

# **Stand Up For California!**

“Citizens making a difference”

standupca.org

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June 14, 2005

Yuba County Board Of Supervisors  
Yuba County Government Center  
Board Chambers  
915 Eighth Street, Suite 109A  
Marysville, California

## **RE: Casino Contract Conundrum**

Dear Yuba County Board of Supervisors:

Stand Up For California writes to this honorable Board today to alert you to serious questions regarding the validity and enforceability of the Memorandum of Understanding (MOU) between the County of Yuba and the Enterprise Rancheria. I urge you to seek special outside legal council in this matter because: (1) The county may lack the authority to enter into an agreement based on revenue sharing with a tribal government from casino profits (2) thus, the MOU may be invalid and unenforceable, (3) the County may be in violation of the California Environmental Quality Act (CEQA), and (4) the Enterprise Tribe may be in material breach of the MOU signed December 17, 2002 and (5) which may invalidate the agreement.

**Lack of County or City Jurisdictional Authority:** The Indian Gaming Regulatory Act (IGRA) authorized states to negotiate compacts for gaming with Indian Tribes. California has both Constitutional and state statutes empowering the Governor to negotiate and the state Legislature to ratify gaming agreements as provided by federal law. There is, however, no express constitutional or statutory authorization for cities or counties to enter into agreements with tribal governments for a share of casino revenue without a provision in a tribal state compact. The County has not sought, nor obtained an legal opinion as to the validity of or the ability to enter in to an MOU.

**County Non-Compliance of CEQA:** City and County governments which have developed agreements with tribes lacking tribal state compacts or land in trust do not know whether, or the conditions under which, class III gaming will be approved for the land in question. The Yuba County MOU may constitute a “project” under CEQA. The Yuba County MOU contains provisions that purport to legally bind the County to definite courses of action that typically involve physical changes to the environment. In entering this agreement, it appears the county may be in general noncompliance with state environmental review requirements under CEQA. Recent City MOU’s have resulted in judicial invalidation agreements by 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*)

**Potential Breach of MOU:** “Whereas clauses” may constitute admissions by the party or parties agreeing to them to be true. (Evidence Code section 622.) It is imperative that the County be certain that these recitals in the “Whereas clauses” are in fact true. For example:

The very first recital in the December 2002 MOU states:

**Whereas, the Tribe is a federally recognized Indian Tribe which has been recognized by the Government of the United States, continuously, since 1915:**

This “whereas” raises several issues, including whether this group of Indians was, in fact, ever federally recognized, notwithstanding any recital in the Federal Register. Also, are the signatories to the MOU the legitimate successors-in-interest to the current Enterprise Rancheria? These legal issues are in dispute between the Enterprise Tribe’s own tribal factions with a formal appeal sent to the Indian Appeals Board. Given these legal challenges, this MOU may be premature or invalid or voidable.

Another example:

**Whereas, a ruling on the Tribe’s trust acquisition application constitutes a federal discretionary action subject to the National Environmental Policy Act (NEPA);**

The MOU with the Enterprise Rancheria was entered in good faith by the County of Yuba based upon the tribes “**discretionary**” land acquisition. (25 CFR 151.11). Since the MOU was signed, the tribe has inexplicably attempted to acquire the land as a Congressional Act – on two separate occasions – without notifying the County of Yuba or Congressman Herger. As you may know, a Congressional Act makes the tribal land acquisition ‘**mandatory**’, **not discretionary**. The land becomes eligible for gaming under a clear and indisputable exception pursuant to IGRA. A Congressional Act exempts the tribe from otherwise complying with the law (as a discretionary acquisition) and the Tribe thereby circumvents state gaming policy recently established by Governor Schwarzenegger and the discretion of the Secretary of the Interior.

This may appear more trouble in light of the fact that the Enterprise Rancheria recently filed a motion to intervene in the re-licensing of the Oroville Dam Project before the Federal Energy Regulatory Commission. The Tribe’s motion asserts a conflicting and revised tribal history of Indian lands and may amount to an attempt to acquire land through a ‘**land settlement**’ with the United States. This demonstrates another attempt by this tribal government to seek a back-door Congressional ‘**mandatory exception**’ – which may violate the terms of the MOU or make it voidable.

Other “whereas” clauses are equally troubling.

**Whereas, the County is prepared to support the Tribe’s trust acquisition application only if the County is assured that anticipated detrimental impacts to the County and the surrounding communities can be mitigated through a binding and enforceable agreement between the County and the Tribe and the Tribe is willing to enter into such a binding and enforceable agreement:**

This clause is vague, ambiguous and subject to various interpretations. For example, what detrimental impacts will there be? How can they be mitigated? What will be the specific terms and provisions of any future “binding and enforceable agreement”? The County itself, in the August 19, 2004 letter to Clay Gregory, Regional Director of the Pacific Region of the Bureau of Indian Affairs, recognized the vagueness of this clause. The letter identifies thirty-six items and supports the conclusion that the casino/hotel resort complex will have a significant and detrimental environmental impact in several respects. However, the tribe has provided no assurance to the County as required in the Whereas clause.

Erecting a casino at this location will entail a multitude of significant and direct impacts. This area, previously zoned farm-land, was voted to become a raceway under the stringent guidelines of CEQA. Without the protection of CEQA to fully mitigate the impacts of a casino/hotel resort complex, including the related facilities such as restaurants and parking structures (see section 1 of the MOU), this project could be an environmental disaster for the County. This is especially true when coupled with the Tribe’s plans (section 11) to purchase and take into trust additional contiguous parcels of land. No mitigation has been proposed for these additional facilities and/or parcels. Until this land is in trust, the tribal government and the County must comply with state law and abide by CEQA. Legal counsel will confirm that the tribe’s sovereignty does not prevent the enforcement of CEQA on land not held in trust (i.e. owned in fee-simple).

It is further unclear if this proposed casino includes the serving of alcoholic beverages. If so, both state and federal law apply. The administrative regulation (25 CFR Section 291.4 (15)) provides that service of alcohol in a class III gaming facility can only follow the tribe’s adoption of a liquor ordinance and approval of that ordinance by the Secretary of the Interior. The ordinance is submitted to the Secretary and reviewed. This process is subject to federal criminal law (18 USC Section 1154- Intoxicants dispensed in Indian Country). California State Constitution XX section 22 applies to public welfare at the manufacturing, importing or sale of alcoholic beverages at tribal casinos. Off-reservation impacts of the sale of alcohol may implicate County services such as law enforcement, ambulance services, and other unaddressed impacts. It seems the approval of the serving of alcohol may implicate indirect impacts subject to CEQA, but not addressed by the MOU.

**New State Policy: Section 14: Reopen Provision** - The MOU identifies the possibility of state or federal changes in gaming laws, financial obligations or changes which materially impact the parties.

On May 18, 2005 Governor Schwarzenegger made public a Proclamation of State policy regarding off reservation casinos. This proclamation provides four clear criteria that must be met in order for the Governor to consider a section 20 concurrence.

Two days later, James Cason, Assistant Deputy Secretary of the U.S. Department of the Interior, announced a major policy shift at the BIA regarding tribal state compact approvals. This represents a major policy shift that will require tribes to place their land into trust before seeking a tribal state compact. The current two-part determination trust process is taking upwards of 3 to 4 years for gaming acquisitions.

- This new policy by the BIA represents a significant new federal policy that affects both gaming laws and financial obligations and materially impacts the parties.
- The governor's policy of no section 20 concurrences without a demonstration of widespread public support and the lack of an independent public policy affects this MOU.
- The tribe's failed Congressional Acts affects this MOU.
- As noted, the tribe's current motion against the FERC stating a conflicting and revised tribal history impacts the MOU.
- The Enterprise Tribe's Environmental Impact Statement and scoping hearing implicates a significant financial obligation by the tribe affecting the MOU. This also identifies the potential failure of the County to adhere to CEQA.
- The opening of Thunder Valley Casino since the approval of this agreement clearly impacts the financial ability of the tribe to mitigate the impacts of a casino in Yuba County.
- Congressman Pombo's federal legislation to rein in "**reservation shopping**" affects this MOU.

In light of the significant changes to date, the MOU will be even more outdated in 3 to 4 years. Numerous private developments are proposed and being developed around the location of the currently proposed site. These new developments will require additional mitigations not considered in the outdated MOU.

Additionally, Governor Schwarzenegger has established judicially enforceable agreements in the newly negotiated compacts. The new compacts include "**disincentives**" for local government to host off-reservation casinos. Revenue sharing is with the State of California, not with local governments. Local government may anticipate only land use and service mitigations in Schwarzenegger compacts.

Further, this MOU is intended to obligate the County to support the tribes land acquisition in return for "**unenforceable promises**". There is a great deal of inconsistency in the treatment of promises and representations by the Tribe. Violation of

Section 3, 6, and 7-1 contain breach language. However the remaining sections contain only promises made by the tribe. For example:

Section 4: there is reference to mutual interest in acting against ‘crimes which may be committed against the Tribe, its members, personnel, business entities or patrons.’ Why no mirror reference to such crimes committed by those persons or entities against non-Tribal entities/persons?

Further, in Section 4 with reference to public benefit fraud there is a provision for a “redacted copy” of a document to be provided. What is the public policy rational behind this? What is to be redacted? Who decides? Is this to protect tribal members who might violate the law?

Overall, there is a disconnect with regard to the amount the County is to receive for law enforcement services. The amount is capped at Five Hundred Sixty Five Thousand Dollars (\$565,000.00). The problem is that if the County does not employ adequate personnel or acquire adequate equipment to provide law enforcement services “at a level at least equal to that provided to the County as a whole”, the tribe may **WITHHOLD** up to Five Hundred Sixty Five Thousand Dollars (\$565,000.00). The problems is obvious: The County may end up providing services, but the Tribe may deem it less than other areas and unilaterally withhold the funds. Moreover, what if the cost of providing those services (at an equal level) exceeds \$565 thousand dollars?

- **These are just a few of the many serious and critical inconsistencies in this agreement.**

Stand Up For California urges you to seek special outside legal counsel familiar with Indian law, gaming law and environmental law regarding the validity, to discern the enforceability of this MOU. Other issues remain. For example, it is unclear if Tribal Resolution NO. 02-27, passed by the Enterprise Tribal Council on December 18, 2002, grants authorization to the persons signing the MOU.

Absent clear legal direction, it is unclear to what extent, if any, the parties are bound by the MOU. At the very least, there are public policy concerns and financial burdens that may overwhelm the County taxpayers today and into the future.

Sincerely,

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Honorable Peter Siggins, Secretary of Legal Affairs to Governor Schwarzenegger  
Honorable Attorney Dan Kolkey, Tribal State Compact Negotiator  
Honorable Congressman Wally Herger  
Honorable Congressman Richard Pombo  
Honorable United States Senator Dianne Feinstein