CITIZENS FOR WINDSOR
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TOWN OF WINDSOR

February 12, 2016

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

Re: Lytton Project–HR 2538
Memorandum from Nancy Thorington

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

On January 26, 2016, we sent a letter to the Town Council to address misstatements in a letter to the Town from Congressman Huffman regarding the Lytton project, and in two letters enclosed with his letter. Nancy Thorington, an attorney who specializes in Indian law and who was hired by the Town, has submitted a memorandum dated January 28, 2016 to the Council in response to our letter. That memo has been posted to the Town's website, and we reply to Ms. Thorington's memo. We follow the same headings as the prior letters.

Obama Administration Stance on Taking Land into Trust

We argued that the relevant issue is not the Obama Administration's political position on the Lytton application to the BIA to put the land into trust, but rather whether current law authorizes the Administration to take land into trust.

Ms. Thorington does not dispute that point.

Carcieri decision

We argued that the Lytton present a unique situation in that there was no Lytton group in 1934. Where application of the *Carcieri* rule has been disputed in other cases, there was an Indian group in 1934 and the issue was whether or not the tribe in question was under federal jurisdiction in 1934. Here, there is a much more fundamental defect–there wasn't an Indian group in existence in 1934.

Ms. Thorington argues that BIA records are often missing and histories need to be pieced together. She then claims that the Lytton history is unknown. She writes:

> "... the conclusion that the Lytton Rancheria did not exist under federal jurisdiction in 1934 is based on a single letter from Andra [sic] Hooch [sic] of Governor Schwarzenegger's Office, in which she admitted that her conclusions were based on the limited documents to which she had access."

That is not true. We have numerous documents from the 1930s that establish our point. These documents make it crystal clear that there was no Lytton group in existence, let alone under federal jurisdiction, in 1934. Our January 26 letter had not even mentioned the letter from Ms. Hoch, Governor Schwarzenegger's Legal Affairs Secretary.[1] The fact is that the federal government purchased the land in 1927, no one lived on the rancheria until 1937, and the two families who moved onto the rancheria in 1937 and 1938 were not previously an identifiable Indian group.

Ms. Thorington writes, "It is probable that the Lytton Rancheria and the federal government have additional information that they have not made public, so we do not have sufficient information to conclude that the Lytton Rancheria cannot meet any of the definitions in the IRA for taking the lands into trust." The Lytton submitted their application to have land taken into trust in 2009. There is no reason to believe that they have failed to put their best foot forward. Nor does Ms. Thorington present a shred of evidence that the Lytton existed in 1934.

While it might be that the Lytton and the federal government have additional information that they have not disclosed, the information available paints such a clear and compelling picture that it is unlikely any additional information could contravene the conclusion that there was no Lytton group in 1934.

<u>Enforceability of MOA</u>

Our main point was that the MOA is fully enforceable by the County, and the County would not look to the federal government to enforce this private agreement. Ms. Thorington does not contest that.

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[1] That said, it is noteworthy that the Legal Affairs Secretary came to the same conclusion that the "Lytton was not federally recognized until 1991 and not under federal jurisdiction in 1934" and that "the Secretary of the Interior lacks the authority to take land in trust for Lytton."

We addressed another point in response to a comment by Secretary Washburn. Secretary Washburn had written that a tribe "has a right to conduct gaming on trust land if such gaming is lawful under IGRA." We pointed out that gaming on this particular land would not be lawful under IGRA. Section 20 of IGRA sets forth a general rule prohibiting gaming on land acquired after October 17, 1988, and while some exceptions exist, none apply.

Ms. Thorington claims that one of the exceptions applies. She claims that this is restored land for a restored tribe. That is not correct. One of the requirements in the regulations implementing section 2719 is that "the tribe is not gaming on other lands." 25 CFR 292.12. The Lytton have been gaming on land in San Pablo in Contra Costa County since 2003, and so do not qualify under the regulations. The San Pablo site is their "restored" land.

Huffman's Conclusions

In our January 26 letter, we showed that Congressman Huffman put a completely incorrect political spin on Secretary's Washburn's responses. We detailed how all three conclusions drawn by Congressman Huffman were in fact incorrect. Contrary to Mr. Huffman's claim that the BIA likely would grant the Lytton's trust application, Secretary Washburn had made clear that the BIA had not made any determination. Further, based on the law allowing land to be taken into trust only for tribes under federal jurisdiction in 1934 and the facts demonstrating that the Lytton were not under federal jurisdiction in 1934, there is no reason to believe that the BIA could take the land into trust. Ms. Thorington does not dispute that argument.

Second, we showed that contrary to Mr. Huffman's statement that the land would come into trust with none of the federally enforceable limitations and restrictions in HR 2538, the land cannot come into trust and even if it did, the limitations and restrictions in the MOA would be enforceable by the County. Ms. Thorington does not dispute that argument.

We then noted that Congressional acts are not permanent. Another Congress can undo the law of a prior Congress. In contrast, agreements can be made permanent. Ms. Thorington grudgingly agrees with this but argues it is unlikely Congress would remove the gaming restriction. Given the power of money in politics, we think such a blanket statement is naive and misleading. Ms. Thorington then argues that the County MOA is effective for only 22 years. We

agree with this criticism, but that is a reason why the Town should oppose, not support, the Huffman bill.

Third, we showed that contrary to Mr. Huffman's statement that if the land were taken into trust, the land would be gaming eligible, Secretary Washburn never said any such thing in his letter and IGRA explicitly prohibits gaming on this land. We also reiterated that the land cannot be taken into trust. Ms. Thorington again argues that the evidence is not in to make such a determination. At this point, the evidence is in, and she is wrong.

Town Manager's Report

We had corrected a misstatement of the Town Manager when she spoke at the January 20, 2016 Town Council meeting. She had said, "Lytton would be eligible for gaming if permissible under the Indian Gaming Regulatory Act unless it chooses not to do so." We pointed out that this is not true and not what Secretary Washburn said or what Congressman Huffman said. It ignores the MOA with the County, and the prohibition in IGRA.

Ms. Thorington attempts to defend this misstatement. She points out that the MOA with the County is only 22 years. However, the Town Manager did not say that after 22 years, the Lytton could engage in gaming on the land.

Conclusion

Ms. Thorington's memo adds a section entitled "conclusion" that does not correlate with any section of our letter and is not in direct response to anything I said. Ms. Thorington states again that our assertion that the Carcieri decision precludes the BIA from taking the subject land in trust is "based solely on the letter from Govenor Schwarzenegger's Office. As we noted above, our conclusion was based on government documentation of the Lytton Rancheria from the 1930s, and not the letter from Governor Schwarzenegger's office at all. She disagrees with the conclusion but cites no evidence. She states that the law weigh strongly in the Tribe's favor but never details what law. She also states that BIA policy weigh strongly in the Tribe's favor, but as noted above never contested our showing that the issue is not BIA policy but BIA authority.

We remind the Council that the Council is on record as opposed to the Lytton project. The Council originally adopted that position on November 20, 2002 when

the proposed project was just 50 acres on the grounds that it would be inconsistent with the General Plan and the zoning regulations of the County. The Council reaffirmed that position on May 6, 2009 after the proposal grew to 100 +/- acres. Both resolutions were adopted at public meetings of the Council. The current Council has not changed that position. It has not agendized the matter for consideration. It has not debated the matter and it has not voted to change the official position of the Town. Yet, it seems clear that Council and staff repeatedly act inconsistent with this official position. The Council should either conform to the official position or hold public meetings to change its position. That would show the respect for the Windsor voters which has been so clearly lacking in the last year.

Very truly yours,

Eric Wee

Michael Robison