CITIZENS FOR WINDSOR
2669 Mark West Station Rd.
Windsor, CA 95492

January 26, 2016

Town Council
Town of Windsor
9291 Old Redwood Hwy, Room 400
Windsor, CA 95492

Re: Letters from Congressman Huffman

Dear Mayor Millan and Councilmembers Fudge, Foppoli, Okrepkie, and Salmon:

On January 15, 2016, Congressman Jared Huffman sent a letter to the Town regarding the Lytton project. The letter included two other letters, the first, a December 2, 2015 letter from the Congressman to Kevin Washburn, the then Assistant Secretary in charge of Indian Affairs at the Department of Interior, and the second, a December 17, 2015, letter from the Secretary to the Congressman. We write to correct possible misunderstandings arising from these letters.

Congressman Huffman asked three questions, and Secretary Washburn responded to each one. We discuss each question separately and then discuss Congressman Huffman's conclusions.

Obama Administration Stance on Taking Land Into Trust

Congressman Huffman asked first about the Obama administration's stance on taking land into trust for tribes, both nationally and in California and whether the Department intends to continue prioritizing taking fee lands into trust for tribes. Secretary Washburn confirmed that the Obama Administration has taken 300,000 acres into trust already and hopes to take 200,000 more acres of land into trust in 2016.

The Obama Administration's desire to take land into trust is irrelevant to the Lytton issue. The issue, here, is whether the law authorizes the BIA to take land into trust for the Lytton. The issue is not whether the BIA would exercise discretion in favor of the Lytton but whether the BIA has any discretion. In this regard, we note that the Lytton application has been pending since 2009, almost seven years. If the Obama Administration intended to grant the application, presumably, they would have done so already.

Carcieri Decision

The way the second question is worded makes it irrelevant. Congressman Huffman asked "Do you consider the 2009 Supreme Court decision in *Carcieri v. Salazar* to be an insurmountable obstacle to further administrative land-into-trust decisions on behalf of tribes such as the Lytton Rancheria?" In this question, Huffman does not ask specifically about the Lytton but generally about "tribes such as the Lytton." Nor does he identify the specific issue with the Lytton.

The Lytton present an issue that is unique and unprecedented. Section 465 allows the Secretary to take lands into trust for members of Indian tribes "under federal jurisdiction" in 1934 and "descendants of such members." In all the land into trust decisions since *Carcieri*, the Indian group had existed in 1934, and the issue was whether that group was under federal jurisdiction in 1934 or consisted of descendants of such members. For example, both the Cowlitz and the Mashpee were existing Indian groups in 1934. Here, in contrast, the Lytton Indian group did not exist in 1934. There was no Lytton group and thus no members of a Lytton tribe in 1934 to satisfy either definition. No one lived on the rancheria lands and the people who moved onto the Lytton Rancheria in 1937 and 1938 were not previously associated with one another in any way.

Secretary Washburn provides a lengthy response to the question, but all generalized, not specific to the Lytton. He says that the BIA employs a "case-by-case analysis" to determine whether *Carcieri* bars them from taking land into trust. He then discusses as an example that "some tribes could have been under Federal jurisdiction in 1934, but were not formally recognized...." This example is not at all applicable to the Lytton. As stated above, there was no Lytton group in 1934 and thus no group that was under Federal jurisdiction in 1934. He says that the BIA "will employ our usual case-by-case analysis to determine whether it affects Lytton Rancheria's land into trust application" and concludes, "We have not yet made a determination on that issue." He provides no explanation for why there has been no determination for seven years. Nor does he provide any reason to expect that the BIA will make a positive determination for the Lytton.

<u>Enforceability of MOA</u>

Congressman Huffman's third question is whether the federal government would enforce the Memorandum of Agreement between the Lytton and the County of Sonoma, particularly the no-gaming provision. This question, like the two prior questions, is irrelevant, because it is limited to "federal" enforcement. The County is the party to the agreement and has the right and ability to enforce the

Memorandum of Agreement. Federal enforcement is neither expected or needed. So the question is a total red herring.

Secretary Washburn tells Huffman the same thing. He acknowledges that tribes enter into agreements with local governments and that such agreements "generally contain provisions for the parties to enforce the terms of the agreement."

That said, Secretary Washburn then writes that a tribe "has a right to conduct gaming on trust land if such gaming is lawful under IGRA and is not barred by other laws and regulations." There are two problem with this statement. First, it is not correct. If a tribe agrees not to game on lands in a legally enforceable agreement such as an MOA, it no longer has a right to conduct gaming. Second, IGRA clearly does not allow gaming on this particular land. Section 20 of IGRA (25 USC §2719) sets forth a general rule prohibiting gaming on lands acquired after October 17, 1988. While it contains some exceptions, none comes close to applying to this location.

Huffman's Conclusions

In his letter to Mayor Millan, Congressman Huffman puts a completely incorrect political spin on Secretary Washburn's responses. Congressman Huffman writes that Secretary Washburn's letter "suggests that without HR 2538, there is every reason to believe the BIA could, and very likely would, grant the Lytton's pending trust application before the end of 2016." As noted above, Congressman Huffman's letter to Secretary Washburn had asked about tribes "like Lytton" and not asked about Lytton in specific and the response did not address the specific issue raised by the Lytton situation. As noted, the Lytton situation is unique and unprecedented because they did not exist as an Indian group in 1934 or any time before 1934. Further, Secretary Washburn's response specifically says the BIA has made no determination regarding Lytton. Given the facts and given the difference of Lytton from all the other land into trust cases considered since Carcieri, there is no reason to believe the BIA could or would grant the Lytton's application whether in 2016 or ever.

Second, Congressman Huffman concludes that "the land would come into trust with none of the federally enforceable limitations and restrictions in HR 2538." As seen above, this is not correct. First, and most important, the land cannot come into trust at all under current law because the Lytton did not exist in 1934 and thus were not under federal jurisdiction in 1934. Presumably that is why the application is still pending. Second, even if the BIA could take the land into trust, the limitations and restrictions in the MOA would be enforceable by the

County. It is irrelevant that they would not be enforceable by the federal government.

We also note that limits in a Congressional bill are not permanent and always remain subject to amendment by a future Congress. Congress could amend or remove them anytime without any approval of the County, the Town or the local citizens. The Tribe, with its ever-growing financial resources of $200 million a year, could persuade Congress to ease up on these. In contrast, the County MOA can be amended only if the local Board of Supervisors agree.

Third, the Congressman concludes that if the land were taken into trust, the land "would be gaming eligible should the Tribe choose to abrogate its MOA with the County." This conclusion is not correct and not based on Secretary Washburn's letter. As noted above, the land cannot come into trust under current law. Second, as also noted already, IGRA explicitly prohibits gaming on lands acquired after October 17, 1988, a prohibition which would apply to this land, and Secretary Washburn never claimed otherwise. Third, the tribe cannot ignore its MOA with the County. The MOA is fully enforceable by the County. Even if the BIA could take the land into trust, the Lytton cannot game on the land under the MOA, and the tribe has no ability to "abrogate" the MOA. Congressman Huffman's statement is completely false.

In the end, the letters do nothing to rebut our claim that the only winner from Congressman Huffman's bill would be the Lytton. The letters utterly fail to rebut the fact that under current law, the land cannot be taken into trust for the Lytton, and that Congressman Huffman's bill would create this right for the Lytton.

The land should not be taken in trust for the Lytton unless Congress provides that the land shall remain subject to state and local law. Congress has made new Indian lands subject to state law before, and should do so here. This land sits adjacent to the Town in a heavily populated and developed area, and development on these parcels would have significant effects on the whole area. Therefore the lands should remain governed by the same law that govern the whole area. One law for all.

Town Manager's Report

At the January 20, 2016, Town Council meeting, the Town Manager provided a very detailed oral report on these letters. In doing so, she spread the misinformation in the letters. She also misspoke. In summarizing Congressman's Huffman third conclusion, Ms. Kelly said, "Lytton would be eligible for gaming if permissible under the Indian Gaming Regulatory Act unless it chooses not to do

so." This is not what Secretary Washburn or Congressman Huffman wrote. We saw already that Congressman Huffman wrote that the land "would be gaming eligible should the Tribe choose to abrogate its MOA with the County." Above, we showed that Congressman Huffman's conclusion that Lytton could "abrogate" the MOA was not correct and not what Secretary Washburn said. Ms. Kelly compounds this misstatement by saying that the tribe would be "eligible" for gaming. That is not at all what was said by either Congressman Huffman or Secretary Washburn. As noted, there are in fact numerous reasons that is not so. Aside from the complex legal issues involving Carcieri, there is the simple fact that IGRA prohibits gaming on lands acquired after October 17, 1988.

Ms. Kelly then provides her own conclusion. She stated that unlike the Huffman legislation, which has a no-gaming provision, if the BIA approves the Lytton request to take the land in trust, they will do so without a no-gaming provision and would not enforce the County MOA. This is completely misleading. It ignores the Carcieri issue. It ignores the prohibition in IGRA on gaming on lands acquired after IGRA. And it ignores that the County is fully capable of enforcing the MOA.

In the end, the whole report was very misleading and seemed designed to mislead the public. It is unfortunate that Congressman Huffman and the Town government continue to attempt to mislead the public into supporting this project.

Very truly yours,

Michael Robison

Michael Robison

Eric Wee

E. Wee

cc. Sonoma County Board of Supervisors