernmental Agreement Considerations

One of the reasons that CEQA and NEPA require agencies to prepare impact statements before making a decision is to ensure that the agencies have sufficient information to make decisions on an informed basis. The County and the public currently know very little about the Tribe's proposal, what process will apply under IGRA, and what impacts can reasonably be expected. The NEPA analysis would provide much of the information the County and the public will need to reach an opinion about the merits of the Tribe's project and the impacts that will require mitigation. It is simply premature to negotiate an intergovernmental agreement without knowing what the County is negotiating about.

There was some discussion during the meeting about the type of agreement being contemplated. It is unclear what type of agreement that might be, making it difficult to determine what the County's legal obligations might be, what federal requirements might apply to ensure the agreement's enforceability, or what impact such an agreement might have on any proposed fee to trust process. The Tribe has suggested that CEQA would not apply to the agreement being contemplated because it would only establish a funding mechanism. That might be correct, depending on the purpose of the funding mechanism and if the agreement expressly disclaims any position with respect to a trust

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[7] The California Governor's Office of Planning and Research and the White House Council on Environmental Quality have jointly prepared a handbook on integrating CEQA and NEPA requirements, and explaining their similarities and differences. NEPA and CEQA: Integrating Federal and State Environmental Reviews (February 2014), available at: http://www.opr.ca.gov/s_technicaladvisories.php.

acquisition. If the agreement relates to the proposed trust acquisition, however, or adopts a policy position with respect to the Tribe's proposed development, the Tribe's analysis is likely not correct.

3. Tribes in Kern County

Supervisor Perez raised the question regarding whether there is a party with legal standing to challenge the Department's "reaffirmation" of the Tribe. The answer is that any party adversely affected by the Tribe's reaffirmation has standing to challenge the Department's decision—including the State, the County, individuals claiming to be excluded from the Tribe, and affected neighbors. Such a challenge would proceed under the Administrative Procedure Act, even though the Department did not comply with its acknowledgment regulations in "reaffirming" the Tribe. It may be that some of the parties will wait until there is a trust decision to challenge the Tribe's extra-legal reaffirmation, but they can challenge the decision.[8] So too could the County.

The number of possible tribes in Kern County is also an issue that was raised during the hearing. The Tribe has suggested that it will remain the only federally-recognized tribe in Kern County "for the foreseeable future." That is far from clear. First, just as the Department failed to follow its acknowledgment regulations in reaffirming Tejon, it could do so again with respect to another group. The Investigative Report of the Tejon Indian Tribe by the Department of the Interior's Inspector General states that the Department believes that there are at least ten non-federally recognized Indian groups that have potential claims to the historic Tejon Indians and that the Department did not follow any discernable process in selecting Tejon for reaffirmation.[9] If the Department can ignore its own regulations for one group, it can do so again.[10]

Second, there are several petitioner groups seeking federal acknowledgment through the regulations that are intended to govern the process. While progress through that process has indeed been time

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[8] The Administration's proposed revisions to the tribal acknowledgment regulations were the subject of a recent Congressional oversight hearing. House Subcommittee on Indian, Insular and Alaska Native Affairs, "The Obama Administration's Part 83 Revisions and How They May Allow the Interior Department to Create Tribes, Not Recognize Them" (May 14, 2015), available at: http://naturalresources.house.gov/calendar/eventsingle.aspx?EventID=398320. The Subcommittee memo states, "The Department has also 'reaffirmed' the recognition of at least three groups it claims to have overlooked or accidentally left off its list of recognized tribes." Tejon is explicitly named. The Memo further states, "There is, however, no known regulation, guideline, statute, or court-ordered procedure for recognition through 'reaffirmation.'"

[9] *Id.* at 3 (available at: http://www.doi.gov/oig/reports/upload/Tejon_ROI_FINAL_PUBLIC.pdf).

[10] As a matter of non-binding policy, the Department now "directs any unrecognized group requesting that the Department acknowledge it as an Indian tribe, through reaffirmation or any other alternative basis, to petition under 25 CFR 83 unless an alternate process is established by rulemaking following the effective date of this policy guidance." *See* Requests for Administrative Acknowledgment of Federal Indian Tribes (to be published July 1, 2015) , available at: http://www.bia.gov/cs/groups/public/documents/text/idc1-030768.pdf. The Department, however, conditions this policy on the implementation of its recently promulgated revisions to the acknowledgment regulations. Because of Congressional concerns regarding those revisions, the current appropriations bill for the Department, H.R. 2822, would bar the Department from implementing the new regulations. Thus, the Department seems determined to revert to ad hoc "reaffirmations" if its new regulations are blocked by Congress.

consuming, the Department recently promulgated changes to its acknowledgment regulations, which will not only greatly accelerate the acknowledgment process, they also reduce the substantive standards for acknowledgment.[11]

Finally, although AB 52 imposes only procedural requirements regarding consultation with tribes, it applies to non-federally recognized Indian groups that are listed by California's Native American Heritage Commission (NAHC), as well as federally-recognized tribes. To the extent that the County is basing its decision to negotiate an agreement with Tejon in response to AB 52, it should be aware that it may be asked to do the same by the ten Indian groups the NAHC lists in Kern County.

Conclusion

If you have any questions about these comments, please do not hesitate to contact us. We would be pleased to provide additional explanation for any questions you may have.

Sincerely,

Jena A. MacLean

cc: Tejon Indian Tribe

[11] *See* note 8, *supra.*