Stand Up For California!
"Citizens making a Difference"

www.standupca.org

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October 25, 2021

Paula Hart, Director
Office of Indian Gaming
U. S. Department of the Interior
1849 C Street N. W.
MS-3542-MIB
Washington D. C. 20240
Fax 202.273.3153 or IndianGaming@bia.gov

RE: **RE: Restored Lands Determination – Koi Nation**

Dear Ms. Hart,

Stand Up for California is aware of a September 2021 letter that the Koi Nation has sent to the Office of Indian Gaming Management ("OIGM") requesting a "restored land determination" for property located in an unincorporated area in the County of Sonoma, California, adjacent to the Town of Windsor. The citizens of Sonoma County and citizens of the Town of Windsor have a heightened public interest to participate in all federal processes affecting a potential off-reservation tribal gaming development in their neighborhood. The purpose of this letter is to provide their perspective as well as background information.

In September, the Lower Lake Rancheria (currently calling itself the "Koi Nation of Northern California," referred to herein as the ("Tribe") announced the purchase of 68 acres of vineyard and a residence in Sonoma County for the purpose of developing a casino and resort hotel. This announcement of the purchased property at 222 East Shiloh Road ("Subject Land") was published in a newspaper of general circulation. In checking the ownership of the property, it is held in the name of Sonoma Rose LLC. Public records from the Office of the California Secretary of State ("SOS") indicate that the Tribe is a member/manager of the LLC.

The Subject Land for the casino in Sonoma County is approximately 85.5 miles via Highway 101 (according to google) from the Tribe's historic lands on an island in Clearlake, near Lakeport, the County of Lake, California. If traversing in a straight southernly line, the distance is only 34 miles, however there are no roads that travel in a straight line for this distance and there are geographical barriers that would have hampered easy travel by foot or horseback in historical times.

1. COMMUNITY GROUPS HAVE A RIGHT TO BE CONSULTED

We have been advised that the Tribe submitted a letter to the OIGM on September 15, 2021, requesting a restored lands determination. The OIGM does not have a process for requesting comment from states, local governments, surrounding communities of citizens or even other tribes. This should be a separate public process that focuses on the determination of restored lands. All affected parties, the California Governor, Attorney General and affected local jurisdictions should be involved in the determination. There should be a notification,

comment, and a review and appeal process specific to the determination of whether or not certain lands are Indian lands. This should be a first-step prior to a fee-to-trust application or environmental review. Such a process should be fair, open, and transparent and would eliminate the ability of unscrupulous gaming investors to partner with tribes and reservation shop, abusing the spirit and intent of IGRA. While restored lands determinations from the OIGM are not final agency actions, they do establish the regulatory path for all future Department of the Interior ("Department") analysis and evaluations.

2. SUBJECT LAND HAS NO SIGNIFICANT RELATION TO THE TRIBE

The location of the Subject Land involves the proximity of the land to the tribe's historical roots. Restored lands may include "off reservation" parcels; however, there must be evidence that the land has been in some respect recognized as having a "significant relation" to the tribe. *Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney for the Western District of Michigan ("Grand Traverse Band I")*, 46 F. supp. 2d 689,702 (W.D. Mich. 1999). The location factor has been deemed particularly critical by all of the courts and other authorities reviewing restoration situations.

Koi Nation must demonstrate a significant historical connection to the parcel it seeks to game on. Such hard evidence as the Tribes village, burial grounds, occupancy, or subsistence use in the vicinity of the land. (*See*- section 25 C.F.R. 292.12). Koi Nation cites the establishment of a commercial orchard in Sebastopol by tribal Captain Tom Johnson who is Darin and Dino Beltran's great-great Uncle and his brother John Johnson. Koi Nation identifies the Johnson brothers as leaders of the Tribe from 1919 through the 1940's establishing the Tribe in Sonoma County.

This leads to questions of the whether or not the Johnson brothers exercised tribal governance over a group of people on and off of the orchard lands. Did the tribal group live under state authority and jurisdiction? Did the Tribe live as an independent community outside of the surrounding community? The Johnson's commercial orchard does create a connection in the *vicinity*[1] of the Subject Land; however, it raises significant questions if it demonstrates a significant historical connection with hard evidence?

In 2000, the voters in California supported Proposition 1A which provided a 'limited exception' for the use of casino style gaming, i.e., slot machines and banking games. It was understood that tribal gaming would only occur on Indian lands in mostly rural locations. Tribal leaders and campaign consultants stated regularly in the statewide press, on TV and radio that Indian casinos would not spring up anywhere.

The Subject Land has been without Indian character for more than 171 years. The Koi Nation cannot claim restored lands based on an Indian land claim. That would ignore the 1851 California Land Review Act which established a Commission to review the deeds of California settlers which also included Indian land claims.[2] California is not subject to Indian aboriginal land claims.

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[1] The Johnson commercial orchard if located in the city limits of Sebastopol would be approximately 16 miles from the Subject Land, according to google.

[2] In *Indians of California v. United States,* 98 Ct.Cl. 583, 1942 WL 4378 (1942), the United States Claims Court noted that California Indians failed to establish their title to any land within the state pursuant to the Act of March 3, 1851, 9 Stat. 631. The 1851 Act was entitled "An Act to ascertain and settle the private land claims in the State of California" and it required all claimants to land title to establish their title to the satisfaction of a Commission established pursuant thereto. The Court observed that none of the Indians of California qualified their land claims before the Commission, meaning that "whatever lands they may have claimed became a part of the public domain of the United States." *Indians of California*, 98 Ct.Cl. At 587 (*citing Barker v. Harvey,* 181 U.S. 481 (1901); *United States v. Title Insurance & Trust Co., et al,* 265 U.S. 472 (1924)) (emphasis added).

3. IGRA'S NARROW EXCEPTIONS

When a tribe contends that one of IGRA's narrow exceptions applies to permit off-reservation gaming on newly-acquired land, the OIGM Checklist requires a "conclusive factual and legal finding" to support the applicability of a particular exception. The BIA also must obtain a legal opinion from the Office of the Solicitor concluding that the proposed acquisition comes within one of the exceptions, or that a determination that the proposed land meets the legal threshold of IGRA.

Stand Up California believes the Tribe cannot satisfy IGRA's requirements to declare the Subject Land as its "restored land," for four reasons.

First, the Subject Land is not located within or contiguous to the boundaries of the reservation of the Tribe in existence on October 17, 1988. On that date the Tribe was not included on the list of federally recognized tribes and did not have a land base, did not reside on land set aside under the federal protection against other jurisdictions, and did not assert governmental powers over any land. F. Cohen, Handbook of Federal Indian law at 34-35 (1982 Ed.).

Second, the Tribe never had a recognized reservation in, or anywhere near the vicinity of, the Subject Land. Indeed, the Tribe's historical lands are located near Lakeport, Lake County, CA, approximately 85.5 miles from the Subject Land.

Third, the Subject land is not part of a land claim settlement.

Fourth the Koi Nation has not been recently acknowledged by the Secretary under the federal acknowledgement process. (Part 83 Final Rule.) Rather the Tribe was administratively *reaffirmed,* and the Court in 2019, has ruled it to be treated as a "restored Tribe". The question now becomes does the Subject Land meet the criteria of restored lands?

Should the Subject Land not meet a restored lands determination criteria, then the two-part Secretary Determination of 25 U.S.C. Section 2719 (b) (1) (A) is the only statutorily permitted way for a tribe to conduct gaming on After-Acquired Lands.[3] As the OIGM determined in recent time with the Tejon Tribe of Kern County, and previously a negative determination for the Scotts Valley Tribe at Vallejo, Solano County California, such determinations are equally applicable to the Tribe's claim for the Subject Land Sonoma County.

4. RESTORED LANDS DEFINED

IGRA itself does not define "restoration of lands," and the case law and other precedent interpreting whether lands taken into trust are properly "restored" within the meaning of 25 U.S.C. section 2719(b)(1)(B)(iii) is sparse. *See, e.g., City of Roseville vs. Norton,* 219 F. Supp. 2d 130 (D.D.C. 2002), *aff'd,* 348 F.3d 1020 (D.C. Cir. 2003), *cert. denied, Citizens for Safer Cmtys. v Norton,* 541 U.S. 974 (2004); *Grand Traverse Band of Ottawa and Chippewa Indians vs. United States Atty, for the W. Dist of Mich.,* 198 F. Supp. 2d 920 (W.D. Mich. 2002), *aff'd.* 369 F.3d 960 (6th Cir. 2004); Oregon vs. Norton, 271 F. Supp. 2d 1270 (D. Ore. 2003) (reviewing decision of Secretary following remand by court in *Confederated Tribes of Coos v. Babbitt,* 116 F. Supp. 2d 155 (D.D.C. 2000)). See also, *in re Wyandotte Nation Amended Gaming Ordinance,* NIGC Final Decision (September 10, 2004) *("Wyandotte Decision"); NIGC* Letter to B. Downes re Karuk Tribe of California (October 12, 2004) ("Karuk case" or "Karuk Opinion"); NIGC Memorandum Mechoopda Indian Tribe of the

[3] This statement reflects the same opinion as Acting Deputy Assistant Secretary for Policy and Economics Development, George T. Skibine in a letter dated May 12, 2006, to Chairwoman Merlene Sanchez

Chico Rancheria (March 14, 2003) ("Mechoopda case" or Mechoopda Opinion"); NIGC Memorandum re Bear River Band of Rohnerville Rancheria (August 5, 2002) ("Bear River case" or Bear River Opinion").

In *Confederated Tribes of Coos*, the court recognized that the term "restoration" can be limited to avoid the result where "any and all property acquired by restored tribe would be eligible for gaming." The *Coos* court further observed:

> The term "restoration" may be read in numerous ways to place belatedly
> restored tribes in a comparable position to earlier recognized tribes while simultaneously limiting
> after-acquired property in some fashion.

There are express limits to what constitutes "restored lands". As the NIGC stated in its Grand Traverse Opinion:

> [W} e believe the phrase "restoration of lands", is a difficult hurdle
> And may not necessarily be extended, for example, to any lands
> That the tribe conceivably once occupied throughout its history.

NIGC Grand Traverse Opinion, August 31, 2001, also Office of the Solicitor's memorandum Re: *Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians v. Babbit* ("it also seems clear that restored land does not mean any aboriginal land that the restore tribe ever has occupied).

The test applied in the *Coos* case requires that the land to be considered part of any restoration shall be limited by:

(1) the factual circumstance of the acquisition.
(2) the location of the acquisition; and
(3) the temporal relationship of the acquisition to the restoration

Placement within a prior reservation of the tribe also is significant evidence that the land may be considered in some sense restored. In any event, "restoration" does not mean "acquired." Therefore, there must be other evidence that the proposed acquisition of the **Subject Land "restores" to the Tribe what is previously had.**

5. SUBJECT LAND AND APPROPRIATE RESTITUTION

When making a 25 U.S.C Section 2719 (b)(1)(B)(iii) determination, a general rule of equity, such a balancing of interests, is plainly required by the Indian Reorganization Act, NEPA, and IGRA itself. The Secretary of the Department must consider whether "restoring" the Subject Land to the Tribe for gaming purposes would:

(1) truly restore a sense of parity with other tribes.
(2) eliminate disadvantages as against other tribes; and
(3) Places the Tribe in a comparable position with earlier recognized and landed tribes.
(4) While the Secretary must conclude the acquisition (i) is in the "best interest" of the Tribe and its members, the Secretary must also determine that it will not be (ii) "detrimental" to the surrounding community. 25 U.S.C. Section 2719 (b) (1) (A).

Even more importantly to the equities analysis is recognition that the Tribe cannot be put into a better position than what it previously had; the Tribe can only be placed in a position comparable to its prior position. In short, the equities of this case mandate against finding the restoration exception as applicable. Acquiring the Subject Land for casino gaming purposes would grant the Tribe the right to operate a casino along one of California's most traveled north/south highways, near a residential track of homes, near children's schools and within the

sphere of influence of the family-centered Town of Windsor, population of 27,447. This would affect other Tribal governments, such as possibly the Federated Indians of the Graton Rancheria or the Dry Creek Rancheria.

The Subject Land is accessible by Highway 101 by way of East Shiloh Road or Old Redwood Highway. Both have limited traffic controls and are unlit, two-lane country roads near a community park and a newly proposed project of homes. These are the main egress and ingress roads local residents have to use for daily transportation as well as wildfire evacuations, which have occurred two to three times in the last few years. Casino traffic on these roadways would exacerbate evacuations and potentially cause loss of life.

Casino gaming on the Subject Land would certainly divert gaming that would otherwise occur at already operating tribal casinos some in more remote locations. In fact, near the Tribe's Lake County historic area, the Big Valley Rancheria and Robinson Rancheria have established casinos on historic lands.

Historical records do not assist the Tribe in their quest for a restored lands determination in Sonoma County. The 1923 records of the Reno Indian Agency[4] ("Agency") indicate an approximate population of six hundred Indians comprising nine groups residing in Lake County. One of the nine groups, the Lower Lake Koi consisted of thirteen families, thirty-seven persons including eight minors. Congress appropriated funds in 2014 for the purchase of lands for homeless Indians. The Agency purchased 140.46 acres of land in 1916. By 1947 according to the House Report H.R.585 authorizing the conveyance of the Rancheria to Lake County of the Lower Lake Koi Rancheria only two Indians resided on the track of land. The land was sold to Lake County for an Airport, but 41 acres was placed in fee for an Indian, Mr. Harry Johnson.

A Cultural Resources Evaluation report filed May 17, 2021, titled: Cultural Resources Study for the Windsor Residences Project at the Corner of Old Redwood Highway and Shiloh Road Windsor, Sonoma County, California, by Eileen Barrow, M.A./R.P.A.[5]

"This report was prepared for CRP Affordable Housing & Community Development project. This project is located directly across the street from the Subject Land and includes the Subject Land. A request was sent to the State of California's Native American Heritage Commission (NAHC) seeking information from the Sacred Lands File and the names of Native American individuals and groups that would be appropriate to contact regarding this project." Letters were sent to the following groups:

Cloverdale Rancheria of Pomo Indians of California
Dry Creek Rancheria of Pomo Indians
Federated Indians of Graton Rancheria
Guidiville Band of Pomo Indians
Kashia Band of Pomo Indians of the Stewarts Point Rancheria
Lytton Rancheria of California
Middletown Rancheria of Pomo Indians of California
Mishewal-Wappo Tribe of Alexander Valley
Pinoleville Pomo Nation

[4] Annual Report 1923 Reno Indian Agency: RG 75 Reno Indian Annual narrative and Statistical Reports 1912-1924 Box 6; Folder (Annual Narrative Reports 1923 Reno Ind. Ag.) pages 12-13
[5] https://www.townofwindsor.com/DocumentCenter/View/21738/Appendix-C---Cultural-Resources-Assessment

The NAHC replied with a letter dated May 6, 2021, which indicated that a search of the Sacred Lands File showed that there are cultural resources within the township and range of the APE. They added that the Mishewal-Wappo Tribe of Alexander Valley should specifically be contacted about this.

Plainly missing from this list is the name Koi Nation, Lower Lake Rancheria, Lower Lake Koi, or any other name which the Tribe has used in the past.

Evidence of reservation shopping: The Tribe has been reservation shopping since early 2002. This has been documented in the press and in City and County Board of Supervisor meeting minutes. Prominent investors, law firms and elected officials are named as persons hired by the Tribe to assist in its quest to establish a casino somewhere in California. For example, in January of 2005, the Tribe presented a power point presentation to the City of Oakland in the San Francisco Bay Area. The proposed casino would house 2000 slot machines and include a 1000 seat entertainment venue with four or five restaurants and a luxury hotel.[6] The Tribe offered the city council $35 million in a proposed mitigation agreement to support the project.

At that time (2005), attorneys from the East Bay Regional Park Service were requesting the Secretary of the Interior to retract the decision of the Assistant Secretary Indian Affairs that reaffirmed the federal status of the Lower Lake Koi in the December 29, 2000, decision. Further, the agency wanted the Tribe removed from the list of federally recognized tribes published pursuant to 25 U.S.C. 479a-1. (List of Federally Recognized Tribes, aka: List Act)

With respect to the Subject Land, no Indian lands have existed in the region since at least as early as 1850, when California became a State and exercised governance over the Subject Land. Sonoma County was one of California's original counties. In other words, without dispute for 171 years, no Indian lands have existed at the site of the Subject Lane (i.e., all land has been subject to local, state, and federal Law). Common sense dictates that it is unreasonable to place a new political entity for the purpose of establishing a casino which enjoys immunity to civil liability and tax exemption that for 171 years has been subject to local, state, and federal law and in the private ownership of generations of private citizens. The very nature of tribal sovereignty will impact and erode the cultural, political, and economic systems of the regional area.

In reality, the Tribe is once again asking for the remedy of a multi-million-dollar casino, asserting that this is equitable and reasonable relief because of an error made by the Department in terminating their status as Indians.[7] The Tribe and its investors are simply trying to do an "end run" around the two-step Secretary Determination process, precluding public, state, local government and tribal government comment on such a significant project should not be permitted under any circumstances.

The Subject Land by review of federal documents is not restored lands. Should the Tribe wish to proceed with the fee-to-trust process, it must abide by a two-step Secretary Determination process.

CONCLUSION

The non-tribal populations, agriculture interests, affected local governments and nearby tribes surrounding the Subject Land have justifiable expectations that the land remains similar in character. If changes in zoning, jurisdiction and critical health and safety issues regarding a change in the governing authority occur, then it should be determined in an open, fair, and transparent process.

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[6] Feb. 8, 2005, Berkeley Daily Planet, North Oaklanders Blast Airport Casino Plan by Richard Brenneman

[7] United States Department of the Interior, Memorandum 12-29-1999 to Regional Director, Alaska Region and Regional Director, Pacific Region from Assistant Secretary Kevin Grover subject: Reaffirmation of Federal Recognition of Indian Tribes.

Stand Up California accordingly urges the following determinations be made:

- The Subject Land cannot be taken into trust under the "restored lands" exception under the IGRA.
- The Subject Land must instead adhere to the two-part Secretary determination.
- The Tribe must seek restored lands in its historic area.

We hope you will find these comments helpful and useful in preparation of your restored lands determination decision-making process, for an Indian lands determination for the Tribe in Sonoma County will have far reaching impacts for the neighboring communities and environment.

Sincerely,

Cheryl A. Schmit
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