

LOZANO SMITH

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Trevin E. Sims

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April 7, 2008

By U.S. Mail & Fax: (916) 978-6055

Amy Dutschke
Acting Regional Director
Pacific Regional Office
Bureau of Indian Affairs
2800 Cottage Way
Sacramento, CA 95825

Re: DEIS Scoping Comments, Manzanita Band of Kumeyaay Indians, 60.8 acre fee-to-trust
Casino Project, Calexico, California

Dear Ms. Dutschke:

We are legal counsel for the Calexico Unified School District ("District"). We submit the following comments on the above-referenced Project on behalf of the District.

The Manzanita Band of Mission Indians ("Tribe") is one of the five tribes that make up the Kumeyaay Indians. The Tribe consists of approximately 108 members and has its own reservation, which consists of approximately 4,580 acres of land in trust located in the City of San Diego. The Tribe seeks to develop a casino with 2,000 slot machines and a 200-room hotel in the City of Calexico ("City"), Imperial County. The Tribe has identified an approximately 60-acre parcel of land within the City, but not within the Tribe's current trust lands, for the Project.

The Tribe has made application to the Secretary of the Interior to approve placing the proposed Project land in trust. Among other impacts, the placement of the proposed land in trust would remove the land from local tax roles. Further, the influx of workers and new residents associated with the Project would impact the District's school facility and programmatic capacity.

As part of its trust application and to address the anticipated impacts of the Project, the Tribe entered into a memorandum of understanding ("MOU") with the City, dated April 4, 2006 ("Original MOU"). A copy of the Original MOU is enclosed for your reference. Among other things, Section 3.2 of the Original MOU provides that the Tribe will pay approximately \$2 million dollars per year in the form of a revenue sharing payment to the City ("the RSP"). Subsequent to the execution of the Original MOU, the Tribe, City and District had continued discussions regarding the need for additional mitigation measures to address the Project's anticipated impacts on the District. As a result of those discussions, the City, and District have recently agreed to a sharing of the RSP ("the RSP Agreement"). The County of Imperial

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Amy Dutschke
 April 7, 2008
 Page 2

("County") and the Imperial Valley College ("IVC") are also parties to the RSP Agreement. Specifically, the parties have agreed to share the RSP as follows:

City:	42.2%
CUSD:	30.0%
County:	18.6%
IVC:	9.2%

This sharing arrangement is based on a "fair share" concept representative of the percentage of tax and assessment revenues each agency would ordinarily receive from the proposed trust land.

On March 7, 2008, the City attorney provided the District, IVC, and the County with a proposed Memorandum of Understanding memorializing the RSP Agreement and its terms. On March 27, 2008, we provided the City attorney with a revised draft of the RSP MOU with the District's proposed changes. On April 7, 2008, the City attorney advised us that the City Council had not made a decision regarding the District's proposed changes and would not do so until the City's April 14, 2008 council meeting. Further, the City attorney advised us that the City had not yet received any comments, revisions, or changes from IVC or the County.

The District's goal and desire is for the parties to execute a final RSP MOU by May 1, 2008. With the execution of a final RSP MOU, the District believes the Tribe and City will have taken a substantial step in addressing the anticipated impacts of the Project on the District. The District reserves the opportunity to supplement these comments regarding the status of the proposed RSP MOU.

The District looks forward to a long and continued partnership with both the Tribe and City in addressing the challenges and capitalizing upon the opportunities presented by the Project.

The District is thankful for the opportunity to submit these comments. If you should have any questions or require further information, please do not hesitate to contact the undersigned.

Sincerely,

LOZANO SMITH



Trevin E. Smith

TRB/bmh

Enclosure

cc: David Alvarez, Superintendent, Calexico Unified School District
 Jennifer Lyon, City Attorney, City of Calexico
 John Kennedy, Tribe Representative
 Ralph Cordova, County Counsel, County of Imperial

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November 19, 2009

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Imperial County- Office of the County Counsel
Fax No. 760-353-9347

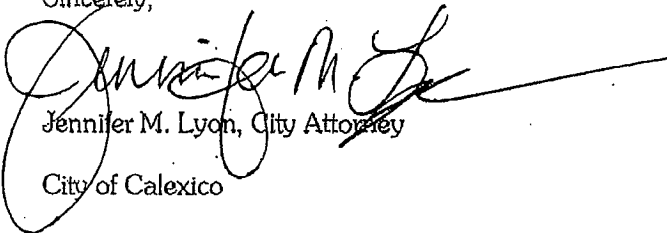
Via Facsimile Only

Re: MOU for Revenue Sharing- City of Calexico

Dear Ms. Tucker,

Pursuant to your recent request, please find a copy of the most recent version of the Draft MOU between the City of Calexico, County of Imperial, Calexico Unified School District, and Imperial Valley College attached to this letter. Although there were discussions about this draft MOU in March through June of 2008, no version of this MOU has been executed or approved by all parties to my knowledge. Further, no revisions to this draft MOU have occurred since May of 2008. Please contact me if you have any questions.

Sincerely,


Jennifer M. Lyon, City Attorney
City of Calexico

Attachment: Draft MOU

DRAFT

MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding ("MOU") is made this ___ day of November 2008, by and between the City of Calexico ("City,"), the County of Imperial ("County"), the Calexico Unified School District ("CUSD") and Imperial Valley College ("IVC"), hereinafter also referred to as a "Party," or jointly, "Parties" to outline the details of a revenue sharing arrangement between the Parties.

RECITALS

WHEREAS, the Manzanita Tribe ("Tribe") will seek approval from the Bureau of Indian Affairs ("BLA") of an application pursuant to Section 5 of the Indian Reorganization Act, 25 U.S.C. § 465, the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, *et seq.* ("IGRA"), and the National Environmental Policy Act, 42 U.S.C. § 4321, *et seq.* ("NEPA"), requesting that the United States accept trust title to a parcel in the City to conduct Indian gaming on such parcel; and

WHEREAS, pursuant to a favorable vote by the citizens of the City in June 2005, the City and the Tribe negotiated a Memorandum of Understanding (hereinafter "City-Tribe MOU"), attached hereto as Exhibit "A," to mitigate impacts that a casino could have on the City; and

WHEREAS, during negotiations of the City-Tribe MOU, the City formed a Casino Town Hall Advisory Committee which consisted of various representatives from local entities and members of the community and such Committee held several meetings to gather public input to provide direction to City staff to be used during the negotiation of the City-Tribe MOU; and

WHEREAS, the City-Tribe MOU was approved at a public meeting held by the City which was attended by representatives of several local entities, including the County and CUSD, in February of 2006; and

WHEREAS, the City-Tribe MOU contains provisions which require the Tribe to perform the appropriate level of environmental review and mitigation and also provides for various payments to the City to off-set the impacts that the casino will have on the City; and

WHEREAS, the plain language of Section 3.2 of the City-Tribe MOU contains a provision that the Tribe will pay the City an annual Revenue Sharing Payment ("RSP") into the

General Fund of the City in the amount of \$2,000,000.00 for the "unspecified impacts to the City"; and

WHEREAS, in the spirit of cooperation and to help off-set any potential impacts to the County, CUSD, and IVC, the City has proposed to share its RSP from the Tribe pursuant to the arrangement as specified in this MOU; and

WHEREAS, this MOU is intended solely as a funding arrangement between the local entities and is not a "project" as defined by the California Environmental Quality Act ("CEQA"); and

WHEREAS, this MOU is based on the estimated size and description of future development of an Indian gaming facility in the City; and

WHEREAS, no specific timeline has been identified for construction of the gaming facility at this time and no federal or state approvals have been obtained by the Tribe yet; and

WHEREAS, the City and the Bureau of Indian Affairs are currently performing the required environmental review for the proposed Indian gaming facility and surrounding development; and

WHEREAS, given the uncertainty of approvals and timelines for the Indian gaming facility, the City-Tribe MOU does not bind the City to providing any services at this time; and

WHEREAS, this MOU is not intended and shall not alter any provision of the City-Tribe MOU and only addresses the arrangement to share a portion of the City's RSP with the County, CUSD, and IVC.

NOW, THEREFORE, the Parties agree as follows:

1. Specific Provisions.

1.1. Revenue Sharing Payment. The City hereby agrees to share the RSP detailed in section 3.2 of the City-Tribe MOU with the County, CUSD, and IVC according to the following arrangement:

RSP Allocation

County: 18.6%

CUSD: 30%

IVC: 9.2%

This arrangement is based on the phased schedule as outlined in Section 3.2 of the City-Tribe MOU. Therefore, the first installment of the RSP that the City receives upon operation by the Tribe of a temporary gaming facility (one million) will be shared in the manner as specified above. Upon operation by the Tribe of the permanent gaming facility, the RSP will increase to its full potential as outlined in Section 3.2 of the City-Tribe MOU (two million), and the City will apportion the revenue sharing based upon the allocation listed above. The City hereby agrees to make payment to the County, CUSD, and IVC its share of the annual RSP within sixty (60) days of receipt by the City of the annual RSP by the Tribe.

If the RSP to the City is increased as described in Section 3.2 of the City-Tribe MOU due to (1) an increase in construction cost, (2) expansion of the casino, or (3) an annual inflation factor, the allocation specified above will apply to the increased amount. If the RSP to the City is increased for any other reason by the Tribe, the City agrees to apply the above allocation to the increased RSP amount. If the RSP to the City is decreased by one-half pursuant to the terms of Section 3.2 of the City-Tribe MOU due to another Indian Casino locating within 25 miles of this proposed casino, then the County and IVC agree to a reduction in the allocation listed above by one half, so that the County's and IVC's allocation will be 9.3% and 4.6% respectively and the allocation will be applied to the reduced amount of RSP that the City will receive. If the RSP to the City is decreased by one-half pursuant to the terms of Section 3.2 of the City-Tribe MOU due to another Indian Casino locating within 25 miles of this proposed casino, then the City and CUSD agree that CUSD will still receive 30%, however the percentage will be applied to the reduced amount of RSP that the City will receive and CUSD will therefore be receiving a reduced amount. If the Tribe seeks and obtains a reduction in the RSP for any other reason, all Parties to this MOU agree

to meet and confer in good faith and decrease the RSP allocation in this MOU in proportion to the decreased RSP to be paid to the City.

If the Tribe fails to make the annual RSP to the City, the City is not bound or obligated in any way to provide any allocation to the County, CUSD, or IVC. If the Tribe makes a partial payment of the annual RSP, the City will pay the partial payment based on the allocation set forth above. Further, the sharing arrangement outlined under this Section only pertains to the amount to be paid by the Tribe to the City as specified in Section 3.2 of the City-Tribe MOU. This allocation does not pertain to any other provision of the City-Tribe MOU.

- 1.2. **Effectiveness.** This MOU is only effective if (1) signed by all parties and (2) the Tribe obtains the appropriate approvals by the state and federal governments to take land within the City into trust and to operate gaming (as defined in the City-Tribe MOU) on land within the City. If the Tribe is informed that the United States will not take the land into trust or that the Tribe may not conduct gaming activities thereon, this MOU has no force and effect, and the City is not obligated to make any payments as outlined above in Section 1.1.
- 1.3. **Limitation of Claims.** The Parties each acknowledge and agree that this MOU shall constitute the full and final resolution of all Parties' claims known or unknown against the City with respect to any revenue sharing between the City and Parties listed herein of the revenue received by the City from the Tribe under the attached City-Tribe MOU, and any amendments thereto, for any impacts associated with the casino. In exchange for the payments as specified in Section 1.1 above and other promises made herein, the County, CUSD, and IVC hereby, and for their heirs, representatives, successors, and assigns, release, acquit, and forever discharge the City, their past and present employees, agents, officers, representatives, insurers, attorneys, predecessors, successors and assigns, and all persons acting by, through, under, or in concert with any of them, and each of them, from any and all claims, charges, complaints, liabilities, obligations, promises, benefits, agreements, controversies, costs, losses, debts, expenses, damages, actions, causes of action, suits, rights, and demands of any nature

whatsoever, known or unknown, suspected or unsuspected ("Claims"), which pertain to any revenue sharing between the City and Parties listed herein of the revenue received by the City from the Tribe under the attached City-Tribe MOU, and any amendments thereto, for any impacts associated with the casino, without regard to whether such Claims arise under federal, state, or local constitutions, statutes, rules, regulations, or common law. The Parties expressly acknowledge that any Claims are forever barred by this Agreement. Specifically, the County, CUSD, and IVC hereby agree not to request or demand any further allocations of money from the City with respect to the City-Tribe MOU, or any amendments thereto.

In relation to the release provisions of the paragraph above, the County, CUSD and IVC understand that California Civil Code section 1542 reads as follows:

A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.

The County, CUSD and IVC hereby waive the protection of California Civil Code section 1542 for the specific issue specified above.

- 1.4. **Further Agreements.** The Tribe is not a party to this MOU, and this MOU does not bind the Tribe in any way above and beyond the approved City-Tribe MOU and any amendments thereto. However, nothing in this MOU prohibits the City, the County, CUSD, or IVC from entering into separate or additional agreements with the Tribe.
- 1.5 **Non-Payment by the Tribe of the RSP.** In the event that the Tribe fails to make the RSP to the City under the terms and for the amount agreed upon in Section 3.2 of the City-Tribe MOU, each Party hereby agrees that unless each Party contributes to the dispute resolution costs and attorneys fees for the City to litigate such issue with the Tribe in a proportionate amount equal to the allocation of funds outlined in Section 1.1 above, such Party shall forego its share of any award

received by the City upon a successful arbitration judgment against the Tribe. This Section in no way binds the City to pursue an action/arbitration against the Tribe if the Tribe fails to make such RSP; such decision is completely at the discretion of the City, and City reserves the right to choose its own legal counsel. However, if the City does institute an action pertaining to the RSP and a Party to this MOU fails to contribute toward such action, such Party cannot receive a benefit from such action. Further, if the City does institute an action against the Tribe and a Party to this MOU contributes its fair share towards such action, such Party shall only be entitled to receive the proportional amount of the award which relates solely to the issue of the RSP. Any Party which contributes toward an action/arbitration against the Tribe for nonpayment of the RSP as described above, shall be entitled to reimbursement of its proportional share of the dispute resolution expenses if the City is deemed the "Prevailing Party" (as defined in section 8.5 of the City-Tribe MOU) and receives an award of its "Dispute Resolution Expenses" (as defined in section 8.5 of the City-Tribe MOU) from the Tribe pursuant to section 8.5 of the City-Tribe MOU.

- 1.6 **Support for Project.** In consideration for the obligations undertaken by the Tribe and the City, the Parties shall support the application of the Tribe to the United States, shall respond favorably to inquiries about the Tribe's trust application from the Bureau of Indian Affairs, and shall provide all other correspondence or documents reasonably requested by the Tribe to facilitate or promote the development and successful operation of the casino facility.
- 1.7 **Discretionary Use of Funds.** The City has not conditioned the use of the RSP funds to be allocated to each Party as described herein. Each Party has the discretion to use these funds for the needs of its entity. However, each Party expressly acknowledges that these funds are not guaranteed by the City in any way. The provision of these funds to the Parties is solely dependent on the Tribe paying such money to the City. If the Tribe fails to provide such RSP to the City, each Party takes sole responsibility for the effects of such non-payment and agrees not to institute an action against the City for the results of such non-payment.

2. DISPUTE RESOLUTION

2.1. **Dispute Resolution.** The methods outlined below must be followed if there is any dispute between the Parties as it relates to this MOU. No action shall be instituted in a court of law unless the dispute resolution procedures listed herein have been exhausted.

A. **Meet and Confer Process.** In the event that any Party believes that the other has violated this MOU, it may request in writing that the Parties meet and confer in good faith for the purpose of reaching a mutually satisfactory resolution of the problem within fifteen (15) days of the date of service of said request.

B. **Notice of Dispute.** If the Party is not satisfied with the result of the meet and confer process, such Party may provide written notice to the others, describing any alleged violation of this MOU ("Notice of Dispute"), with particularity and setting forth the action required to remedy the alleged violation.

C. **Response to Notice of Dispute.** Within fifteen (15) business days of service of a Notice of Dispute, the recipient Party shall provide a written response setting forth in detail the steps it has taken and/or will take to address the problem. The failure of the recipient Party to serve a timely response shall entitle the complaining Party to proceed directly to mediation, as provided in Subsection D below.

D. **Mediation Procedures.** Subject to prior compliance with the meet and confer process set out above in Subsection A and the Notice and Response process in Subsections B and C, any Party may initiate mediation to resolve any dispute arising under this MOU. The mediation shall be held in Imperial County, California, unless otherwise agreed. Mediation fees, if any, shall be divided equally among the parties involved.

2.2. **Limitation on Damages.** In the event of a successful mediation or other legal action on behalf of a Party to this MOU, each Party may only collect as damages from the City an amount equal to its portion of the annual RSP as outlined in Section 1.1 of this MOU. In no event shall the City be held responsible for

damages to any Party to this MOU beyond an amount equal to the Party's fair share portion of the RSP under the City-Tribe MOU which has been actually paid by the Tribe and received by the City. The City shall not be liable for any consequential, punitive or special damages to any Party to this MOU.

2.3. **Attorneys Fees.** In the event any Party commences an Action (as defined herein) against the other Party which arises out of a default of, breach of, failure to perform this MOU or otherwise related to this MOU, the Prevailing Party in the Action shall be entitled to recover its Dispute Resolution Expenses (as defined herein) from the other Party in addition to whatever relief to which the Prevailing Party may be entitled. For the purposes of this Section, the term "Action" means any arbitration, any action to enforce an arbitration award, or any other legal action, and the filing, recording, or services of any process, notice, claim, lien, or other instrument which is a prerequisite to commencement of the Action. For the purposes of this section, the term "Dispute Resolution Expenses" means all costs and expenses, to the extent such are reasonable in amount, that are actually and necessarily incurred in good faith by the Prevailing Party directly related to the Action. For the purposes of this Section, the term "Prevailing Party," shall have the meaning ascribed in Code of Civil Procedure section 1032(a)(4).

2.4. **Indemnification.** The County, CUSD, and IVC agree to indemnify, defend, and hold harmless the City its officers, agents, and employees in a proportional amount equal to the allocation listed in Section 1.1 herein, from and against any and all claims, demands, disputes, actions, losses, damages, injuries and liability direct or indirect (including any and all related costs and expenses in connection therein) which arise from (1) the City's approval of this MOU, (2) the City's decision to share the revenue as specified herein, or (3) the City's ongoing commitments under this MOU.

3. GENERAL PROVISIONS

3.1. **Notice.** Any notice required to be given pursuant to this MOU shall be delivered to the appropriate Party by Federal Express or by Certified Mail Return Receipt Requested, addressed as follows:

If to City: City Manager
City of Calexico
608 Heber Ave.
Calexico, CA 92231

Copies to: Jennifer Lyon, City Attorney
Mc Dougal, Love, Eckis,
Smith, Boehmer & Foley
460 North Magnolia
El Cajon, CA 92021

If to County:

If to CUSD:

If to IVC:

or to such other different address(es) as any Party may specify in writing. Any such notice shall be deemed given two (2) days following deposit in the United States mail or upon actual delivery, whichever first occurs.

- 3.2. **Authority to Execute and Perform MOU.** Each Party represents and warrants that it has full power and authority to execute this MOU and to be bound by and perform the terms hereof. On request, each Party shall furnish evidence of such authority. The persons executing this MOU on behalf of the Parties hereto warrant that (a) such Party is duly organized and existing, (b) they are duly authorized to execute and deliver this MOU on behalf of said Party, (c) by so executing this MOU, such Party is formally bound to the provisions of this MOU, and (d) that

entering into this MOU does not violate any provision of any other MOU to which said Party is bound.

- 3.3. **Waivers.** No failure or delay by any Party to insist upon the strict performance of any term or condition of this MOU, or to exercise any right or remedy upon the breach thereof, shall constitute a waiver of any such breach or any subsequent breach of such term or condition. No term or condition of this MOU, and no breach thereof shall be waived, altered or modified except by written instrument. No waiver of any breach shall affect or alter this MOU, but every term and condition of this MOU shall continue in full force and effect with respect to any other then existing or subsequent breach thereof.
- 3.4. **Captions.** The captions for each Section and Subsection are intended for convenience only.
- 3.5. **Interpretation; Severability.** It is the intent of the Parties that this MOU be interpreted as a whole to carry out the intent of the Parties. If any provision hereof is challenged as being invalid or unenforceable, it shall be construed, insofar as possible, to uphold its enforceability and if it cannot, and is held invalid or unenforceable, it shall be held severable and said invalidity shall not affect the validity of the remainder of this MOU, so long as the fundamental purposes hereof can be obtained.
- 3.6. **Periods of Time.** Whenever any action is to be taken on a date specified in this MOU, if such date falls on a Saturday, Sunday, or legal holiday under the laws of the State of California, said date shall be extended to the next day which is not a Saturday, Sunday or legal holiday.
- 3.7. **Amendment.** The parties may from time to time approve amendments hereto in the same manner as this MOU was approved. Any change to or modification of this MOU must be in writing signed by all Parties. All Parties agree to negotiate in good faith to further the objectives of this MOU.
- 3.8. **Entire MOU.** This MOU, including the Exhibit referred to herein and any documents referenced herein or executed by the Parties simultaneously herewith,

which are expressly incorporated herein by reference, constitutes the entire understanding and MOU of the Parties hereto and supersedes all prior written or oral agreements between the Parties.

- 3.9. Preparation of MOU.** This MOU was drafted and entered into after careful review and upon the advice of competent counsel; it shall not be construed more strongly for or against any Party. This MOU may not be unilaterally amended and shall be strictly construed as set forth herein to accomplish the purposes of the MOU.
- 3.10. Standard of Reasonableness.** Unless specifically provided otherwise, all provisions of this MOU and all collateral MOUs shall be governed by a standard of reasonableness.
- 3.11. Execution.** This MOU may be executed in counterparts. Each of the four originals is equally valid.
- 3.12. No Third Party Beneficiaries.** This MOU is not intended to, and shall not be construed to, create any right on the part of a third party to bring an action to enforce any of its terms, or otherwise to impair the sovereign immunity of the Tribe.
- 3.13 Term.** This MOU shall become effective only if (1) fully executed by all Parties and (2) the Tribe obtains the appropriate approvals by the state and federal governments to take land within the City into trust and to operate gaming (as defined in the City-Tribe MOU) on land within the City. The term of this MOU shall be the same as the term specified in Section 9.15 of the City-Tribe MOU. It is the intent of the Parties that this MOU shall remain in full force and effect as long as the City-Tribe MOU is in full force and effect. If the City-Tribe MOU terminates, this MOU shall also immediately terminate. This MOU may be terminated at any time by mutual agreement of the Parties. If one Party seeks to terminate this MOU and the other party does not agree to terminate, then the Parties shall resolve the dispute as provided in Section 2 of this MOU.

WHEREFORE, IN WITNESS THEREOF, the Parties hereby execute and enter into this MOU with the intent to be bound thereby through their authorized representatives whose signatures are affixed below.

City of Calexico

By: Mayor Louis Fuentes

Date

County of Imperial

By:

Date

Calexico Unified School District

By:

Date

Imperial Valley College

By:

Date