

Honorable Phil Cline
November 1, 2010
Potential Brown Act Violation

Stand Up For California!
“Citizens making a difference”

www.standupca.org

P.O. Box 355
Penryn, CA 95663

Nov. 1, 2010

Honorable Phil Cline
District Attorney Tulare County
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RE: Additional Information on Brown Act Violation by the City of Porterville

Dear District Attorney Cline:

Stand Up For California! is a statewide organization with a focus on gambling issues affecting California, including tribal gaming, card clubs and the state lottery. We have been involved in the ongoing debate of issues raised by tribal gaming and its impacts for nearly a decade. Since 1996, we have assisted individuals, community groups, elected officials, and members of law enforcement, local public entities and the State of California as respects to gaming impacts. We are recognized and act as a resource of information to local, state and federal policy makers.¹

We write today with and on behalf of the *Coalition of Retailers*, a newly organized group of civic minded business owners in and around the City of Porterville to request your office to take a “hard look” at the attached letter to the City of Porterville, dated October 13, 2010 and the City of Porterville’s response. We also wish to provide your office some additional information regarding this issue. There is heightened public interest in this issue as it significantly affects business development, jobs and the future revenues of the County. We ask for a timely review.

Background on Tule River Indian Tribe’s Proposed Fee to Trust Acquisitions²

As you may be aware, the Tule River Indian Tribe (“Tribe”) has submitted a fee to trust application for 40 acres within the City of Porterville. The Tribe owns this land in fee and operates a successful aviation business. The Tribe also operates a successful Class III casino off of highway 190 near Springfield. The Tribe is a model of success.

¹ Attached for your information is the Bio of Cheryl Schmit, Director *Stand Up For California*.

² The Fee to Trust Acquisition is a federal process, [25 CFR 151](#) – This process covers a review of land use under the National Environmental Protection Act. This process provides for affected governmental entities to address issues of taxation and the administration of justice as well as land use impacts. Moreover, the process makes specific requirements on the tribe to submit information about its need of the land, and the intended purpose for the land. If the purpose includes commercial development, the tribe must submit a detailed business plan.

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Besides the 40 acre application for the proposed transfer of fee land into trust, the Tribe has recently submitted an additional application for 878³ acres in the Springfield area. Should the Tribe be successful in taking these lands into trust, only the Tribe will have control over the development of these lands. (*The title to tribal lands is held by the federal government in a trust status for the benefit of the tribe.*) If the tribe is sincere in its statement not to change the zoning or the present use of the lands then there is no need for taking the land into trust. Moreover, there would be no need for a 'cooperation agreement'. The Tribe would have to develop the 40 acres as any other business entity and pay local and state taxes. Moreover the Tribe would develop the land consistent with the City General Plan and with the California Environmental Quality Act.

There appears no "*immediate need*" for acquiring this land in trust. The Tribes current land base consists of 56,322.93 acres. That is approximately 66.3 acre per each of the approximate 850 enrolled members. The newly proposed acquisitions would increase that to approximately 67.4 acre per enrolled member.

The Tribe through open market purchase has regain control over the development of the 40 acres within the City of Porterville. However, taking this land into trust creates a significant negative impact to the entire County of Tulare as it grants the Tribe *governmental control* over these lands. This creates a disruptive and practical consequence to the surrounding areas which are populated by non-Indians. Taking these lands into trust creates a mix of state and tribal jurisdictions which burden the administration of state and local government and adversely affect landowners neighboring the tribal lands. The County of Tulare⁴ will lose any future taxable revenue from development on these lands as well as reduced revenue from local businesses trying/failing to compete with businesses that the Tribe will establish on these lands. For example:

The Tribe's Eagle Feather Gas Station on Highway 190 is a lucrative business. The stations success, other than a terrific location across from Lake Success providing for the recreational needs of campers, is due to being free from state and local taxation and air quality regulatory requirements. The Station purchases 2 to 3 truckloads of gas each day from the State of Nevada offering gas at a reduced price and gas that is non-certified by the California Air Pollution Control Board. *This weekly purchase represents 2.5 to 3 million dollars annually in lost taxable revenue to the State of California.* This estimate is according to a representative of the California Board of Equalization ("BOE") that was here in Porterville and observed the Eagle Feather Station. This unfair competition has financially harmed other nearby stations that cannot compete with the reduced gas prices and are inhibited by state regulations requiring reduction of green gas emissions.⁵

³Three of the four parcels proposed to be taken out of State regulatory authority and transferred into trust for the Tribe are under Williamson Act Contract. (APN 305-130-010 is the parcel not under Williamson Act Contract). On September 22, 2005 a notice of full non-renewal was recorded on the three parcels. The administration of the Ag Preserve, which includes getting in and getting out, as well as, contract management, etc. lies with the Resource Management Agency of the County. This proposed transfer to trust presents a further loss of taxation to the County.

⁴ The cooperation agreement provides payments to the City, and an increased payment should the Tribe develop something inconsistent with the City General Plan.

⁵ Letter Dated July 14, 2010 from Mr. Greg Forrester supported by 25 additional individual gasoline retailers and store owners, addressed to Andrea Hoch, Legal Affairs Secretary for Governor Arnold Schwarzenegger

Stand Up For California! encourages and endorses Comprehensive Memorandums of Understanding negotiated by affected local jurisdiction impacted by the on reservation developments that create off reservation impacts such as the example above. However, the Cooperation Agreement by the City of Porterville fails to protect the City, its citizens, the County and the future economic success of businesses that will be forced to compete with the Tribe.

I. The City of Porterville and the Cooperative Agreement with the Tribe Approved Behind Closed Doors

Stand Up For California! And the *Coalition of Retailers* is requesting that you take a “hard look” at the process by which the City of Porterville has negotiated and approved the Cooperation Agreement with the Tribe. Attached is the letter dated October 13, 2010 addressed to the City Council that details a substantial violation of a central provision of the Ralph M. Brown Act.

The City Attorney Julia M. Lew has responded on behalf of the City of Porterville. The letter is dated October 22, 2010. The City respectfully disagrees. (*See-attached letter*) There are legitimate concerns with the City’s response.

The City cites Government Code 54956.9(c) as the location on the March 16, 2010 agenda for the discussion. Indeed, the March 16, 2010 agenda under Closed Session includes Item # 6- Government Code Section 54956.9(c) –“Conference with Legal Counsel – Anticipated Litigation (4 cases)”. It is unclear what possible anticipated litigation the City was concerned about at this juncture.⁶ Moreover, it is unclear what the dispute was between the City and the Tribe that would require a closed session under section 54956.9(c).

The Tribe is in a federal process ([25 CFR 151.11 Off-Reservation land acquisitions](#)). This is a discretionary proposal to take land and place in trust. This federal process provides the City, the surround community of citizens, the County, nearby Indian tribes and the State to make comment on the potential negative impacts for the proposed fee to trust acquisition. **This is not an adversarial process**; this is an environmental and land use process.

Nevertheless, the City chose to negotiate a Cooperative Agreement. Clearly, the negotiation of the agreement had to occur prior to this closed session. There must have been meetings between staff and elected officials, and or the City Attorney and the Tribe. This raises new and additional questions regarding compliance by the City to the Brown Act. Amendments to the Brown Act of January 2009 amend the law to prohibit a majority of members of a legislative body to "use a series of communications of any kind, directly or through intermediaries, to discuss, deliberate, or take action on any item of business that is within the subject matter jurisdiction of the legislative body." Over what period of time did this agreement develop and how did all the council members agree at this one meeting in which they were seeking legal advice from the City Attorney about a “potential contemplated legal action”?

⁶ A PRA has been submitted to the City of Porterville making a request for documents that identify the dispute which contemplated potential legal action.

The City states in the October 22, 2010 letter:

“The City did not report the action from the March 16 meeting, nor was it required to, because the Agreement had not yet been approved by the Tribe.”

The term “*action taken*” as defined by section 54952.6 includes a collective decision commitment or promise by a majority of the members of a body. The fact that the decision is tentative rather than final does not shield participants from criminal liability. Section 54952.6 of the Brown Act, which defines “*action taken* for the purposes of the Act expansively, i.e. as “a collective decision made by a majority of the members of a legislative body, a collective commitment or promise by a majority of the members of a legislative body to make a positive or negative decision, or an actual vote by a majority of the members of a legislative body when sitting as a body or entity, upon a motion, proposal, resolution order or ordinance.”

The City negotiated a Cooperative Agreement and a position of support to transfer 40 acres of land to be taken out of the regulatory and administrative authority of the State of California. This certainly appears to be a collective decision, commitment or at the very least a promise by the majority of the members of the body.

We are puzzled as to why the City would have chosen to take this action so early in the fee to trust process? The City established its position prior to the County of Tulare or the Governor of California presenting their comments on the significant environmental impacts to the human environment. In doing so, the City has fast-tracked the Tribes proposed fee to trust application process to the issuance of a “Finding of No Significant Impact” (FONSI). The Bureau of Indian Affairs, Pacific Regional Office issued the FONSI based solely on the unenforceable promises made in the Cooperative Agreement.

II. The City of Porterville views the demand for a cure as untimely as it was not received within 90 days.

Is that 90 days from the March 16, 2010 Hearing or 90 days from the Tribe’s signing of the document or is it the April 20, 2010 Hearing in which the final action is simply reported? Citizens were not really told about the Cooperative Agreement until later in the year when the City held a meeting and whole-heartedly support the Tribe’s application to take land out of the regulatory and administrative authority of the State. Even the Porterville Record reported this as an agreement negotiated behind closed doors. Moreover, the Report on the April 20, 2010 agenda presents the agreement as a done deal. There was no opportunity to provide input or comment on this significant issue by citizens with legitimate concerns.

III. City of Porterville’s Prior Participation in the Fee to Trust Process is Contrary to its current actions.

On August 3, 2003, the City of Porterville was participating in the same federal process it is currently involved in now. The City sent a detailed 7 page letter of comment to the Bureau of Indian Affairs. The letter itemized the loss of property tax, sales tax, and projects the future increased revenue on the improvements to the buildings which is also a loss to the City of Porterville should the land be taken into trust. The letter goes on to identify Utility Users Tax,

Honorable Phil Cline
November 1, 2010
Potential Brown Act Violation

Storm Water Drainage Impact Fee, Water Impact Fee, Sewer Impact Fee, Transportation Impact Fees, Police, Fire and Emergency Services and the loss of that tax if the land is developed and improved should it be placed into trust.

One has to question what has changed for the City since 2003. What “potential contemplated legal action” exists today that did not exist in 2003 when the city was involved in the federal fee to trust process? Will the taxpayers, the small business owners be expected to not only compete with unfair competition but subsidize the loss taxes that are created by on reservation Tribal developments?

IV. City of Porterville Previously Approved a Cooperative Agreement

On January 30, 2008, the City of Porterville listed on the agenda under scheduled matters, Item #1:

Consideration of Approval of a Memorandum of Understanding between the City of Porterville and the Tule River Indian Tribe to Advance Further Negotiations and the Performance of Governmental Process. RE: Consider approval of MOU with the Tribe identifying framework for future negotiations for the development of the Porterville Municipal Airport area.

At this time, the Tribe was proposing to move their Gaming Facility from the established Reservation to the City of Porterville and develop the 40 acre site as a casino/resort. Indeed, the Tribe’s desire to establish this 40 acre site as a casino/resort dates back to 2002.

Nevertheless, in 2008, the City followed the spirit and the letter of the law of the Brown Act to allow the public to attend, observe, monitor and participate in the decision-making process at the local level of government. The proposed Memorandum of Understanding (MOU) is attached to the Jan. 30, 2008 agenda.

V. Flaws in the Cooperative Agreement that Require Legal Review to Ensure Enforceability

The Cooperative Agreement approved by the Council on March 16, 2010, and then not disclosed to the public until the April 20, 2010, has effectively circumvented the public’s ability to have input in the development of an agreement that significantly affects the business community and its economic viability in and around the City of Porterville. Ultimately, the City of Porterville has negatively affected the scarce tax dollars to the county’s general fund further impacting the county budget and county jobs.

City Attorney Lew writes in the October 22, 2010 letter, “Pursuant to Section 54960.1(d) (3), actions taken giving rise to a contractual obligation, upon which a party has in good faith detrimentally relied, cannot be invalidated.” Well...these types of agreements have been invalidated by the lower courts for various reasons. Below are two questionable areas of the Cooperation Agreement between the City of Porterville and the Tribe, which present serious and critical concerns over the documents ability to control developments and its enforceability.

Honorable Phil Cline
November 1, 2010
Potential Brown Act Violation

If the agreement is not enforceable, how can the Bureau of Indian Affairs issue a FONSI based solely on the Cooperative Agreement?

(a) The City of Porterville has potentially violated the California Environmental Quality Act in approving this Cooperative Agreement. Section 4 of the Cooperative Agreement states:

#4. NON-Applicability of CEQA

The approval of this Agreement is not subject to the California Environmental Quality Act (CEQA) as it does not constitute a project under CEQA.

A “project” is a proposal (or any part of a proposal) requiring discretionary approval, which may result in physical changes to the environment. The term “project” refers to the activity that causes the environmental damage. Clearly this Cooperative agreement acknowledges changes in the environment, as well as changes to the City General Plan.

The proposed agreement constitutes a “project” under the California Environmental Quality Act, (CEQA). The proposed agreement contains provisions that purport to legally bind the City signatory to a definite course of action that typically involves physical changes to the environment. Agreements like the Cooperative Agreement between the City of Porterville and the Tribe, present a future of general noncompliance with state environmental review requirements under the California Environmental Quality Act (CEQA). Some of these types of agreements have already resulted in judicial invalidation by the lower courts. (*Citizens to Enforce CEQA vs. City of Hesperia*, See also *No Casino in Plymouth vs. City of Plymouth*, *Amador County vs. City of Plymouth*, and *Citizens for Local Gov't Accountability vs. Palm Springs RDA: Settlement Payment, Attorney General Lockyer May 17, 2005 Settlement - Citizens for East Bay Parks vs. The City of Richmond*)

(b) The Cooperative Agreement appears to be Judicially Unenforceable. Section 8 of the Cooperative Agreement states:

Waiver

Subject to the provisions of this section, each of the Parties expressly and irrevocably waives sovereign immunity (and any defenses based thereon) in favor of the other Party as to any civil action relating to claims of breach of this Cooperation Agreement (including but not limited to, claims for injunctive, specific performance or declaratory relief), and not as to any other actions, matters or disputes. Both parties agree that any dispute that is brought as a result of this Agreement shall not include any claim for monetary awards of damages.

Federal Indian law drastically affects and changes any contractual agreement. There is no Tribal Resolution that accompanies the final document reported to the public on April 20, 2010, under the Consent Calendar as item #10a. Tribal Governments must pass a resolution to bind it to a contractual agreement. However, when a tribe waives its sovereignty certain criteria must appear in the resolution to ensure that it will be judicially binding and enforceable. The following criteria are required.

Honorable Phil Cline
November 1, 2010
Potential Brown Act Violation

1. The Resolution must agree to address matters arising under the terms of the contract in order to judicially waive the Tribes immunity to civil liability.
2. The Resolution must be adopted in a manner consistent with the Tribes Constitution. If the Tribe Constitution does not address waivers of immunity and some do not, then it will require a vote of the entire tribal membership, in order to waive the tribes immunity to civil liability.
3. The Resolution must identify who is to sign the agreement or authorize the entire Council to sign the Agreement
4. If the Contract exceeds seven years and limits a tribal government's authority over the use of the land or impairs the title to the land, it then requires a review under USC Section 81 by the Secretary of the Interior. This may require the signature of the Secretary of the Interior. (25 CFR Part 81).

V. Conclusion.

The City of Porterville regardless of the ultimate determination regarding the City's compliance with the Brown Act in connection with the Cooperative Agreement, has managed to circumvent the input and legitimate concerns of the public, and move forward with a project that has been the Tribe's goal since 2002. Moreover, the City's actions have fast-tracked the proposed acquisition to the benefit of the Tribe and the detriment of the County and surrounding community of citizens.

What is in this deal for the City, the County the State? Nothing! The City of Porterville will eventually become a charity of the Tribal government. Elected officials will lose their political power and ability to protect the very citizens who support their political careers. The County and the State will lose a valuable revenue source further exacerbating our economic condition.

Stand Up For California! and the *Coalition of Retailers* respectfully requests that you give the process by which the City approved the Cooperation Agreement and the terms and enforceability of the Cooperation Agreement a "hard look". Further, we hope that you will share your findings with the Tulare County Board of Supervisors to assist in its efforts opposing this proposed 40 acre acquisition. If *Stand Up For California!* can be of further assistance please do not hesitate to contact me. We send our sincere thanks in advance for your timely consideration.

Sincerely,



Cheryl Schmit – Director

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www.standupca.org

Honorable Phil Cline
November 1, 2010
Potential Brown Act Violation

CC: County of Tulare

Andrea Hoch, Secretary Legal Affairs for Governor Arnold Schwarzenegger
Sara Drake, Sr. Asst. Attorney General Indian Law and Gaming Unit

ATTACHMENTS: Links to these attachments connect to the City of Porterville web site or to the Stand Up For California web site (should the links not work for you paste this link in your address line <http://www.standupca.org/off-reservation-gaming/contraversial-applications-in-process/tule-river-indian-tribe-1/>)

Bio Cheryl Schmit, Director Stand Up For California (attached)

City Agendas and Letters:

January 30, 2008 Agenda – Demonstrates a transparent process, Item 1. Under Scheduled Matters

March 16, 2010 Agenda - Closed Session includes Item # 6- Government Code Section 54956.9(c) “Conference with Legal Counsel – Anticipated Litigation (4 cases)

April 20, 2010 Agenda - Item #10a listed as Report only, no action

July 26, 2010 Agenda - 18a. Request for a Letter of Support for the Tule River Indian Tribe’s Fee to Trust Application Re: Authorizing the Mayor to sign a letter of support for the Trust Conveyance of the Tribe’s 40 acre site, located in the vicinity of the Porterville Airport.

August 2003: City of Porterville comments 40 acre application of Airport Property Letter from City of Porterville to Dale Risling, Sr. Superintendent BIA

Related News Stories:

City retorts to Brown Act violation claims October 27, 2010 10:41 AM By DENISE MADRID THE PORTERVILLE RECORDER

City backs Tribe's application for trust 07-23-10 12:42 PM By JENNA CHANDLER Porterville Recorder July 22-2010

Tribe report cites small revenue loss to City, County 10, 2010 10:00 AM By JENNA CHANDLER THE PORTERVILLE RECORDER

City, Tribe draw framework for collaboration 04-18-10 09:19 PM A ‘Cooperation Agreement’ requires city approval of development of Tribe's 40 acres near airport April 17, 2010 9:55 AM BY JENNA CHANDLER THE PORTERVILLE

Tule River Tribe seeks off-reservation casino June 30, 2008 Indianz.com

Documents – includes letters by the Governor, the County and Business owners:

***October 22, 2010: City Responds to Coalition of Retailers** The City disagrees with the Retailers contentions.

***October 13, 2010: Violation of the Brown Act** Coalition of Retailers is a group of civic minded business owners operating in and around the City of Porterville. We have reviewed and cited within this letter directly from the Attorney General of the State of California's publication, the substantial violations of the central provision of the Ralph M. Brown Act.

September 17, 2010: Amended FONSI

September 9, 2010: Re-submit Letters of Comment on September 2, 2010 the BIA issued a FONSI on the 40 ac application by the Tule River Indian Tribe. The FONSI failed to include letters of comment which included the Governor's letter of comment. The BIA is

Honorable Phil Cline
November 1, 2010
Potential Brown Act Violation

withdrawing the FONSI and will consider the comments before resubmitting the FONSI.
We hope the BIA will require a full EIS.

[July 26, 2010: FINAL-Tulare County letter to BIA](#) Exhibits A - E

[EXHIBIT A - Revised: RMA Letter to BIA](#)

[EXHIBIT B. 4.28.10 ltr to BIA re Tule Tribe airport land](#)

[EXHIBIT C.1 Letter](#)

[EXHIBIT C.2 Honorable Andrea Hoch](#)

[EXHIBIT C-3](#)

[Exhibit D.1 7.22.2010 NEWS- City backs Tribes application for Trust](#)

[EXHIBIT D.2 7.23.2010: NEWS- Porterville Recorder](#)

[Exhibit D.3 7.22.2010- NEWS- Fresno Bee](#)

[EXHIBIT E Revised. ALUC Letter to BIA](#)

[Attachment: County of Tulare Letter to BIA](#) Improper Notification

[July 26, 2010: Governor's Comments on Tule River Fee to Trust](#)

[July 26, 2010: Smiths Enterprises comment](#)

[June 2010: Draft Environmental Assessment Airpark](#) Unknown Future Developments

[Feb. 10, 2010: Governor to US Dept. of Interior](#) The application does not demonstrate any need to transfer the land into trust nor does it demonstrate that the Tribe would not be able to prosper economically without the land being in trust.

[Dec. 23, 2009: Tule River Notice of 40 acres](#) Notice renewing 2002 application for land into trust

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