

Stand Up For California!

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November 3, 2016

Honorable Members of the Kern County
Board of Supervisors
1115 Truxtun Avenue, 5th floor
Bakersfield, CA 93301
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clerkofboard@co.kern.ca.us

**RE: Questions raised at the October 2016 Hearing Regarding a
Memorandum of Understanding between Kern County and the Tejon Tribe**

Dear Honorable Members of the Kern County Board of Supervisors,

At the October hearing, the Kern County Board of Supervisors raised many significant questions regarding a proposed Memorandum of Understanding (MOU) between the Tejon Tribe and the County of Kern. The MOU covers law enforcement and fire services for the Tribe's proposed Community Headquarters and Cultural Center in Mettler. It was clear from the meeting that many of the Supervisors questions went unanswered.

Perhaps the most troubling question was whether the MOU would enhance the Tejon Tribe's gaming application for a Casino in Mettler. The Bakersfield Press quoted Supervisor Mike Maggard as saying, "*I have no qualms in helping the tribe establish its headquarters and cultural heritage,*" but Supervisor Maggard questioned whether the agreement would take the County any further toward approving ground for gaming.¹ Several other Supervisors expressed concern that approving an agreement for a tribal community center might affect the County's ability to object to the Tribes gaming proposal off of I-5, highway 99 and 165. These concerns are well founded.

We support the Tejon Tribe's efforts to negotiate an agreement for services on a non-gaming application, despite there being no requirement that it do so. The only agreement required by law is a tribal-state gaming compact, which is necessary for casino-style gaming. California Tribal State Compacts have gone a step further to require mitigation agreements with affected local governments to offset significant impacts off-reservation created by on-reservation developments related to gaming. The negotiation of a government-to-government agreement between the Tejon Indian Tribe and the County of Kern would establish a relationship in the daily operation of tribal and county government activities.

¹ Bakersfield Newspaper, *Casino fears complicate tribe's bid for new home*, by James Burger.
http://www.bakersfield.com/news/casino-fears-complicate-tribe-s-bid-for-home/article_92cd8805-47c9-591a-8122-831bf380fd4c.html

The MOU, however, also expedites the acquisition of the Meridian School into trust AND fulfills required criteria in the federal regulations governing gaming applications. The acquisition of the Meridian School in trust establishes the required “*Modern Connection*” to the land nearby the proposed casino location. See 25 C.F.R. Part 292.² Specially, 25 C.F.R. 292.12 provides that “*the Tribe must demonstrate one or more of the following modern connections to the land*” to qualify for gaming under the “restored lands” exception to the prohibition on gaming on lands acquired in trust after 1988. The regulations require:

- (1) The land is within reasonable commuting distance of the tribe’s existing reservation;
- (2) If the tribe has no reservation, the land is near where a significant number of the tribal members reside;
- (3) The land (proposed for the casino) is within a 25 mile radius of the tribe’s headquarters or other tribal governmental facilities that have existed at that location for at least 2 years at the time of the application for land into trust; or
- (4) Other factors demonstrate the tribe’s current connection to the land.

25 CFR 292.12(a) Item number 3 is what Kern County Supervisors need to consider, the presence of a nearby “headquarters or other tribal governmental facilities. In the development of this final rule, the Bureau of Indian Affairs explains why it shaped this rule in this manner.

The headquarters (*modern connection*) test is a useful means of determining whether a tribe has a modern connection to the newly acquired land and the 25-mile radius is both useful and consistent. Nonetheless, the concerns raised by these comments are legitimate because the version of the headquarters test in the proposed rule could be construed as being open to manipulation. Therefore, the qualifier was added in the final rule that the Tribe’s headquarters or other tribal governmental facilities be in existence at the location for at least two years at the time of the application for land into trust. The language of “other tribal governmental facilities” was added to address concerns that tribes often operate out of more than one headquarters or facility. (Gaming on Trust Lands, 73 Fed. Reg. 29354, 29365 (May 20, 2008)).

During the rulemaking process, the Bureau of Indian Affairs received numerous comments expressing concerns that a tribe would be able to set up sham headquarters in order to establish a “modern connection” to the selected casino property. The Bureau of Indian Affairs agreed that this was a legitimate concern and accordingly added the 2-year minimum and other factors that demonstrate a modern connection. Still, the language of this federal rule is vague and weak and allows for manipulation by tribes and out-of-state gaming investors.

The intent of the “*modern connection*” test was to “offer a mechanism to balance legitimate local concerns with the goals of promoting tribal economic development and tribal self-sufficiency.” Without doubt, the “*modern connection*” of a headquarters at the Meridian School, puts the community and the County of Kern on notice of the tribal presence and the Tribe’s intent to achieve an approved gaming application. *Id.* at 29365.

Lastly, a citizen raised questions during the hearing regarding whether the Tejon Tribe was a federally recognized Tribe and whether the proposed MOU will smooth the way to a casino development. These questions should not be lightly dismissed. Although the Tejon Tribe is listed in the Federal Register as one of the 566 federally recognized tribal governments entitled to “services” from the Bureau of Indian Affairs,³ the

² <https://www.standupca.org/gaming-law/federal-rulemaking/comment-letters/Skibine%20BIA.nov21Final.pdf/view>

³ 25 U.S.C. 479a-1 Publication of a List of Federally Recognized Tribes

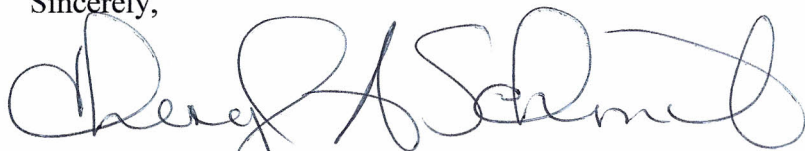
manner in which the Tribe achieved its federal status raises complex federal questions. County Supervisors may want to request outside legal counsel specializing in federal Indian law regarding the legality of the Tribe's "reaffirmation" and to ensure that the MOU it negotiates, if any, does not undermine the County's ability to oppose a gaming fee-to-trust transaction down the road.

The Indian Gaming Regulatory Act (IGRA) provides exceptions for Tribes that are restored to federal recognition by the federal regulatory process, federal court stipulated agreements or congressional action.⁴ IGRA *does not provide* for Tribes that are reaffirmed (*Id.* at 29363) Reaffirmation is a highly irregular decision that bypasses the acknowledgment process established by Bureau of Indian Affairs regulations (25 C.F.R. Part 83). The Inspector General of the Department of the Interior investigated the Tejon Tribe's reaffirmation and issued a highly critical report in 2013, in which investigators concluded that there was not any discernable process used by the BIA to reaffirm the Tribe. While the Tribe is federally recognized, its status is susceptible to legal challenge, as is its eligibility for trust lands. Also problematic, is the late date of the Tribe's reaffirmation, 2011. The Secretary of the Interior lacks authority to acquire land in trust for Tribes that were NOT, "*federally recognized and under federal jurisdiction in 1934.*"⁵

One potential solution would be for the Tejon Tribe to transfer its current tax exemption from the California State Tax Board at 1731 Hast-Acres Dr. Suite 108, Bakersfield, CA 93309 to the Meridian School location.⁶ The County retains jurisdiction and the Tribe reaps the benefits of a tax exemption. Further, the Tribe establishes its Governmental Headquarters without having to process a costly fee-to-trust application and can begin immediately holding meetings and refurbishing the Meridian School. The County avoids the issues raised about the negotiation of an agreement at this time for a non-gaming application potentially watering down County objections to the Tejon acquiring land in-trust for gaming in the future.

Again, Stand Up encourages local governments and Tribes to negotiate MOUs to address environmental and fiscal impacts. However, in this instance, Tejon is negotiating on land yet to be acquired into trust. The County must be certain it understands the federal processes that apply and how an MOU covering the Meridian School will affect those processes. Without such an understanding, the County cannot possibly protect its interests or Kern County residents.

Sincerely,



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⁴ 25 U.S.C. 2719 (b)(A) and 25 2719 (b)(B) (i-iii)

⁵ *Carcieri v. Secretary of the Interior*, U. S. Supreme Court Feb. 24, 2009

⁶ Government Code 1616 (g) <http://www.boe.ca.gov/lawguides/business/current/btlg/vol1/sutr/1616.html>

List of eligible locations: https://www.boe.ca.gov/sutax/tribal_gov_meeting_locations.htm