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May 4, 2006

The Honorable Richard W. Pombo
House Committee on Resources
1324 Longworth House Office Building
Washington, DC 20515-6201

The Honorable Nick Rahall
House Committee on Resources
1329 Longworth House Office Building
Washington, DC 20515

Re: House Committee on Resource Hearing of April 5, 2006

Dear Chairman Pombo and Ranking Member Rahall:

I write to offer testimony for the record on HR 4893, and in particular regarding the Scotts Valley Band of Pomo Indians. I am the President of Artichoke Joe's, a cardroom in San Bruno, California, near the San Francisco Airport. Artichoke Joe's is a family owned business started 90 years ago by my grandfather. We provide over 300 jobs to the community and pay taxes to the City of San Bruno which amount to over 5% of the city's budget.

California, perhaps more so than any other state in the country, is grappling with the proliferation of Tribal casinos. At the onset, let me state that I share the view held by a great majority of Californians that Native Americans are to be commended for taking steps to preserve their culture and for pursuing business opportunities to help ensure economic self-sufficiency and provide Tribal families with critically needed social, educational, and health care services.

Moreover, I also share the view of most Californians that some Tribes (not to mention their non-Tribal investment partners) have unfortunately misinterpreted our state's collective compassion for the plight of the Native American to mean something that it clearly never did and never should.

When California voters approved Propositions 5 in 1998 and 1A in 2000, and granted a monopoly on casino gaming to California Indian tribes, they did not intend to allow Nevada-style gaming in the urban areas of the state. Many voters expressed a concern that these

Propositions would allow tribes to establish casinos in urban areas and the tribes insisted that was not true. The tribes ran many TV ads – reportedly $100 million worth of ads – many showing a rural reservation. The message was that Indian lands were in rural locations, far from population centers. The Voters Pamphlet echoed this message, telling voters that Indian gaming would be confined to remote, mostly rural areas of the state.

There are few issues that directly and uniquely impact Californians and are more deserving of Congressional attention than off-reservation Indian casinos. I recognize and applaud your Committee for making significant strides to restore common-sense policy and decision making in this area. The legislation, as introduced, appropriately rejects the notion of "grandfathering" certain Tribes from compliance with the common-sense guidelines and reforms that are so badly needed. To grandfather any Tribe is to perpetuate the status quo process which, in my view, fundamentally violates the spirit of the very legislation this Committee is working to enact.

In your efforts to advance this important legislation, you have heard from several compelling witnesses and experts in this area. Having reviewed the written testimony from your hearings, I have developed a better understanding of the severity and breadth of this issue nationwide. Locally, however, I'm troubled by the fact that your Committee heard from a witness that provided testimony on April 5, 2006 that was, at best, factually inaccurate and meaningfully misleading. I hope my statement herein helps to correct the record and lends factual data for the Members to more fully consider.

The Chairman of the Scotts Valley Indians, Donald Arnold, submitted both oral and written testimony to the Resources Committee, at its April 5, 2006 hearing. According to the testimony of Mr. Arnold, the Scotts Valley Indians are not reservation shopping and are deserving recipients of a "grandfather" escape clause from the reforms envisioned within H.R. 4893. The facts simply do not support the testimony presented by Mr. Arnold. As the research findings outlined below clearly illustrate, the Scotts Valley Indians are engaged in the practice commonly known as reservation shopping. Moreover, the rancheria, when it existed, was not sovereign Indian land, and the Indians who lived on it were not a tribe. They have, according to the records, no history in Contra Costa County, and have no basis to operate a casino in the Bay Area.

In support of this conclusion, I would like to provide the Committee with the following background summary uncovered in my documented research findings.

History of Scotts Valley Rancheria

The history of the Scotts Valley Indians begins with the history of the rancheria system. The rancheria system was established in the early 1900s as an alternative to the reservation system. In 1905, Congress appointed C.E. Kelsey, an attorney and early Indian advocate, to investigate and report on the condition of California Indians. He found them in poor condition and recommended that rancherias be created for Indians not living on reservations. The rancheria would be a small parcel of land – many were 50 acres or less – purchased from private parties in settled areas of the state. Thus, these lands were already under state jurisdiction. These were not to be reservations, unsettled lands far away from non-Indian communities, but were in and among these non-Indian communities, so that Indians could obtain jobs in the area. Indian families would each be assigned small plots of five to ten acres.

In 1906, Congress authorized money to buy new lands for California Indians. These rancherias were not intended as sovereign Indian lands. They were not administered by the regional office, and since Indians on the rancheria did not live on a reservation, those Indians were not considered under the jurisdiction of the BIA.

In 1911, Kelsey purchased 56 acres of land in Lake County for Indians in the Scotts Valley area. The land, as usual with rancherias, was purchased from private parties, and had been under state jurisdiction for years. There was a big ranch house on the property. Title was not taken in trust, but was held in the name of the United States.

The rancheria was immediately subdivided and assigned to 14 families. The residents did not act as a group, and there is no evidence of any tribal government, let alone any government to government relationship with the United States.

In 1935, the BIA conducted a vote on the rancheria to determine if the residents wanted to organize as a tribe under the Indian Reorganization Act of 1934. Seventeen residents voted, and they voted against organization. At the time, many Northern California Indians felt that the IRA was going to put them back on reservations and reverse their economic progress. The residents expressly did not want to be considered a tribe.

In 1955, residents of the rancheria requested that their land assignments be distributed to them individually. In 1958, Congress passed the California Rancheria Act authorizing the BIA to distribute the site to the residents. The Senate Report recited that the residents were not "formally organized" as a tribe. Under the Rancheria Act, the distributees lost rights to any tribal benefits.

Residents were gifted these lands. They did not have to buy them. There were 7 homes and 10 assignees. Contrary to Mr. Arnold's testimony, the residents were not relocated. To the contrary, they were given land and the opportunity to live on their land. Many choose to leave and to move to the Bay Area in search of employment, but that was not under any compulsion.

When one resident tried to sell his parcel, the title company raised an issue whether the land was trust land, held for tribal Indians, thus precluding the government from transferring the land. This same issue had been raised with regard to land sales from other rancherias and in August 1960, the BIA issued a Opinion of the Solicitor declaring what had been the case all along, that the land was not trust land, and that the federal government had always held both legal and equitable title.

In 1986, descendants of the former residents of the rancheria sued the federal government for "illegally terminating" the tribe. They claimed that the rancheria had been trust land under tribal jurisdiction and that the tribe had been wrongfully terminated. These arguments were not correct. The rancheria land had not been trust land and the residents had never organized or operated as a tribe. Therefore, there was no tribe to terminate. A memorandum prepared by the Department of Justice in the litigation confirms this history, reading, "The group apparently made no effort to formally organize or adopt a governing document, and there is no effort to formally organize or adopt a governing document, and there is no indication they routinely conducted meetings or evidenced their decisions by enactment of resolutions." Nevertheless, the government conceded these points, and without conducting any review under section 83 regulation, agreed to treat the group as a tribe.

According to an internet search of title records, the Scotts Valley Indians currently own five parcels of property in Lake County, purchased between 1996 and 2004. A least one parcel is big enough to hold multiple dwellings. Between 1996 and 2003, Scotts Valley was awarded Community Development Block Grants from the US Department of Housing and Urban Development totaling $1,544,476 for housing on those sites. As of 2002, the tribe was building 2 units and a road on one parcel and was planning to build six more units.

In 2002, the Scotts Valley Indians partnered with a non-Indian businessman to develop a casino in the Richmond area, and in January 2005, the Scotts Valley Indians submitted an application to the BIA to have land in Contra Costa County taken into trust.

* * *

On April 5, 2006 the House Resources Committee held a hearing on H.R. 4893 and invited the Chairman of the Scotts Valley Indians to testify in support of a "grandfather" clause that would exempt his Tribe from the process reforms contemplated under Chairman Pombo's

legislation. The witness, Don Arnold, unfortunately offered testimony that was, at best, misleading. I would like to address several of his unfounded and unsupportable statements:

Rebuttal to Testimony

- *"Scotts Valley is a small landless Tribe"*

  The Scotts Valley Indians were never considered a tribe when the rancheria existed. They were not a tribe when the rancheria was purchased. They were not a tribe during the 1930s, 40s and 50s, having declined to organize under the Indian Reorganization Act. Nor were they a tribe when the California Rancheria Act was passed and individuals were given plots of land outright.

  Nor are the Scotts Valley Indians currently landless. As noted, the Scotts Valley Indians currently own five parcels in Lake County. According to the group's website, they secured funding from the US Department of Housing and Development, were building 2 houses on the Kelseyville project and hoped to build six more units.

- *Scotts Valley "has absolutely no land base."*

  See above. According to an internet search, the group owns five parcels in Lake County and is building housing on the Kelseyville project.

- *"The Tribe's status as a federally-recognized Indian tribe was illegally terminated in 1965 under the California Rancheria Termination Act."*

  When the rancheria was first purchased, the Indians who became residents were not part of an organized tribe and were not considered to be under the jurisdiction of the BIA. Nor was the land administered by the regional BIA office. The residents were not a tribe then and never became a tribe. When the rancheria was distributed, the residents were not a tribe and there was no tribe to terminate. The claim that a tribe was illegally terminated is a myth of over-zealous lawyers. The myth was used to justify reinstatement of federal benefits for Indian descendants, but since then has been used much more insidiously to establish a sovereignty that has no basis and to avoid land use rules and frustrate expectations of the East Bay community.

- *The Tribe's status was "restored in 1992 pursuant to a judgment of the Federal District Court for the Northern District of California. The Judgment, however, specifically precludes the Tribe from re-establishing our former Rancheria."*

The 1992 judgment did not restore tribal status but created a tribal status that had not previously existed. Furthermore, the judgment was based on a stipulation of the BIA, not on an evidentiary hearing and judicial fact-finding. Nor was the BIA's stipulation based on administrative fact-finding. The BIA did not require the Scotts Valley Indians to go through a section 83 regulatory review. The stipulated judgment does not satisfy any of the three methods specified under federal law for gaining tribal recognition. It was neither an administrative determination after a section 83 review, nor was it a judicial determination.

Moreover, the Judgment did not preclude the Tribe from re-establishing the former rancheria. To the contrary, the Judgment expressly allowed for reestablishment of the former rancheria. It read:

> Federal defendants agree to accept in trust status any land within the boundaries of the former Scotts Valley...Rancheria[] that:
>
> (a) is currently in Indian ownership and
>
> (b) was deeded or passed as a direct consequence of termination to:
>
> (1) the Sugar Bowl Association...or
>
> (2) any distributee who received land under a rancheria distribution plan, or
>
> (3) any dependent or Indian heir, or successor in interest to such distributee, provided any successor in interest is an Indian from the rancheria. (As used herein, "Indian of the rancheria" shall include distributees and their dependent members, and their Indian spouses and lineal descendants.)
>
> Federal defendants further agree to discharge any tax liens against the property and to discharge those specific liens, deeds of trust, or mortgages listed in Exhibit A, attached hereto, which were incurred by the Indian owner after the purported termination for the purpose of improving the habitability of the subject property....

Exhibit A listed two parcels as follows:

> (1) Assessor's Parcel No. 005-450-05 (Boggs, Theresa Pearl - deceased)
>
> (a) Delinquent taxes, including penalties, for 1983-1990 totaling $1,880.60."
>
> (b) Estimated taxes for 1990-1991 in the amount of $127.00.

(2) Assessor's Parcel No. 005-040-06 (Elliott, Bennett)
   (a) North Lakeport Water District assessment of $4,108.30, payable over a 25 year period at an annual assessment in the amount of $285.00.
   (b) Current taxes are minimal because of homeowner's exemption. Taxes, combined with Fire District assessment of $22.50, totaled $23.20 in 1989-1990.

In a separate paragraph of the Judgment, the Federal government agreed to accept in trust any land within the former boundaries of the rancheria which is subsequently acquired by any distributee, or by their dependent or lineal descendant or by the Scotts Valley Band. (Para. 8)

The Judgment stated that "the authority of the respective tribal governing body" would not extend to the former rancheria lands unless the individual "landowners" consented to the tribal authority. (Para. 14.) However, the fact is that there is no tribe and the group has no governmental authority over any land.

- *"As a result of the Federal Government's termination and relocation policies throughout the 20th century, the vast majority of members were relocated to the San Francisco Bay area."*

The Federal government had no "termination" policy. It did not "terminate" tribes as there were no tribes on rancherias, only unaffiliated Indians. It terminated guardianship status over these Indians, freeing them from the stultifying confines of an outdated guardian-ward relationship. Certain benefits were terminated, but in return, the Indians were given title outright to the lands they were living on.

The Federal government never had any sort of relocation policy. Individuals were given rancheria lands with the right to stay on those lands. If they left it was of their own choice, with no involvement and no knowledge of the BIA. The idea that the BIA relocated people is not supported in an extensive search of archived records of the BIA. It is unknown where the 10 original distributees of the Scotts Valley rancheria lived during the remainder of their lives.

- *"In 2000, the Bureau of Indian Affairs designated Contra Costa County, California as the Scotts Valley Band of Pomo Indians 'service population area.'"*

  This claim is apparently based on a May 16, 2000 Federal Register notice of "near reservation designations" for 29 California tribes. The term "service population area" appears to be used as a synonym for "near reservation designation."

  The Federal Register states that these are "near reservation designations of certain tribal entities . . . recognized as eligible to receive services from the BIA." The Register further states "In the absence of officially designated 'near reservation' areas, such services are provided only to Indian people who live within reservation boundaries. The tribes identified below are now authorized to extend financial assistance and social services to their eligible tribal members (and their family members who are Indian) who reside outside the boundaries of a federally recognized tribe's reservation, but within the areas designated below."

  Near reservation locations for the Scotts Valley Indians are listed as the counties of Mendocino, Lake, Sonoma and Contra Costa. However, the only significance of the near reservation designation is with respect to availability of services. Without designation, a tribe can provide services only to members living on a reservation. This designation does not indicate that the Indian group has any sort of claim of sovereignty over the County that would allow it to own land and claim exemption from land use controls or other laws of the state and County.

- *"Because a large percentage of tribal members reside in and around the County and the County has been designated as the Tribe's service population area, the Tribal Council has determined to restore the Tribe's trust land base in the County, and to fully establish the Tribal Government and Tribal community in Contra Costa County."*

  Both the factual and legal underpinnings of this statement are incorrect. The Scotts Valley Indians were not a sovereign tribe. They had no land over which they had sovereign control to the exclusion of the state. The implied claim in this statement, that if they were an Indian tribe and did have sovereignty, they could unilaterally decide to purchase land in a County over 100 miles from its historic reservation and somehow oust the state of jurisdiction is remarkable. It also is wrong. Once a state has jurisdiction over land within its borders, it cannot be ousted from its jurisdiction. Only if the state ceded jurisdiction back to the federal government would an Indian tribe be able to obtain new jurisdiction. No tribe can just decide to purchase land wherever it wants, oust the state and county of jurisdiction. Even if the federal government takes title to the land, declares it held in trust and declares it a reservation, the land remains under state control until the

state cedes jurisdiction. Designation of Contra Costa County as an area where members can receive tribal services (i.e. government benefits) is irrelevant.

As noted above, the Scotts Valley Indians have five parcels of land in Lake County and are constructing housing on those parcels. One parcel has sufficient acreage for a number of residential units.

- *"A detailed Environmental Impact Statement (EIS) was developed which identifies a range of measures necessary to mitigate significant impacts our project will have on the local community."*

  This statement similarly suffers from factual and legal defects. Legally, the issue is whether the Indian group has any right to oust the state and county of jurisdiction over the proposed site. The issuance of an EIS would not provide that right. Furthermore, while a lengthy draft EIS has been released, it fails in significant ways to disclose the significant impacts the project would have on the local community. It denies any significant social and economic impacts. It denies that it will increase crime in the community. It similarly denies that it will lead to an increase in bankruptcies. Both these assertions rely on single academic studies that controvert vast bodies of academic studies that conclude otherwise. Reliance on one study against a body of other studies is not proper.

- *"Congress provided the restored lands exception of Section 20 (b)(1)(B)(iii) of IGRA so that eligible tribes such as Scotts Valley could be placed closer to the position they would have been in had the Tribe been restored and held lands in trust prior to 1988."*

  As shown above, the residents of the Scotts Valley rancheria never constituted a tribe, and the restored lands exception was never intended to benefit such a group. The descendants of this group would not have been entitled to have a casino on lands held before 1988 because they never held land under their own jurisdiction.

- *"We are not 'reservation shopping'"*

  This is reservation shopping by a group which is not entitled to any reservation. The former group never organized as a tribe when they held land and the rancheria was never Indian land under Indian jurisdiction. But even if they had been a tribe and were entitled to Indian land under their jurisdiction, there is no justification for taking land in Richmond, over 100 miles away from their former lands. The justifications given, that the group cannot move back onto the former rancheria lands and that this is a designated service area, are not valid. The group could buy other lands in Lake County. In this

regard, the group already owns five parcels in Lake County, all near the former rancheria. There is no reason not to use some of that land for a casino, if in fact the group is entitled to sovereign lands. The only reason for coming to Richmond is to locate this business in the urban area, the essence of reservation shopping.

- *"The tribe has both a strong historic connection to our proposed restored trust land and an even stronger modern day connection to that same proposed trust land."*

  As demonstrated, the Scotts Valley Indians are not a tribe in the sense of a group entitled to exercise Indian sovereignty. Nor do they have any historic connection to the area. Their connection to the area is no more than Europeans, Asians and others who have moved to the Bay Area for economic reasons. Their history is as immigrants, not as the historic residents and sovereigns of the area. This is not a history that allows them to buy land and to claim exemption from the land use laws adopted by the community.

- *"Finally, there needs to be a grandfather clause for those tribes already in the process. Many of these tribes have exhausted much time and resources like Scotts Valley. Changing the rules of the game is unfair... This is the only fair and equitable remedy... The rules of the game should not be changed midway through the seventh inning."* (Oral testimony based on unofficial transcript.)

  It is unfair to the community for a tribe from 100 miles away, financed by investors from out of state, to buy land in the community and then claim that now the land is exempt from all land use controls the community has set in place. People have established residences, purchased homes, and founded businesses. Over the last 150 years, people through the local government, have created a physical infrastructure, including roads, railways, and airports, water lines, sewer lines, drainage, and other utilities, and have created a service infrastructure to provide governmental services to the community. This is a huge investment, and these investments are based in large part on the land use controls in the community. These controls create expectations among current residents. To have a group come in and claim they are exempt from government controls is a radical claim which serves to undermine the whole system and frustrate the residents expectations. <u>The "tribe" wants to be in the community but not "of" the community. It does not want to be governed by restrictions that would apply to everyone else.</u>

  That was never the intent of IGRA. IGRA was intended to apply only to lands already under the tribes' jurisdictions. It did not intend to apply to lands under state jurisdiction or to create some new process exempting lands from state jurisdiction. Further, IGRA provided a general prohibition against gaming on after-acquired lands. The exception

was intended to be very narrow, restored land under the tribe's jurisdiction. No one ever thought this would be urban lands.

Nor is this consistent with current desires of residents of the immediate area or of the wider East Bay area or of the Bay Area or of the state. Polls confirm that residents in all these areas overwhelmingly oppose the introduction of gaming into the urban area. Newspapers in the area have overwhelmingly editorialized against this, and numerous politicians have opposed this. In fact, no politicians support this except in the cities which would receive windfall payments from Indians.

Scotts Valley has not obtained any approvals for its proposal. Federal law does not usually involve zoning type issues, so a review of state law is helpful to evaluate whether a change in rules is fair or unfair to the Indians. Under state law, an owner has no vested rights to proceed unless they have expended monies based on some governmental approval. Since Scotts Valley has never obtained any governmental approval to construct a casino at the proposed site, they would have no vested rights, and a community would be able to set the zoning laws without any obligation to the Indian owners. The same result should pertain in the federal sphere. Scotts Valley has no vested interest in exploiting the loophole in IGRA, and Congress, to protect the wider community, can close this loophole without any unfairness to the group.

* * *

In conclusion, I join with a significant majority of Californians in urging the Committee to move forward with off-reservation gaming reform proposals like that proposed in H.R. 4893, and do so without creating new loopholes for Tribes in the form of grandfather provisions. Finally, H.R. 4893 must also restore the rights of local communities that were unfairly circumvented by dark-of-night congressional legislation intended to advantage one Tribe by allowing it to escape IGRA community input protections.

Thank you for the opportunity to provide these comments and thank you for taking action to protect the community through H.R. 4893. Please feel free to contact me with any questions Committee Members may have on my testimony or off-reservation gaming problems generally.

Sincerely,

Dennis Sammut