

Stand Up For California!

“Citizens making a difference”

standupca.org

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February 6, 2006

Honorable Richard Pombo
Chairman, House Resources Committee
Attn: Chris Fluhr
Fax: 202-225-7094

RE: Draft II. - October 31, 2005 - Off Reservation Gaming

Dear Chairman Pombo:

Stand Up for California sincerely appreciates your continued efforts to bring forward legislation in an attempt to restrict the proliferation of tribal gaming and at the same time encourage greater local government involvement in the mitigation of impacts. After holding several hearings and eliciting comments from tribal leaders, state and local governments, and other interested parties, your office has circulated the second of two draft bills (1-31-06) to amend IGRA to address off-reservation gaming. We wish to submit additional comments to this draft language essential to reining in the proliferation of gaming on after acquired-lands in California.

The draft bill currently has two sections, the first we ask you to consider deleting as it drastically affects the delicate balance between the rights of authorities of states, tribes and the federal government, and the second we vigorously support.

Section 1. Restriction on Off-Reservation Gaming:

Stand Up For California has great concerns over this section of the draft bill and respectfully requests your consideration to strike this section. The problem is not gubernatorial concurrence (section 2719 (b)(1)(a)) as there have been only three such withholdings of gubernatorial authority in the last 17 years, rather the problem is with tribes and gaming investors circumventing the two-part determination carving out one of the exceptions under section 2719 (b)(1)(B) (i-iii).

This section while giving the appearance of expanding concurrence for approval of off-reservation gaming, to include a governor, state legislature, nearby Indian tribes and a majority vote of the surrounding Parish or County is in essence a federally mandated moratorium on gubernatorial concurrence. This language needlessly restricts a governors executive authority to assert long-standing state policy in the management, growth and location of class III gaming. Moreover, it invites tribes to fight tribes over gaming market competition.

Discussion of Gubernatorial Concurrence: Section 20 concurrences for land acquired after October 17, 1988 require a two-part determination approval for the establishment of land for gaming facilities after the enactment of IGRA. The information for the determination is prepared in the Department of the Interior, Bureau of Indian Affairs-Indian Gaming Management. The research and compliance items are given to the Secretary of the Interior to review in order to develop a concurrent opinion with the Governor of the state. This process provides significant opportunity and protections for nearby tribes, State Agencies, Commissions, local governments and communities of citizens to participate in the Section 20 concurrence process.

Nevertheless it must be noted, there is no federal regulation in place that details the concurrence process. It is unclear what triggers the review if the land is already in trust. Without a federal regulatory process there is no assurance that there is a window of review, a deadline and a final action. The concurrence of the Governor of a State and the Secretary of the Interior are determinations which must reflect the process for land acquisition specific for gaming and verify the Secretary has completed requirements to consult with the state, state agencies, other local political subdivisions and affected tribal governments of the proposed off-reservation casino.

Tribes promoting gaming off-reservation under Section 20 do not have the legal authority to **'obligate'** the Governor to concur with the Secretary of the Interior. The Governor's concurrence is an exercise of "executive powers" *on an infrequent and episodic basis*. The law merely says that the Governor may concur -- if the Governor does not concur, the tribe does not get a tribal state compact. The Siletz Tribe sued the Governor of Oregon for refusing to concur. The 9th Circuit Court of Appeals ruled in favor of the Governor.

The request from local government for the exercise of the Governor's executive power to permit off-reservation gaming must not be abused. A Governor must **establish objective criteria** for the exercise of his/her executive power for concurrence of an off-reservation casino in agreement with the Secretary of the Interior. Criteria must include evidence of public comment received and public debate engaged in of the affected communities and local governments at large.

The objective criteria must include meaningful evidence that the Cities/Counties have provided the opportunity for public comment and allowed for the public to engage in debate. This must be done before the Governor can concur in the federal determination of no detrimental impacts to the surrounding community or in the contractual agreement of a tribal state compact. The established criteria of the Governor's determination will be supported by evidence of responsible government actions representing the majority of their constituents and regional neighbors.

The off-reservation Indian gaming policy is purely at the discretion of the Governor. This authority is an 'executive exercise'. If misconstrued as a veto, some judges might view this as a significant authority by an official who is not appointed by the President and may be a violation of the Appointments Clause of the U.S. Constitution, or the

principles of separation of powers. This very issue has been litigated in the 7th Circuit in the case of Lac Courte Oreilles Band of Lake Superior Chippewa Indians in an action against the U. S. The court once again upheld the exercise of executive authority to refuse negotiations for off-reservation casinos.

On May 18, 2005, Governor Arnold Schwarzenegger introduced a detailed Proclamation stating his general policy opposing off-reservation gaming. The Governor stated he would not negotiate with tribes for urban casinos, or with tribes that did not have eligible land for gaming or widespread local support. In addition, the project must serve “a clear, independent public policy, separate and apart from any increased economic benefit or financial contribution to the State, community or the Indian tribe that may arise from gaming.” Criteria such as this placed in federal regulation would strength further the concerns of affected communities and nearby Indian tribes.

Nonetheless, since there is no federal regulation in place, this is a gray area and has left room for both political and gaming money influence. Determinations are often based on a “sliding scale” in which the relationship to the land wanted, the intensity of the development and the availability of alternatives all play a role.

Recommendation: Therefore, we respectfully request that the two-part determination and gubernatorial concurrence be addressed through the rule-making process. Additional requirements in federal regulations through the rule-making process must be required on tribes and their gaming investors that require more than satisfying as a matter of historical fact that Indians have resided continuously on the specific site of the casino project. There should be evidence of Indian title to the land. The evidence must be strong and compelling and the claim on the land must be continuous and current.

Consolidation of Gaming:

We fully support the concept of “*consolidation*” and ask that you take into consideration the concerns of California State Association of Counties in the final language of this section.

Reservation venue sharing is the concept which provides a unique and novel solution to tribal gaming on after-acquired lands. This proposal further eliminates the social discord and environmental impacts to the surrounding community through the development of new Indian lands for gaming. Consolidation has a positive effect for tribes to develop destination resort locations as evidenced in the Las Vegas model, further enhancing the economic viability of the tribal gaming industry.

The language of this draft clearly defines and makes transparent the proposed gaming process and proprietary interests and responsibilities for gaming conducted through a lease agreement between a host and invited Indian Tribe.

Sincerely,

Cheryl Schmit – Director

Congressman Pombo -Draft
10-31-05

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