Testimony of Marshall B. Grossman

Before the
United States House of Representatives Committee on Natural Resources
Subcommittee on Indian and Alaska Native Affairs

On

"Oversight Hearing on Indian lands: Exploring Resolutions to Disputes Concerning Indian Tribes, State and Local Governments, and Private Landowners over Land Use and Development"

Washington, DC
August 2, 2012

Thank you for the invitation to appear here today. My name is Marshall Grossman. (My bio is attached as pages 4-5 to the Appendix). I am a lawyer engaged in private practice. I have also been privileged to serve on two California State commissions.

I was previously a member of the California Coastal Commission. We faced highly contested land use and development issues along the 1100 mile California coast line and coastal zone. I learned that it is not always easy to resolve the legitimate and sometimes competing interests of private property owners and of those challenging proposed development based on land use and environmental laws. A number of those projects required the need to ensure that they did not negatively impact sites important to Indian heritage and culture. In balancing competing interests, I understood how important it is for those entrusted with decision making during the administrative review of land use issues to hear from all stakeholders and to make legitimate findings on the material issues and to do so with clarity.

Additionally, most recently, for 10 years I served as a member and then Chair of our State Commission on Judicial Performance which is charged with disciplinary oversight of our State judiciary. As is true of most agencies, the Commission on Judicial Performance has specific guidelines and makes specific findings in rendering its decisions.

In preparing for this hearing, I was surprised to learn that the Secretary of Interior may summarily render his decisions on fee to trust issues without applying the fundamental principles of fair process normally required of any administrative hearing officer. I was also surprised to learn that in California alone during the 2001 to 2011 time period there were 110 applications for fee to trust conversions and every one was approved.

Our family has been privileged to own a 29 acre ranch in Santa Barbara County's Santa Ynez Valley since 1979. We are directly across the highway from the 1400 acre non reservation land recently purchased by the Santa Ynez Band of Chumash Indians. These 1400 acres, approximately 2.2 square miles, approximate in its size the largest city in the Santa Ynez Valley

The Santa Ynez Valley is well known for its bucolic setting of open space, oak trees, and ranches, horse breeding, thousands of acres of vineyards and over 100 wineries with some 5,000 acres of vineyards. Some of you may recall this Valley as the setting for the movie Sideways. Many know it as the location of the Reagan ranch, the former Western White House, Il Cielo. The Valley is a remarkable melding of the old and the new West. The community takes pride in the old stage coach route and historical sites and the diversity of recreation, livestock and wineries. The towns in the Santa Ynez Valley are small and western in character with populations of a few thousand and as low as a few hundred. The largest city is Solvang (pop. 5,245), an original Danish settlement founded in 1911. These communities represent the best in small-town America. The Valley has many long-standing traditions which celebrate its diversity, including Danish Days, the local Olive and Jazz festival and the annual inter-tribal Pow Wow and Chumash Cultural Days.

The 1400 acres now subject to potential fee to trust conversion is the gateway to the Santa Ynez Valley. It is a picture perfect panorama of pastoral beauty which visitors see upon arriving in the Valley from the south; a sweeping meadow generously graced with historic and protected oak trees. This expanse of farm and ranch land is located some 2 plus miles away from the tribe's reservation and existing casino which is sited in a commercial center. (Photographs are included at pages 1-2 to the Appendix)

The community is now facing a challenge of unprecedented proportion. It is the proposed conversion of 1400 acres of protected farm and ranch land into some 500 residential units, golf courses and a several hundred room resort hotel and perhaps yet another casino for the Santa Ynez Band. This land is not part of or contiguous to any Indian reservation. It is unthinkable that the Department of Interior is vested with the legal power to approve unchecked development in an area the size of a city under any circumstances.

I appear today as a private citizen to urge Congress to ensure that the voices of the public and of their local and state public officials and agencies are truly heard on key land use and environmental issues when the Department of Interior considers fee to trust transfer of private property to Indian land. I trust that you are aware that this is an issue at the state level as well. Coastal states such as California evaluate fee to trust applications for their consistency with their respective Coastal Zone Management Acts. In doing so, the states apply clear guidelines and make specific findings. In California there is an effort to silence the State and its various agencies from objecting to fee to trust transfers. In June 2012, the California Coastal Commission adopted its Staff Report in opposing this legislative effort. (The Staff Report is attached as pages 6-7 to the Appendix.)

At the federal level, the absence of meaningful standards for review of fee to trust transfers literally guarantees that a Department of Interior so inclined will invariably approve any and all transfers regardless of their impact on the community and without any realistic chance for judicial review. The result is an utter disregard of the community and local government long term planning for the region with its carefully crafted land use laws. Without a change in the law, you can be certain of the defacement of non tribal land in small towns and communities through out this country, perhaps including areas in your State or your district which you and your constituents hold dear.

I appear before you to seek your help in creating common sense and reasonable standards for the Department of the Interior when it considers taking privately owned land into trust for the benefit of an Indian tribe. By doing so, you will help to ensure a hearing and fair process to those

community stakeholders whose way of life and property values will be impacted by a proposed fee to trust conversion. Today, the tribal interests are well protected. The interests of others are not and are often simply ignored. The Department of the Interior operates without any real constraints or standards. It effectively preempts and neuters the planning of state and local governments. It disenfranchises citizens, neighbors and property owners from the stewardship of their own communities. In the case of this specific proposed fee to trust transfer, those at the most risk are ranchers, farmers, vintners, horse breeders, the small business owners and the over whelming majority of the citizenry. What of their economic concerns? What of their environmental concerns? They don't count under the current system. No pun intended, but the deck is stacked.

Our situation in the Santa Ynez Valley is a truly important and critical case. If land the size of the largest city in the region can be converted to trust and its development virtually unchecked then it will sow the seeds of harm for rural communities throughout the country. No community where there is an Indian reservation in the same general area will be immune from a similar fate.

It has been suggested by some that Indian gaming is not sound public policy. That is not my concern here today. The reality is that there is no shortage of Indian gaming in California. There are 67 NIGC licensed gaming facilities in California and they generate almost one-third of the more than $27 billion in 2011 national Indian gaming revenue.

The 143 members of the Santa Ynez Band share in this wealth. To its credit, the Santa Ynez Band appears to be a resounding economic success. Its members have a 130 acre reservation in Santa Ynez which includes the Chumash Casino Resort and a 123 room AAA Four Diamond Award hotel and spa. Its off reservation holdings in the Valley include the 124 room Hotel Corque and adjacent restaurant; the two-story Hadsten House Inn with day-spa and restaurant; two of the four gas stations in the area and an employee-resource center office building in neighboring Buellton. In all, the Band is the public owner of some two dozen parcels in the Valley. (See the map at pages 3 of the Appendix).

It has also been suggested that those who oppose this specific fee to trust conversion are dismissive to our Indian neighbors. That is not true. Being dismissive to your neighbors is where, as here, a tribe wants to scrap a community wide land use plan and throw it to the winds. All neighbors should respect water conservation, preservation of sensitive habitat, traffic and crime prevention controls, scenic and view protection. Yet the Santa Ynez Band can ignore them all it wants, if the federal government enables it to do so. What's wrong with this picture? Everything. Being dismissive is attempting to place non reservation land into trust and to create a mini city which no others could lawfully do under existing land use laws.

We are not talking here about a mere variance based on site specific conditions. We are here concerned about shredding a carefully considered regional land use plan approved by local public officials with over whelming community support. Nor are we talking about a mere transitory step subject to further review. A transfer into trust is permanent. It binds future generations. It saps the community of its character and beauty. It takes what prior generations have built and casts it aside with the stroke a pen. It destroys our land and our watershed. It forever removes this land from agricultural use. It replaces horses and bicycles and scenic country drives with 24 hour casino tour buses and intoxicated drivers. It increases the burden on public service and weaves a quilt of overlapping law enforcement. It deprives both the local government and the state of badly needed tax revenues while increasing the tax burdens of all those who do pay taxes. Even now the mere potential of this proposal is being felt. Recent property sales in the immediate area are reportedly off by 40 to 50 percent. In short, if this transfer is approved it will benefit one small community and its unknown financial backers at the expense of every other community and stakeholder.

I do not discount the legitimate economic concerns of this or any other tribe. I understand the federal government - notably the Congress - has a unique trust responsibility. I understand that the policy of the United States is to further the self-determination and economic self-sufficiency of Indian tribes and Native Alaskan communities. Where appropriate, this means consolidating and acquiring land in trust. Ideally, fee to trust should be based on mutual support and respect between tribal governments and the state and local communities which fosters good stewardship of the land, public safety and economic growth. The current review process fosters distrust; not

partnership or cooperation. There is no need for any tribe to consider the views of anyone other than the Department of Interior.

The Valley has treasured sound stewardship of the land for well over a hundred years. Most importantly I refer to the Santa Ynez Valley Community Plan enacted by the Santa Barbara Board of Supervisors in 2009. The Community Plan is the product of more than 50 community meetings with wide citizen participation. It represents sound and well considered planning for the Santa Ynez Valley. It is a public document which you are welcome to review.

http://longrange.sbcountyplanning.org/planareas/santaynez/documents/Board%20of%20Supervisors%20Adoption/Electronic%20Docket/Master%20Final%2010-15-09.pdf

The Community Plan establishes the criteria for land use, housing, conservation, open space and related fields. The impetus for the Plan was a proposed private development of this land led by its then owner, Fess Parker, and the Band. In 2003, Fess Parker and the Band were seeking to jointly develop a major resort with two golf courses, a 300-unit resort hotel and 500 residential units. The land was then and is now zoned for agriculture and included in the State's agricultural conservation law, known as the Williamson Act. This was Parker's second attempt to develop the land contrary to existing land use laws. There was overwhelming community opposition. By 2005 the proposal was dropped. However, in 2010, following the death of Fess Parker, Parker's estate sold the parcel to the Band. In short order the Band announced plans to take the parcel into trust.

I understand the Band claims that it will only use the land to house its members. With respect, that is not viewed as credible. The prior development plans of Fess Parker and the Band show the desired development to be much more than housing. Moreover, the naked statement of intended use means nothing. As the Committee knows, under existing law once land is taken into trust it can be used for any purpose with no consideration for local laws and scant for federal law. Thus, there is no apparent penalty for misrepresenting the intended use of land once it is transferred to trust.

As here, there is every reason to have concern when a tribe justifies its application for land in trust on the grounds of housing without any reference to gaming or casino resort development. History shows that after the conversion from fee to trust the next conversion is from housing to non-housing use. This has happened with acquisitions for the Tule River Indian Tribe and the Aqua Caliente Band of Cahuilla Indians. The Big Lagoon Indian Reservation and Rohnerville Rancheria initially attempted to use HUD funds for casino development. The San Manuel Band of Serrano Mission Indians took land in trust for a represented community recreational area, and then announced they will use it for expansion of the existing casino.

Here's the problem. In 2008, Assistant Secretary of Interior for Indian Affairs, Carl Artman wrote: "[O]nce land is taken into trust, the Department is not authorized to reconsider its decision because land cannot be taken out of trust without Congressional authorization. In addition, current land acquisition regulations ... do not authorize the Department to impose restrictions on a Tribe's future use of land which has been taken into trust. In addition, the Department has been reluctant in the past to take any action to eliminate the flexibility that Indian tribes enjoy to change the use of trust lands both because it is an aspect of tribal sovereignty and because it is a needed tool to adapt to changed economic conditions." (The letter from Assistant Secretary Carl Artman to Representative Duncan Hunter, dated May 12, 2008 is attached as pages 8-9 to the Appendix.)

Unfortunately, the current statue is open-ended and the Secretary of Interior's regulations reflect that. The current regulations allow conversion in trust "[w]hen the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing." That standard is as good as no standard at all. I am informed, but have not confirmed, that in California alone, over the past ten years there have been 110 fee to trust applications to the Department of Interior. All have been approved. Doesn't this raise questions which require answers?

The current regulations limit state and local government comments to impacts on regulatory jurisdiction, real property taxes and special assessments. Off limits are any comments about land use, open space, water resources, environmental protection, traffic congestion, scenic values,

population density review, architectural controls, agricultural preservation, and other common sense issues which are critical to sound planning in every community in this country. Good land use planning fosters economic development. Lousy or no land use planning results in the devastation of community and economic development.

The Secretary is required to consider "jurisdictional problems" and "potential conflicts" of land use that may arise. But it is lip service at best because no government comments are permitted. As a result, the potential land use conflicts are those framed by the applicant, the tribe. There is virtually no fair process in this framework at all. Our financially strapped cities, counties, states and townships should never be placed in this position. The Secretary need only say, "I've considered the problems and potential conflicts as I see them, and there being no other reason not to take the land into trust, I take the land into trust."

In short, the transfer of private land into trust is a sham; the process is a sham; and the results are more likely than not to be a shame.

This is what Congress can do:

- First, Congress can require the Secretary to adopt regulations to ensure that the Secretary must ask for, consider and give weight to the comments of state and local government officials, citizen groups, associations and property owners specifically including the potential impacts on land use planning and environmental factors.
- Second, the Congress can require the Secretary to consider, as a means of addressing the comments and views of the state and local communities, imposing restrictions on the use of land being taken in trust. I refer to restrictions which respect tribal sovereignty and flexibility and also respect the existing community as a whole, its land planning, environmental laws and other regulatory concerns.
- Third, it should require negotiations with the stakeholders who will be impacted by the land being taken into trust. Surely this is favorable to the current practice of dismissing outright or trying to preclude altogether the views of others who have a legitimate seat at the table.

In short, Congress must tighten the standards to take land into trust. The current framework, established by Congress provides unbridled discretion and too few standards for the Secretary.

I understand that members of this committee are interested in a "*Carcieri*-fix," to allow the Secretary to take land into trust for tribes that were not under federal jurisdiction in 1934, the year of the IRA's passage. That is an equitable issue for which a fix may be required. But that alone will only add to the injustice of current laws unless the fix deals with the root of the problem--the lack of federal consideration of the community at large. Congress has the ability to require the federal government to condition or restrict trust land acquisitions where the proposed or potential tribal economic activity will greatly alter the character of the land or harm the economic, environmental and aesthetic interests of the local residents, property owners and affected citizens. It should do so. Under the *Patchak* decision, it is settled that affected citizens are within the "zone of interests" with standing to have their voices heard by the Secretary. Until the law has some teeth, that standing is but a pyrrhic victory.

Thank you for your service to our country and your consideration of my views.

Appendix

Testimony of Marshall Grossman

Before the
United States House of Representatives Committee on Natural Resources
Subcommittee on Indian and Alaska Native Affairs

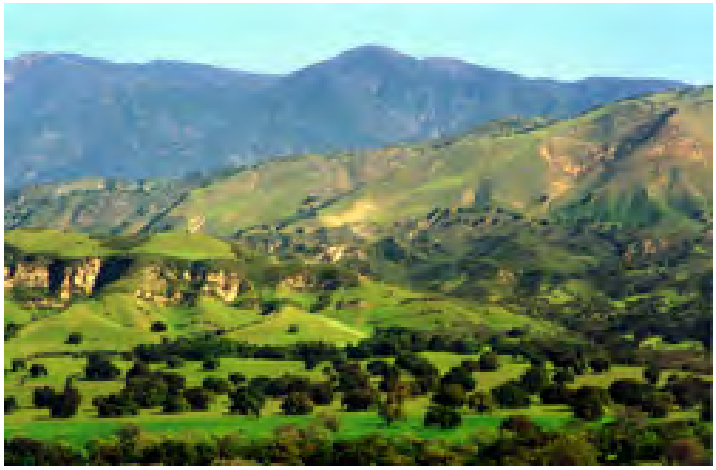
Washington, DC
August 2, 2012

A. Photographs

Heart of the Santa Ynez Valley / Gateway to Santa Ynez

Camp 4, Santa Ynez Valley: Looking Northeast across 1,400 Acres from intersection of Highways 154 & 246

Looking Southwest from 1,400 Acres across Highways 154



from webpage, Santa Ynez Planning Area, County of Santa Barbara Planning and Development Department

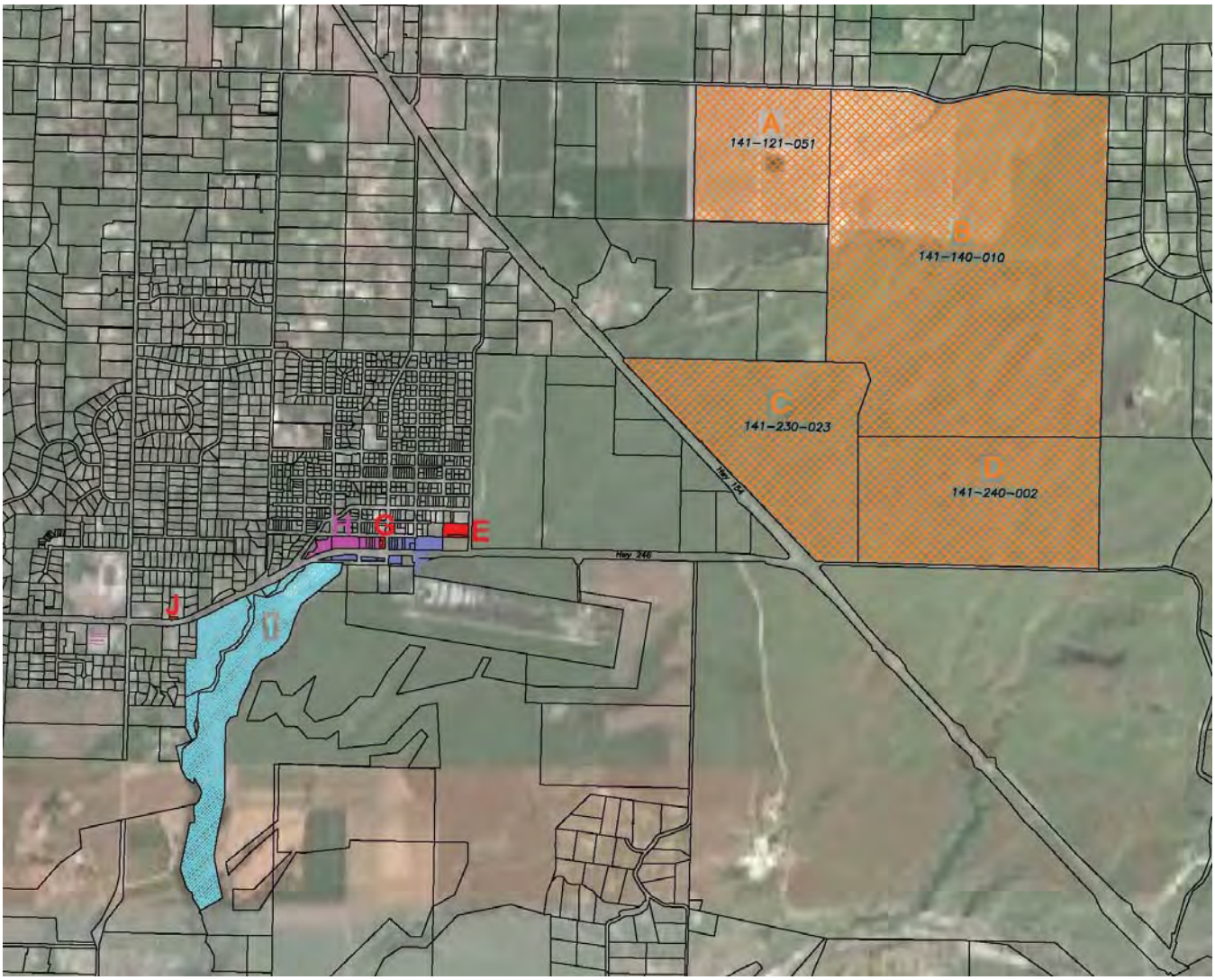
from AppellationAmerica.com, photo Dennis Schaefer

B. Planning Documents and Maps

1. Comprehensive Santa Ynez Valley Community Plan:

http://longrange.sbcountyplanning.org/planareas/santaynez/documents/Board%20of%20Supervisors%20Adoption/Electronic%20Docket/Master%20Final%2010-15-09.pdf

2. Map with Camp 4: Parcels A, B, C and D combined



C. Biography of Marshall Grossman

Marshall B. Grossman

Partner

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Marshall Grossman has both prosecuted and defended major commercial litigation throughout his distinguished career.

Marshall has been honored with No. 1 rankings by *Chambers Global* in Litigation (National Trial Lawyers) and by *Chambers USA* in Commercial Litigation, and a top ranking in Entertainment and Media Litigation. For over 20 years, he has been listed in the *Best Lawyers in America* (Bet-the-Company Litigation and Commercial Litigation). For several years, including 2011, he has been listed among the "100 Most Influential Lawyers" in California by the *Daily Journal*. Marshall is named one of *LawDragon's 500* "Leading Lawyers in America." Marshall is profiled as the cover story in the 2010 edition of *Southern California Super Lawyers* magazine. Marshall is among the few lawyers to be top ranked by Chambers in three different areas of litigation.

From 2001–2010, he served as a commissioner (and also served as chair) of the California Commission on Judicial Performance. Having represented clients throughout the U.S. for more than 40 years, Marshall is admitted to practice in numerous state and federal courts.

EDUCATION

- University of Southern California Law School, Juris Doctor, Order Of The Coif (1964)
- University of California, Los Angeles

REPRESENTATIVE MATTERS

- Agudas Chasidei Chabad — Obtained judgment against the Russian Federation to recover religious texts that were seized during the Bolshevik Revolution and World War II
- Apple Computer Inc. — Defended Apple Computer Inc. in patent infringement litigation
- Arthur Andersen — Led Arthur Andersen's trial team to a defense jury verdict in a $1 billion class action securities fraud lawsuit
- Beats by Dr. Dre - Representation of Beats in diverse matters
- Blockbuster — Defended Blockbuster in consumer class action litigation as well as patent infringement litigation filed by Netflix
- Cirque du Soleil
- Equity Funding — Served as lead counsel for the plaintiff classes in Equity Funding Securities Litigation
- Grupo Televisa S.A.B. — Represented Grupo Televisa S.A.B., the world's largest Spanish language media company, in a three-year licensing litigation against Univision Communications Inc.; the case settled in 2009 for more than $600 million three weeks into trial
- Guess? Jeans — Represented the owners of Guess? Jeans in successful litigation against the owners of Jordache
- International accounting firms — Long-term representation of international accounting firms in complex federal securities litigation and related federal investigations
- Packard Bell NEC Inc. — Defended Packard Bell in a Lanham Act litigation, including the highly publicized battle between Compaq and Packard Bell
- Suzuki Motor Corporation — Lead counsel for Suzuki in landmark litigation against Consumers Union

- The Estée Lauder Companies, Inc.— Representation of Estée Lauder in diverse matters
- University of Southern California — Prosecuted suit for the University of Southern California to terminate long-term lease of University Hospital to Tenet Healthcare with ultimate settlement restoring ownership of University Hospital to the university
- University of Southern California — Represents the university in various aspects of its athletic program
- Counseled J.K. Rowling, Steven Spielberg, Clint Eastwood, Mariah Carey, Tommy Hilfiger, Erin Andrews and Larry King in diverse matters

AWARDS AND HONORS

- *Chambers USA*, leading lawyer in General Commercial Litigation and Media and Entertainment Litigation (California) (2008–2012)
- *Chambers Global*, ranked No. 1 in Litigation: Trial Lawyers (2009–2012)
- *The Best Lawyers in America*, leading lawyer in Bet-the-Company Litigation, Entertainment Law and Commercial Litigation (1991–2012)
- Litigator of the Year, Century City Bar Association (2010)
- *Who's Who Legal USA*, Commercial Litigation (2010–2011)
- *Daily Journal*, "Top 100 Lawyers" (2009–2011)
- *Hollywood Report*er's "Litigation Power Lawyer," 100 most influential lawyers in entertainment (2008–2010)
- *Los Angeles Business Journal*, "Who's Who in L.A. Law" (2007, 2009–2010)
- *Super Lawyers*, Southern California, Top Vote Recipient
- *PLC Dispute Resolution Handbook*, leading dispute resolution lawyer (2009)
- *International Who's Who*, Commercial Litigators (2009–2011)
- Honoree, Anti-Defamation League (2007)
- Honoree, Los Angeles Jewish Federation Legal Division (2004)
- Honoree, American Jewish Committee (2002)
- *National Law Journal*, "Top 10 Trial Lawyers of the Year" (1989, 1999)
- *Lawdragon 500*, "Leading Lawyers in America"
- Guide to the World's Leading Litigation Lawyers

MEMBERSHIPS

- Chancery Club (2007–present)
- Commissioner and past chair, State of California Commission on Judicial Performance (2001–2010)
- Commissioner, California Coastal Commission (1981–1986)

COMMUNITY SERVICE

- National trustee, American Jewish Committee
- Board member, Jewish Big Brothers-Big Sisters
- Former board member, Public Counsel
- Former board member, United Way
- Lecturer in Law, University of Southern California Law School

D. California Coastal Commission opposition to SB

STATE OF CALIFORNIA – THE NATURAL RESOURCES AGENCY EDMUND G. BROWN, GOVERNOR

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W17a

BILL ANALYSIS
SB 162 (Anderson)
As Amended May 21, 2012

RECOMMENDED POSITION
Staff recommends the Commission **Oppose** SB162.

SUMMARY
In relevant part to the Commission, SB 162 would prohibit any state agency from opposing a tribal "fee-to-trust" acquisition application if the acquisition was intended for the purpose of housing, environmental protection or cultural restoration. The bill would also define a "federally recognized tribe" as a tribe that has been included on the list of "Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs", published pursuant to Section 479a-1 of Title 25 of the United States Code.

EXISTING LAW
Section 465 of Title 25 of the United States Code authorizes the federal government to acquire land in trust for an Indian tribe's benefit. This process is known as a "fee-to-trust acquisition." The Bureau of Indian Affairs (BIA), under the Department of the Interior (DOI), has jurisdiction over fee-to-trust applications. Once land is annexed in a federal fee-to-trust process, the land is taken out of city/county/state jurisdiction in perpetuity and added to the reservation of the tribal applicant. The practical effect of this within the coastal zone is that tribal lands taken into trust are removed from the coastal zone for purposes of the Commission's review authority under the Coastal Act or the Coastal Zone Management Act (CZMA). Because federally recognized tribes are considered sovereign nations, state and local land use laws and regulations have no force and effect on trust lands. Once taken into trust, the regulations in 25 CFR Part 151 do not authorize the Department to impose restrictions on a Tribe's future use of land, or revoke its status. Only Congress can revoke trust status.

Because a fee-to-trust acquisition is a federal action, the Coastal Commission has review authority under the Coastal Zone Management Act. The Commission and other state agencies also have the ability to comment as part of the NEPA consultation process. This process allows state agencies to concur with or object to the acquisition. The BIA's action is subject to appeal and ultimately to judicial review. Plaintiffs must have standing in order to litigate.

ANALYSIS
The Commission's authority over fee-to-trust acquisitions is expressed through federal consistency review. Recognizing that fee-to-trust acquisitions may be an important mechanism for facilitating Native American self-determination, the Commission has generally been supportive of these acquisition applications when they are for purposes, such as economic development, that can be carried out consistent with Coastal Act policies Since 2000, the Commission has concurred with nine of the ten fee-to-trust applications it has considered. At least three of the Commission's concurrence determinations relied upon changes pre-negotiated with the tribes relating to future uses of the lands taken into trust. The Commission concurred

with every fee-to-trust application since 2000 except for one: the Big Lagoon Rancheria's application to take five acres of land into trust for housing. The Commission's objections were based on cumulative impacts and concentration of development. The Commission is currently participating in an administrative appeal regarding this matter.[1]

While the Commission rarely objects to applications for fee-to-trust acquisition, the ability to do so when necessary is important, because there is little state oversight once an acquisition is complete. The development that follows fee-to-trust acquisition has the potential to cause significant environmental and land use impacts, including impacts to traffic and circulation, sensitive habitat, public access and public service impacts. Subsequent development does not undergo environmental review under CEQA, nor any local permit process. Because local governments cannot regulate tribal trust lands, LCP standards do not apply to development. Nor do standard regulatory instruments such as coastal development permits, discharge permits, streambed alteration permits.

Because there is no prohibition for a change of use once land is taken into trust by a tribal government, a tribe can apply to the federal government to take land into trust for purposes of non-gaming activities such as housing, environmental protection, or cultural preservation and upon approval of the application immediately begin planning and implementation of a gaming facility or other type of project. This has occurred on some fee-to-trust lands in the past, including Big Lagoon. While many fee-to-trust acquisitions don't raise public agency concerns, those that have been pursued to facilitate controversial projects such as casinos, golf courses, and resorts have generated controversy with surrounding communities and local governments.

Because federally recognized tribes are sovereign nations and trust lands are not subject to the same regulatory process as land uses on other privately held lands, the only meaningful opportunity for the State to influence the outcome of a fee-to-trust acquisition is before the land is taken into trust. Aside from the federal consistency review process, this occurs during the public comment period when the BIA is considering the application and conducting NEPA review. If state agencies are prohibited from objecting to these acquisition applications, the State will forfeit this opportunity to raise issues and objections on the part of the state and local communities where the impacts are most significant. At least one such action is currently pending. On May 14 of this year, the Attorney General objected to a 535-acres fee-to-trust acquisition in the City of San Jacinto, based on the impacts to city residents and municipal services.

If SB 162 were to become law, the Commission would retain its federal consistency review authority under the Coastal Zone Management Act. However, the language prohibiting a state agency from opposing a fee-to-trust acquisition would arguably prevent the Commission from either objecting to, or conditionally concurring with, future consistency determinations by the BIA regarding fee-to-trust acquisitions.

The Commission would also lose the benefit of other agencies' review of such applications. In its own analysis, the Commission would not be able to utilize information generated by the Department of Fish and Game, State Parks, Caltrans, the State Water Resources Control Board, etc. SB 162 would significantly diminish state authority in these matters, and has the potential to undermine the Commission's existing authority under the CZMA. **For the forgoing reasons, staff recommends the Commission oppose SB 162.**

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[1] The Commission's concurrence was conditional. The Big Lagoon Rancheria did not accept the conditions. The practical effect of this is the same as an "objection."

E. Letter to Rep. Duncan Hunter from Assistant Secretary Carl Artman,

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

TAKE PRIDE IN AMERICA

MAY 1 2 2008

The Honorable Duncan Hunter
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Hunter:

Thank you for your letter of April 1, 2008, regarding a dispute between the Sycuan Band of the Kumeyaay Nation (Tribe) and the Dehesa Valley Community Council (Dehesa Community) concerning a Tribe's land acquisition program. You have enclosed with your letter copies of a January 10, 2006, letter from the Dehesa Community, and of a January 29, 2007, letter from the Tribe. These letters address the issues of concern that the Dehesa Community has raised with you.

The Dehesa Community would like the Department of the Interior to re-examine a fee-to-trust application for an 82.85-acre parcel of land that was taken into trust for the Tribe in 2004 because the actual use of the land (parking lot for casino) is different from the proposed use at the time of acquisition (housing). We understand that the Dehesa Community is very unhappy with what it is calling the "bait and switch" tactic employed by the Tribe. Although we understand the Community's concern, once land is taken into trust, the Department is not authorized to reconsider its decision because land cannot be taken out of trust without Congressional authorization. In addition, current land acquisition regulations in 25 CFR Part 151 do not authorize the Department to impose restrictions on a Tribe's future use of land which has been taken into trust. *See City of Lincoln, Oregon v. Portland Area Director*, 33 IBIA 102 (1999). To do so would require amending existing regulations in 25 CFR Part 151. The Department is not currently in the process of amending these regulations. In addition, the Department has been reluctant in the past to take any action to eliminate the flexibility that Indian tribes enjoy to change the use of trust lands both because it is an aspect of tribal sovereignty and because it is a needed tool to adapt to changed economic conditions.

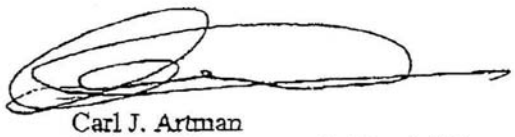
The Dehesa Community also questions whether the use of the 82.85-acre parcel for a parking lot is consistent with a provision of the Tribe's 1999 compact with the State of California which requires any portion of a gaming facility (including a parking lot) to be located on Indian lands on which gaming may lawfully be conducted under the Indian Gaming Regulatory Act (IGRA). Since the 82.85-acre parcel of land is contiguous to the Tribe's Indian Reservation as it existed on October 17, 1988, gaming on the parcel would be authorized under Section 20(a)(1) of IGRA, 25 U.S.C. 2719(a)(1).

The Dehesa Community would also like the Department to "pay attention" to the Tribe's potential future trust acquisition of a specific 1,600-acre parcel because that parcel is identified in the Tribe's 2007 class III gaming compact with the State of California. At this

time, the Department of the Interior has not received an application to take the 1600-acre parcel into trust for the Tribe. If and when that happens, the Department will be vigilant in reviewing the application, especially because the 2007 compact specifically lists that parcel as potentially eligible for gaming.

We hope this information is helpful. Thank you for your interest in this important matter.

Sincerely,



Carl J. Artman
Assistant Secretary – Indian Affairs