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May 4, 2005

VIA FACSIMILE (916-978-6099)
AND FEDERAL EXPRESS

Clay Gregory – Regional Director
Bureau of Indian Affairs
Pacific Regional Office
2800 Cottage Way
Sacramento, California 95825

Re: Comments in Opposition to Scotts Valley Tribe's Request to Acquire Land in Trust for Gaming Purposes

Dear Mr. Gregory:

This letter is written on behalf of the Rumsey Indian Rancheria of Wintun Indians of California ("Rumsey"). Rumsey is aware that the Bureau of Indian Affairs Regional Office in Sacramento ("BIA") has received an application from the Scotts Valley Band of Pomo Indians ("Scotts Valley Tribe" or "Tribe") requesting that approximately 30 acres of land located in western Contra Costa County ("Subject Land") be acquired in trust for the Tribe to use for casino gaming ("Request"). Specifically, the Tribe seeks to acquire land for the proposed "Sugar Bowl" casino located in the northeast corner of the intersection of Richmond Parkway and Parr Boulevard in the City of Richmond. Rumsey hereby timely submits its comments in opposition to the Tribe's Request.[1]

I. RUMSEY HAS A RIGHT TO BE CONSULTED ON THE PROPOSED LAND ACQUISITION

The BIA's Notice of (Gaming) Land Acquisition Application ("BIA Notice") states the notice is given pursuant to 25 CFR §§ 151.10 and 151.11. However, the Notice neglects to state that all applications for the trust acquisition of land intended for gaming "must be processed with Section 20 considerations in mind." *See* Office of Indian Gaming Management Checklist for

[1] Due to the historical, geographical, cultural and other issues pertinent to the Scotts Valley Tribe's Request, Rumsey is currently conducting further investigation and fact-finding, which may include the retention of necessary experts and/or consultants. As a result, Rumsey anticipates submitting supplemental comments in opposition to the Tribe's Request.

Gaming Acquisitions, March 2005 ("OIGM Checklist") (referring to Section 20 of the Indian Gaming Regulatory Act or "IGRA," 25 U.S.C. § 2719).

The BIA Notice leaves no room for doubt that the Subject Land sought to be acquired in trust for the Scotts Valley Tribe is for gaming purposes. The BIA therefore is required to conduct an IGRA Section 20 analysis, as set forth in 25 U.S.C. § 2719, before making any final determination on the Request. Specifically, 25 U.S.C. § 2719 prohibits gaming on lands acquired in trust after October 17, 1988 ("After-Acquired Lands"), with very narrow exceptions.

The OIGM Checklist very carefully and in great detail sets forth the BIA requirements for completing a gaming land acquisition package and taking final action. The Checklist also includes information on certain procedural steps to be followed. Among these requirements is consultation with local communities, nearby tribes and state officials. Rumsey is located just 70 miles from the Subject Land and therefore is a "nearby" tribe.

As demonstrated below, none of the narrow exceptions of 25 U.S.C. § 2719 – including the "restored lands" exception – are applicable to the Scotts Valley Tribe's Request. The Scotts Valley Tribe has its historical, archeological, geographical and cultural roots at the Sugar Bowl Rancheria located near Lakeport, California, just off the western shore of Clear Lake in Lake County. Lakeport is approximately 115 miles north of the proposed "Sugar Bowl" casino in Richmond, located in the San Francisco Bay area. The Tribe wholly lacks the requisite nexus to the Richmond site.

Because none of the exceptions applies, the two-part determination process by the Secretary of the Interior ("Secretary") pursuant to 25 U.S.C. § 2719(b)(1)(A) must be adhered to, and the Governor of California must provide concurrence to the acquisition. Specifically, the Secretary must conclude the acquisition (i) is in the "best interest" of the Tribe and its members; and (ii) will not be "detrimental" to the surrounding community. 25 U.S.C. § 2719(b)(1)(A).

As part of this IGRA-mandated process, Rumsey, as a "nearby" tribe to the Subject Land, must be consulted and have a right to have its views heard. Rumsey has a clear interest in the proceedings and therefore is entitled to submit these and future comments.

II. THE SUBJECT LAND DOES NOT FALL WITHIN ANY OF THE IGRA AFTER-ACQUIRED LANDS EXCEPTIONS

A. Overview Of After-Acquired Lands Exceptions

Under the IGRA, gaming on Indian lands acquired in trust by the Secretary after October 17, 1988, is prohibited unless:

(i) the lands are located within or contiguous to the boundaries of a reservation of the tribe in existence on October 17, 1988;

(ii) the lands are located within the tribe's last recognized reservation within the State within which the tribe is presently located;

(iii) the lands are taken into trust as part of a settlement of a land claim;

(iv) the tribe has been newly acknowledged by the Secretary under the federal acknowledgment process and has had land taken into trust as a result of its new acknowledgement; or

(v) the lands are taken into trust as part of the restoration of lands for the tribe and the tribe has been restored to federal recognition.

25 U.S.C. § 2719(a), (b).

If none of these exceptions are applicable, then the two-part Secretary determination of 25 U.S.C. § 2719(b)(1)(A) is the only statutorily permitted way for a tribe to conduct gaming on After-Acquired Lands.

When a tribe contends that one of the foregoing narrow exceptions applies, the OIGM Checklist requires a "conclusive factual and legal finding" to support the applicability of a particular exception. *See* OIGM Checklist at 6. 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. *Id.* at 7.

The first four exceptions enumerated above are wholly inapplicable here. 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 Scotts Valley Tribe was not a federally recognized tribe and did not have a land base, did not reside on land set aside under 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 also never had a recognized reservation in, or anywhere near the vicinity of, the Subject Land. Indeed, the Tribe's historical lands are located in Lakeport – 115 miles away from the Subject Land. *See* Section II.B.2. below.

Third, the Subject Land is not part of a land claim settlement. Fourth, the Scotts Valley Tribe has not been recently acknowledged by the Secretary under the federal acknowledgment process. *See* 53 Fed. Reg. 9280 (February 25, 1994) (Part 83 Final Rule).

Thus, the exceptions set forth at 25 U.S.C. § 2719(a)(1)-(2) and (b)(1)(B)(i)-(ii) do not apply to the Scotts Valley Tribe's Request.

B. Restoration Is Limited By Certain Factors Prohibiting Acquisition Of Any And All Property For Gaming Purposes

The "restored lands" exception of 25 U.S.C. § 2719(b)(1)(B)(iii) is equally inapplicable here. Pursuant to this exception, the Subject Land would be "taken into trust as part of the restoration of lands for the Tribe." The thrust of the case law and National Indian Gaming Commission ("NIGC") letter opinions is that, under 25 U.S.C. § 2719(b)(1)(B)(iii), land may be "restored" to a federally recognized tribe, provided that specific facts and other criteria are established. As detailed below, the Tribe lacks the requisite criteria for "restoring" the Subject Land under this exception.

The 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. § 2719(b)(1)(B)(iii) is sparse. *See, e.g., City of Roseville v. 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 v. 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 v. 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 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 results where "any and all property acquired by restored tribes would be eligible for gaming." *Id.* at 116 F. Supp 2d at 164. 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.

Id.

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 at 15. *See 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 restored tribe ever occupied.") at 8.

The test applied in the *Coos* case (and adhered to in subsequent precedent) 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.

116 F. Supp.2d at 164. Placement within a prior reservation of the tribe also is significant evidence that the land may be considered in some sense restored. *Id.*

The Scotts Valley Tribe's Request does not pass the *Coos* test and therefore falls outside the narrow limits of the restoration exception.

1. Factual Circumstances Do Not Provide Indicia Of "Restoration"

The factual circumstances of the proposed acquisition of the Subject Land fail to provide any indicia whatsoever of "restoration." The cases hold that "restoration" denotes a taking back or being put in a former position. *Coos* at 162. It might mean "reacquired." *Id.* ("The 'restoration of lands' could be construed to mean just that; the tribe would be placed back in its former position by reacquiring lands.")

In any event, "restoration" does not mean "acquired." *Id.* Therefore, there must be other indicia here that the proposed acquisition of the Subject Land "restores" to the Tribe what it previously had. *Id.*

2. Subject Land Has No "Significant Relation" To Tribe

The second element involves location of the land in proximity to the tribe's historical roots. Restored lands may include "off reservation" parcels; however, there must be indicia that the land has been in some respect recognized as having "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.

In *Grand Traverse Band of Ottawa and Chippewa Indians*, for instance, the District Court of the Western District of Michigan ruled the land in question was properly "restored" for purposes of 25 U.S.C. § 2719(b)(1)(B)(iii), specifically because "evidence clearly established" that the land was of "historic, economic and cultural significance" to the tribe. 198 F. Supp. 2d at 936. The land, therefore, could "reasonably be considered to be part of a 'restoration of lands' in a historic, archeological, and geographic sense." *Id.*; *see also Oregon v. Norton*, 271 F. Supp. 2d at 1278, 1279 (affirming Secretary's decision, based on guidance in *Confederated Tribes of Coos*, that land was properly "restored" because of its "historical, geographical and temporal connection to the Tribe").

In the Karuk case, the NIGC also focused on the geographical and historical relationship between the tribe and the land in question. Based on this review, the NIGC concluded that the land was not properly "restored" to the Karuk under 25 U.S.C. § 2719(b)(1)(B)(iii).

In making its determination, the NIGC acknowledged that the Karuk Tribe was known to have had historic settlements in the vicinity of the Klamath River, including "likely" the land under consideration, and had also used the land in question for hunting and gathering. Karuk Opinion at 6-7. The tribe was then displaced in the mid-1800s by miners and packers, after which the federal government entered into a series of treaties with the Karuk Tribe and other Indians of California, under which the Indians agreed to relinquish any claims to aboriginal territory in exchange for reservations totaling over 8 million acres of land. *Id.* at 7. The treaties, however, were never ratified and did not "specify which of the 8,518,900 acres belonged to the Karuk and which were attributed to the other tribes [that signed the treaties] . . . it is not clear from these records which of the area was specifically attributed to the Karuk." *Id.*

The NIGC observed that an earlier proposed decision on the Karuk matter "is not clear as to whether the parcel in question is ancestral territory or [merely] a neighboring area and is

therefore not helpful to our analysis." *Id.* Additionally, "the Tribe has not provided evidence that the parcel remained important to the tribe throughout its history." Based on (1) the lack of a specific geographical and historical nexus between the Karuk Tribe and the land being considered; (2) the fact that the treaties were never ratified; and (3) the fact that the treaties did not assign the Karuk Tribe to the particular land in question, the NIGC concluded that the land was not properly "restored" to the Karuk. *Id.* As such, the NIGC determined that the IGRA "restored lands" exception was inapplicable.

The logic of the Karuk Opinion is revealed in other decisions concerning the applicability of 25 U.S.C. § 2719(b)(1)(B)(iii). In the Mechoopda case, for example, the NIGC concluded that the land under consideration was properly "restored" to the tribe because the evidence showed conclusively that the land acquired for the tribe "falls squarely within [the] boundaries" of the limits of the tribe's historic villages. Mechoopda Opinion at 3.

Similarly, in the Bear River case, the NIGC concluded that the land under consideration was properly "restored" because it was located just six miles from the boundaries of the tribe's former rancheria and the evidence was again conclusive that the tribe had a historical, geographical and cultural nexus with the land. Bear River Opinion at 11. It was "not merely an acquisition but a restoration of previously used lands." *Id.* at 13. The NIGC noted:

> The Bear River Band . . . consists of Wiyot, Mattole, Nongatl, and Bear River Indians . . . Within a one (1) mile radius of the parcel are: a mythic pond that is the setting of an old tribal story; two (2) aboriginal villages . . .that were major Wiyot settlements in 1850 . . . Within a three (3) mile radius of the parcel are: five (5) aboriginal villages . . . and a town founded in 1870 after European contact . . . Between three (3) and four (4) miles from the parcel is . . . the site of a mythic flood in a Wiyot story telling of the re-population of the world . . . within a six (6) mile radius of the parcel are: the first Wiyot Town established after European contact . . . and the Rohnerville Rancheria.

Id. at 12.

More recently, the NIGC clarified that the tribe's historical connection to the land must be "longstanding" and "ancient" before the land can be "restored" under 25 U.S.C. § 2719(b)(1)(B)(iii). Wyandotte Decision at 5. That the tribe may have occupied nearby land for several years is not sufficient by itself to justify "restoration" under 25 U.S.C. § 2719(b)(1)(B)(iii), despite the fact that "significant roots were put down." *Id.*

The lesson of the foregoing cases is that there must be some "longstanding" or "ancient" geographical, historical, or cultural connection that specifically ties the tribe to the particular land under consideration. A mere likelihood that the tribe once used the land in question and was supposed to be granted land somewhere, including the land in question, under an unratified treaty are not, by themselves, sufficient proof of the requisite connection. Otherwise, the land cannot properly be "restored" to the tribe within the meaning of 25 U.S.C. § 2719(b)(1)(B)(iii).

The Scotts Valley Tribe's situation is even further attenuated than in the Karuk case. Here, there is no evidence – much less conclusive evidence – that the Scotts Valley Tribe has a special historical, archeological, geographical, or cultural connection to, or nexus with, the Subject Land specifically, as opposed to other lands 115 miles away in Lakeport. Unlike Karuk, there is no evidence that the Scotts Valley Tribe had any historic settlements in the vicinity of the Subject Land, or that the Tribe used the Subject Land for hunting and gathering. Such indicia – which was still insufficient in the Karuk case – is wholly lacking here. Nor is there any evidence that the Tribe occupied land nearby the Subject Land, as was still deemed insufficient in the Wyandotte case.

Indeed, there is contrary evidence affirmatively refuting any historical, archeological, geographical, or cultural connection between the Scotts Valley Tribe and the Subject Land. Pursuant to the Smithsonian's authoritative Handbook of North American Tribes, Volume 8, California (1978) ("Handbook"), the members of the Scotts Valley Tribe are historically viewed as Northeastern Pomo residing in the Lake County area.[2] *See* pertinent portions of Handbook attached hereto as Exhibit 1 at pp. 283, 286-87, 302.

The Handbook provides extensive details of what is presently known of the aboriginal culture forms and practices of about 60 California tribes, including the Scotts Valley Tribe (discussed within the Eastern Pomo section of the chapter titled "Pomo: Introduction" and in the chapter titled "Western Pomo and Northeastern Pomo"). The chapters describe the environment, prehistoric archeology, historical archeology, language classification, culture, and population numbers since the time of European discovery, and the history of exploration and settlement by non-Indians. The information also specifically identifies the historical land base areas of the California tribes.

With respect to the Scotts Valley Tribe, the Handbook identifies that Tribe as having historical and geographical roots within the Northern Pomo territory. *Id.* at 283. The Scotts Valley Tribe is shown as residing at the southern tip in the eastern portion of this territory, located near Clear Lake and within the now-existing Lake County area. *Id.* at 286-87. On a table identifying the Pomo Rancherias, Scotts Valley is listed as being located in Lake County.

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[2] Interestingly, Rumsey is located closer to the Subject Land than the Scotts Valley Tribe – Rumsey is approximately 70 miles from the Subject Land.

Id. at 302. Nowhere in the Handbook is there any evidence that the Scotts Valley Tribe had any aboriginal roots, historical, geographical or other ties to the Subject Land. To the contrary, the Handbook references that the Tribe's historical and geographical nexus is in Lake County – not 115 miles away in Contra Costa County. *Id.*

In fact, the Handbook identifies the Costanoans as having their historical and geographical ties to the Subject Land and the San Francisco Bay area generally. Specifically, certain of the Costanoans occupied lands on the eastern shore of San Francisco Bay between Richmond and Mission San Jose – the exact location where the Scotts Valley Tribe is now trying to lay claim. *See* Handbook, pp. 485-495, attached hereto as Exhibit 2. As such, if any tribe has a historical and cultural nexus to the Subject Land, it would be descendants of the Costanoans. Per the Handbook, the Scotts Valley Tribe is Pomo in origin, not Costanoan. *See* Handbook at 283, 286-87, 302 (Exhibit 1).

There is not one shred of factual support that the Tribe has any relevant connection with the Subject Land. There is no evidence that the Scotts Valley Tribe even traveled to the area at issue, much less that the land was "important" to the Tribe throughout history. *See* Karuk Opinion at 7. Nor can it be said that the Tribe had any "longstanding" or "ancient" connection to the Subject Land. *See* Wyandotte Decision at 5. The Handbook discussion unequivocally shows no ties to the Subject Land whatsoever by the Scotts Valley Tribe. All of the Tribe's ties are in Lakeport – 115 miles away. Therefore, the Tribe cannot satisfy the "location" element.

3. No Temporal Relationship Of Acquisition To Tribal Restoration

Even if the Tribe could satisfy the requisite historical nexus to the Subject Land, it still must satisfy the "temporal relationship" element. This it cannot do.

The Tribe had its federal recognition status re-established in 1991 pursuant to the Stipulation. Approximately 14 years later, the Tribe now tries to secure the Subject Land as part of its "restoration" to federal status. There is no evidence that the Tribe has been actively pursuing the Subject Land until recent times. The Tribe's restoration to federal recognition in 1991 and these recent land acquisition efforts are independent of each other and not part of one continuous transaction. Based on the legal precedent relied upon herein, there is not a sufficient "temporal relationship" between any restoration and the proposed lands acquisition.

In sum, there is no – nor will there ever be – "conclusive factual and legal finding" necessary to support the applicability of the restoration exception. *See* OIGM Checklist at 6. As such, the Subject Land cannot be "restored" to the Tribe under 25 U.S.C. § 2719(b)(1)(B)(iii).

C. The Stipulation Does Not Constitute A Restoration Act Mandating Acquisition Of The Subject Land

In *City of Roseville*, there was a specific restoration act mandating the acquisition. There, both the District Court and the Court of Appeals of the District of Columbia ruled that the land was properly "restored" for purposes of 25 U.S.C. § 2719(b)(1)(B)(iii) because the Auburn Indian Restoration Act explicitly authorized the Secretary to acquire the subject land in trust for the tribe. 219 F. Supp. 2d at 161; 348 F.3d at 1022, 1026.

Here, there is no restoration act. The Tribe may try to argue that the Stipulation for Entry of Judgment dated March 15, 1991 ("Stipulation"), can somehow be construed as some official act permitting restoration. The Stipulation, however, serves only to document that the Scotts Valley Tribe was not terminated and the Tribe's Rancheria assets were not distributed pursuant to the Act of August 11, 1964, P.L. 88-419, 78 Stat. 390 ("Rancheria Act"). The purpose of the Stipulation was to re-establish the Tribe's governmental relationship with the Federal government as a federally-recognized Tribe and to re-establish the Tribe's status quo prior to termination with respect to rights and benefits extended to such federally-recognized tribes. A copy of the Stipulation is attached as Exhibit 3.

Specifically, the Stipulation provides that the Federal government agrees to accept into trust status any land "within the boundaries of the former Scotts Valley Rancheria" that:

(1) Is currently in Indian ownership; and,

(2) Was deeded or passed as a direct consequence of termination to certain entities or individuals.

See Stipulation at 5-7.

The Stipulation further permits the Federal government to take land into trust "outside the boundaries" of the former Scotts Valley Rancheria only if the land at issue is currently held in fee or through allotment by (1) any distributee receiving such land under a rancheria distribution plan; or (2) the distributee's dependent or Indian heir, or successor in interest (provided the successor is an Indian of the rancheria or reservation where the allotment/fee is located). *Id.*

The Subject Land does not fall within the explicit terms of the Stipulation permitting trust acquisitions for the Scotts Valley Tribe. The Subject Land is not within the boundaries of the former Scotts Valley Rancheria. Nor does the Subject Land meet the criteria for lands outside the boundaries of the former Rancheria. There is no evidence that the Subject Land is owned by any distributee or his/her dependent, or Indian heir, or successor in interest as required by the Stipulation. *Id.* The Stipulation permits restoration only as to land formerly held or owned by

the Tribe or its members – not land located 115 miles away that has absolutely no connection or nexus to the Tribe.

The Stipulation also permits the Federal government to accept in trust any land "within the former boundaries" of the Scotts Valley Tribe where such land is subsequently acquired by any distributee or other specified individuals or the Tribe itself. Stipulation at 11. Again, the Stipulation does not permit an off-reservation acquisition as is contemplated here, where the land is located many miles distant from the former Scotts Valley Rancheria and has no historical or other requisite nexus to the Tribe.

The Stipulation also specifies a process for restoring trust status. *Id.* at 8. Notwithstanding that the Subject Land does not fall within the Stipulation's description of acceptable "restored" lands, the Tribe has not made any attempt to follow the Stipulation's process for restoration.

The Stipulation provides for the re-establishment of federal benefits provided to members of federally-recognized tribes such as healthcare, education, vocational training and other Federal programs available to Indian tribes. *See* Stipulation at 13. The provision of such services to members of the Tribe – regardless of where they are located – does not convert the locale of such Tribal members to land eligible to be taken into trust for gaming purposes. Indeed, the Stipulation is clear that the provision of Federal services and the restoration of land to the Tribe are separate and distinct elements. The provision of services is wholly unrelated to land restoration. *See* Stipulation at 5-12.

Moreover, the services, rights and benefits accorded to the Tribe pursuant to the Stipulation are specifically mandated by the Indian Reorganization Act ("IRA"), 25 U.S.C. § 461 *et seq*. Stipulation at 4. There is no reference to Section 20 of the IGRA or "restoration" of lands as defined in 25 U.S.C. § 2719(b)(1(B)(iii). The IGRA was passed in 1988 and the Stipulation was executed in 1991. Accordingly, if there was any intent to permit the IGRA "restoration" sought here as to the Subject Land, such intent could have – and should have – been embodied in the Stipulation. It was not. Therefore, the Tribe must abide by the terms of the Stipulation and seek only land as permitted thereunder.

Simply because certain tribal members may have moved to the San Francisco Bay area and have obtained services from the Federal government while residing there, cannot serve as the requisite indicia for permitting "restoration" of land pursuant to the IGRA exception. There is no legal precedent permitting such an assertion, and, in any event, it is in direct contravention of the Stipulation's provisions permitting the restoration of land.

On February 12, 1992, the Federal Register published notice of settlement of the litigation between the Scotts Valley Tribe and the United States. The notice provides that,

pursuant to reinstatement of the Tribe's status they had before termination, the Tribe and its members were now eligible for all rights and benefits extended to other federally-recognized Indian tribes and their members. A copy of the Federal Register Notice is attached as Exhibit 4. The notice provides no mandate for the restoration of any lands to the Tribe. *Id.*

In sum, the Stipulation cannot serve – by any stretch of the imagination – as a restoration act mandating acquisition of the Subject Land. The Tribe needs to seek specific Congressional legislation as was the case with the Auburn Indian Restoration Act in *City of Roseville*. Absent such legislative action, there is no separate restoration act that directs the Secretary to take the Subject Land into trust for the Tribe.

Further, the Scotts Valley Tribe's situation is somewhat similar to that of the Upper Lake Pomo Tribe ("Upper Lake Tribe"). The Upper Lake Tribe obtained a judgment in 1979 against the United States similar in content to the Scotts Valley Tribe's Stipulation. The Judgment set forth certain land entitlements to the Upper Lake Tribe associated with its former trust lands. A copy of the Judgment is attached as Exhibit 5.

In 2002, the Upper Lake Tribe filed a motion seeking to modify the Judgment to permit the Tribe to take land into trust for gaming purposes in the City of West Sacramento in Yolo County. The court denied the motion and noted that the Upper Lake Tribe, in the original lawsuit, had "never demanded nor intended to seek authority for placing property in Yolo County into trust for the Tribe." Judgment at 11. The court further noted that any "continuing obligations" under the judgment to take future lands acquired "within the boundaries of the Rancheria" did not "refer to any duty to continue in perpetuity to place into trust later-acquired lands situated outside the area of the original Rancheria." *Id.* As is the case with the Scotts Valley Tribe, the Yolo County land sought by the Upper Lake Tribe was many miles distant from the former rancheria and clearly was not within the boundaries of the rancheria.

Here, the Scotts Valley Tribe's Stipulation does not contemplate the Richmond site as lands permitted to be taken into trust thereunder. Pursuant to the Stipulation, any lands taken into trust in the future need to fall within the "former boundaries" of the Scotts Valley Tribe's Rancheria – just like the situation of the Upper Lake Tribe. *Id.* And, just as the court correctly denied the Upper Lake Tribe's motion seeking to take land into trust in Yolo County, so must be the result here where the Scotts Valley Tribe seeks to take land into trust 115 miles away from its former Rancheria lands.

D. The Subject Land is not appropriate restitution under the circumstances

Even assuming the Tribe can establish the requisite historical and geographical nexus – which it cannot – the equities also must be reviewed. The Court in *City of Roseville* observed:

> Had the Auburn Tribe never been terminated, it would have had opportunities for development in the intervening years, including the possible acquisition of new land prior to the effective date of IGRA. A "restoration of lands" compensates the Tribe not only for what it lost by the act of termination, but also for opportunities lost in the interim.

348 F.3d at 1029.

Based upon the D.C. Circuit's reasoning in *City of Roseville,* before the Secretary can lawfully acquire the Subject Land in trust for the Scotts Valley Tribe for gaming under the "restored lands" exception, the Secretary must determine that doing so is necessary to provide the "equitable relief of restitution" to the Tribe. Such a determination mandates that the Secretary balance the interests of the Scotts Valley Tribe against the interests of other parties who would be affected by the determination, including other Indian tribes. Restitution, after all, is an equitable remedy. *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 255 (1993).

Whenever such an equitable remedy is considered, it must be considered in light of all the equities surrounding the case, and the ultimate fashion of the remedy must derive from a careful balancing of the interests of all the affected parties. *British Motor Car Distrib. v. San Francisco Auto.*, 882 F.2d 371, 374 (9th Cir. 1989); *FTC v. H. N. Singer, Inc.*, 668 F.2d 1107, 1113 (9th Cir. 1982).

Even assuming – for argument sake only –that the Scotts Valley Tribe is entitled to <u>some</u> form of restitution, it still must be equitable. What form of restitution may ultimately be conferred upon the Scotts Valley Tribe depends on the impacts such restitution would, on balance, have on all the other affected parties, including other federally recognized tribes in Northern California. *See British Motor Car Distrib.*, 882 F.2d at 374; *H. N. Singer*, 668 F.2d at 1113.

In addition to being a general rule of equity, such a balancing of interests – when making a 25 U.S.C. § 2719(b)(1)(B)(iii) determination – is plainly required by the Indian Reorganization Act, NEPA, and IGRA itself. *See*, 25 U.S.C. § 476(f) (forbidding federal agencies from making determinations that confer upon recognized tribes enhanced privileged and immunities relative to other tribes); 40 CFR § 1508.8 ("Effects includes ecological . . . aesthetic, historic, cultural, <u>economic</u>, social, or health effects, whether direct, indirect, or cumulative.") (emphasis added).

The *City of Roseville* case is instructive in this regard:

> By providing an exception for restored lands of restored Indian groups, Congress intended to provide some sense of parity between tribes that had been disbanded and those that had not.

219 F. Supp. at 1661 (emphasis added). The court further noted:

> Indeed, the exceptions in IGRA § 20(b)(1)(B) serve purposes of their own, ensuring that tribes lacking reservations when IGRA was enacted are not disadvantaged relative to more established ones.

348 F.3d at 1030 (emphasis added).

The court in *Grand Traverse Band of Ottawa and Chippewa Indians* provides additional definition:

> Given the plain meaning of the language, the term "restoration" may be read in numerous ways to place belatedly restored tribes in a comparable position to earlier recognized tribes.

198 F. Supp. 2d at 935 (emphasis added).

In making her determination under 25 U.S.C. § 2719(b)(1)(B)(iii), the Secretary must consider whether "restoring" the Subject Land to the Scotts Valley Tribe for gaming purposes would (1) truly restore a sense of parity with other tribes; (2) eliminate disadvantages as against other tribes; and (3) place the Tribe in a comparable position with earlier recognized and landed tribes. Comparable, however, does not mean providing an extraordinary advantage as is the case here.

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. The *City of Roseville* court recognized that "restoration of lands" referred to lands that would place the Tribe in its "former" position. *City of Roseville*, 219 F. Supp 2d. at 159.

In deciphering what was intended by a "restored" land base, the *City of Roseville* court determined that Congress intended to provide a land base "roughly equivalent to the [tribe's] former land base, which might not be identical." *Id.* The court also looked to the Auburn Indian

Restoration Act for guidance. There, the Act specifically authorized the Secretary to take land into trust located anywhere in Placer County. *Id.* at 161.[3]

In the case of the Scotts Valley Tribe, there is no separate restoration act as in the *City of Roseville* case. Even assuming the Stipulation could be interpreted as such, the Stipulation does not designate land in Contra Costa County as permissible restored lands, nor does it permit the acquisition of lands within the Tribe's "service area." As set forth above, the Stipulation very plainly does not permit – much less mandate – the acquisition of the Subject Land which is 115 miles away from the Tribe's former Rancheria.

The Scotts Valley Tribe, pursuant to a restitution theory, may be entitled to land somewhere. But, that land must be similar to the former Rancheria land in Lakeport. There can be no dispute that the Subject Land – located just minutes from the heavily populated Bay Area – is a far cry from the rural and tranquil setting of the former Sugar Bowl Rancheria in Lakeport. The Subject Land is located in a much more attractive setting from the standpoint of establishing a lucrative casino, than a casino many miles to the north in a rural, not-easily-accessible location. To be sure, the Subject Land would not restore the Tribe to its former land base position. It would elevate the Tribe's position light years beyond what it once had. Such a result is not intended by the restitution envisioned in *City of Roseville.*

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 Scotts Valley Tribe the right to operate a casino in a location that is immediately adjacent to the City of Richmond, only five to ten miles northwest of Berkeley and Oakland, and only ten miles northeast of San Francisco. Such an urban location would be easily accessible via major freeways including Interstate 80, Interstate 580, and the Richmond Parkway. Casino gaming on the Subject Land would certainly divert gaming that would otherwise occur at already operating tribal casinos in more remote locations. These tribes did not have the opportunity to select their casino site; rather their casino location was mandated by the location of their historic lands.

Acquiring the Subject Land in trust for the Scotts Valley Tribe for purposes of gaming would, therefore, not provide a sense of parity between the Tribe and other federally recognized Northern California tribes. Instead, it would create disparity. Acquiring the Subject Land for the Scotts Valley Tribe would not eliminate disadvantages between the Tribe and other nearby

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[3] The lands to be included in the acquisition under the Auburn Indian Restoration Act also included lands within the tribe's "service area". *Id.* at 161. The "service area" lands were specifically permitted to be taken into trust pursuant to the Secretary's authority under the Indian Reorganization Act – there is no reference to restoration under the IGRA exception. Thus, the only land permitted to be taken into trust pursuant to the IGRA restoration exception was land located in Placer County and not in the other five counties within the Tribe's "service area". Any land taken into trust within the Tribe's "service area" fell under the IRA authority, not IGRA. *Id.*

tribes. It would grant an immense economic advantage to the Tribe, at the direct and substantial expense of the other tribes. Acquiring the Subject Land for the Scotts Valley Tribe would not place the Tribe in a comparable position with earlier recognized and landed tribes. It would elevate the Tribe far above these other tribes. Such results would confer more than a just measure of restitution on the Scotts Valley Tribe. The results would be inequitable and unfair.

In conclusion, the Secretary may not rely on the restoration exception under 25 U.S.C. § 2719(b)(1)(B)(iii) to acquire the Subject Land in trust for the Tribe for gaming. To do so would be inconsistent with established case law and violate the Indian Reorganization Act's prohibition against enhancing one tribe's privileges over another. 25 U.S.C. § 476(f); 219 F. Supp. at 1661; 348 F.3d at 1030; 198 F. Supp. 2d at 935. It also would not restore the Tribe to its former position, but tremendously boost its stance well beyond where it once stood. This is not allowed by law.

Surely there are other tracts of land available elsewhere – within the Tribe's historical lands near Lakeport which satisfy the requisite nexus – which the Secretary could "restore" to the Scotts Valley Tribe and put it back into its former position. Such other land tracts, when used for gaming, hopefully would not grant the Tribe a materially unfair advantage, but would nonetheless satisfy any notion of equitable restitution underlying 25 U.S.C. § 2719(b)(1)(B)(iii) and facilitate the Tribe's economic development and self-determination.

It is evident that the Tribe is trying to do an "end run" around the two-step Secretary determination process, whereby nearby tribes, local communities and others have the opportunity to weigh in on the proposed acquisition. Precluding public comment on such a significant project should not be permitted under any circumstances.

III. THE SECRETARY'S REVIEW OF THE REQUEST MUST BE INFORMED BY THE NEPA PROCESS AND THE INDIAN GAMING REGULATORY ACT

The law applicable to land acquisitions under the Indian Reorganization Act and the IGRA indicates that, procedurally as well as substantively, the BIA is approaching the Scotts Valley Tribe's Request in reverse order. The correct order, before the Subject Land can be acquired for the Tribe, consists of, first, a determination of whether the Subject Land can lawfully be used for casino gaming under 25 U.S.C. § 2719; second, a completion of the Environmental Impact Statement ("EIS") underlying the acquisition; and third, a determination whether acquiring the subject land would be appropriate under the test set forth in the IRA, 25 U.S.C. § 465. As explained below, this order of determinations is mandated by the applicable statutes and rules.

A. The Subject Land Must Be Necessary For Economic Development Purposes

Under the Indian Reorganization Act and implementing rules, the Secretary is authorized to acquire property for a tribe in trust status only if: (i) the property is located "within the exterior boundaries of the tribe's reservation or adjacent thereto"; (ii) the property is located "within a tribal consolidation area" or the tribe "already owns an interest in the property"; or (iii) the Secretary determines the acquisition is "necessary to facilitate tribal self-determination, economic development, or Indian housing." 25 U.S.C. § 465; 25 CFR § 151.3(a).

The Subject Land is not located "within the exterior boundaries of the tribe's reservation or adjacent thereto." The Scotts Valley Tribe, while a federally recognized tribe, has no land base, does not reside on land set aside under federal protection against other jurisdictions, and does not assert governmental powers over any land. F. Cohen, Handbook of Federal Indian law at 34-35 (1982 Ed.). Even under the broadest possible definition of the term "reservation," there is no indication that the federal government has set aside land for the Scotts Valley Tribe for any particular purpose. *Compare* Pub. L. No. 107-63, § 134 (2001) (confirming Secretary authority to determine whether land is Indian "reservation") *with Sac and Fox Nation of Missouri v. Norton*, 240 F.3d 1250, 1267-68 (10th Cir. 2001) (holding land set aside for Indian cemetery is not "reservation" for purposes of Indian gaming).

There is nothing in the administrative record to suggest that the Subject Land is located "within a tribal consolidation area" or that the Tribe "already owns an interest in the property." There is no evidence that the Secretary has ever approved a plan for the acquisition of land in trust for any tribe or individual in the area of the Subject Land, nor that the Tribe ever owned in fee simple property comprising the Subject Land. *See* 25 CFR § 151.2(h) (defining "tribal consolidation area").

As noted above, the Subject Land is located 115 miles from Lake County where members of the Tribe historically resided. There is no indication that any Tribal members who may currently reside in the Bay Area have any physical connection with the Subject Land, much less any historical or cultural nexus.

To satisfy the Indian Reorganization Act requirements, the Secretary then must determine that the acquisition is "necessary to facilitate tribal self-determination, economic development, or Indian housing." 25 CFR § 151.3(a)(3). As explained below, such a determination by the Secretary would be premature at this juncture.

B. The EIS Must Be Completed Before The Subject Land Can Be Acquired

In its related publications under the National Environmental Policy Act ("NEPA"), the Department of the Interior is already on record that the "purpose" of the acquisition of the

Subject Land would be "to help provide for the economic development" of the Tribe. 69 Fed. Reg. 43431, 43431 (July 20, 2004). This, in turn, would give the Tribe "self-governance capability" by providing it with a sustained revenue stream. *See* Draft EIS Scoping Report § 2.1 (Project Purpose and Need). There is no mention that the acquisition is necessary to facilitate Indian housing.

The EIS will consider the comparative environmental and socioeconomic impacts of alternative casino and non-casino retail development uses of the Subject Land, each of which to some extent would satisfy the economic development and tribal self-determination "purposes" of the acquisition. *Id.* at § 2.2. The EIS also will consider the "no action" alternative, under which the Subject Land would not be placed in federal trust and the stated "purposes" would not be met. *Id.*

As long as the Subject Land is going to be used for one of the casino or non-casino retail development alternatives identified in the EIS, the Secretary may be authorized to acquire the Subject Land because the acquisition would facilitate economic development and tribal self-determination. 25 CFR § 151.3(a)(3). On the other hand, if none of these alternatives is selected – in favor of the "no action" alternative in the EIS – then the Secretary will <u>not</u> be authorized to acquire the Subject Land. Whether the Secretary has authority to acquire the Subject Land for the Tribe depends materially on the outcome of the EIS process. This means the Secretary must wait for the conclusion and take into consideration the results of the EIS process before determining whether to acquire the Subject Land for the Tribe.

C. <u>The IGRA Must Be Considered Before The EIS Can Be Completed</u>

The EIS process cannot include the study of project alternatives, the implementation of which would be unlawful or speculative. *Headwaters, Inc. v. Bureau of Land Management*, 914 F.2d 1174, 1180 (9th Cir. 1990); *Life of the Land v. Brinegar*, 485 F.2d 460, 472 (9th Cir. 1973), *cert. denied*, 416 U.S. 961, (1974).

For instance, if implementing the casino alternatives would be unlawful, then they should not be included in the EIS. This is made clear in the NEPA rules governing the EIS alternatives analysis. These rules are applicable to all federal agencies, including the Department of the Interior:

> This section is the heart of the environmental impact statement. Based on the information and analysis presented in the sections on the Affected Environment . . . and the Environmental Consequences . . . it should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among

> options by the decision maker and the public. In this section agencies shall . . . (e) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement **unless another law prohibits the expression of such a preference.**

40 CFR § 1502.14 (emphasis added); *see, e.g., Kilroy v. Ruckelshaus*, 738 F.2d 1448, 1454-55 (9th Cir. 1984) ("the extent to which the EIS should have addressed ocean disposal alternatives depended on the extent of the restrictions imposed by the Federal Water Pollution Control Act"); *NRDC v. Evans*, 279 F. Supp. 2d 1129, 1165 (N.D. Cal. 2003) (rejecting argument that the fact that an EIS alternative "later turns out to be inconsistent with another federal law is not grounds for disqualifying it from the alternatives analysis").

An EIS cannot include a study of project alternatives otherwise prohibited by law. With respect to the Scotts Valley Tribe's Request, the Secretary must first establish that implementing one of the casino alternatives would be lawful, before assessing their impacts in the EIS. In turn, the EIS must be completed before the Secretary can determine whether to acquire the Subject Land.

If it turns out that the casino alternatives cannot lawfully be implemented, then the authority of the Secretary to acquire the Subject Land for the Tribe will rest entirely on whether the non-casino retail alternative can actually satisfy the economic development and tribal self-determination "purposes" of the project. If the EIS process reveals that the non-casino retail alternative cannot satisfy these project "purposes," then the Secretary would lack authority to acquire the Subject Land. 25 CFR § 151.3(a)(3).

In sum, the Secretary must first determine whether the casino alternatives can lawfully be implemented before completing the EIS process and before the Secretary can determine whether to acquire the Subject Land for the Scotts Valley Tribe. Whether the casino alternatives can lawfully be implemented depends materially on whether gaming on the Subject Land would be allowed under Section 20 of the IGRA (25 U.S.C. § 2719). It follows that the Secretary must issue a determination under 25 U.S.C. § 2719 before the EIS process is concluded and before she can make a determination whether to acquire the Subject Land under the Indian Reorganization Act, 25 U.S.C. § 465, and its implementing rules, including 25 CFR § 151.3(a).

As discussed in Section II above, the case law and NIGC opinions support the conclusion that the Subject Land cannot be "restored" to the Scotts Valley Tribe under 25 U.S.C. § 2719(b)(1) (B)(iii). If the Subject Land is to be acquired for the Tribe, it must adhere to the two-part Secretary determination pursuant to 25 U.S.C. § 2719(b)(1)(A).

IV. THE TWO-PART SECRETARY DETERMINATION PROCESS IS THE ONLY OPTION AVAILABLE TO PERMIT ACQUISITION OF SUBJECT LAND

As demonstrated above, all of the IGRA After-Acquired Lands exceptions are inapplicable to the Subject Land. The only remaining option is where the Secretary, after consultation with the Tribe and appropriate state and local officials (including officials of "nearby" Indian tribes), determines that a casino on newly acquired lands would be in the "best interest" of the Indian tribe and its members, and would not be "detrimental" to the surrounding community, and the Governor of the state concurs in the Secretary's determination. 25 U.S.C. § 2719(b)(1)(A).

Without question, Rumsey is a "nearby" tribe to the Subject Land. As noted above, Rumsey is located 70 miles from the Subject Land – which is almost 50 miles closer than the Scotts Valley Tribe itself. As a nearby tribe, Rumsey would have to be consulted during the two-part Secretarial process. At this juncture, Rumsey takes no position as to the merits of such a determination. Instead, Rumsey reserves its comments until the appropriate time if and when the Secretary undertakes the consultation process.

Nevertheless, Rumsey believes the Tribe will have a difficult burden to demonstrate that the proposed acquisition of the Subject Land would not be detrimental to the surrounding community and would be in the best of interest of Indian Country as a whole. Further, pursuant to the OIGM Checklist, the greater the distance the acquired land is from the Tribe's reservation, the greater the justification will have to be to support the additional benefits to the Tribe. *See* OIGM Checklist at 5. With the distance here being 115 miles, the justification will need to be significant and substantial.

Presumably, there are other tracts of land elsewhere in California – and within the Tribe's historical and cultural lands in Lakeport – that can be taken into trust for the Tribe whereby the acquisition is more amenable to the local communities, nearby tribes and state officials. Rumsey advocates that the Tribe seek other land where it has the requisite historical and cultural nexus in which to engage in gaming and other economic development.

V. CONCLUSION

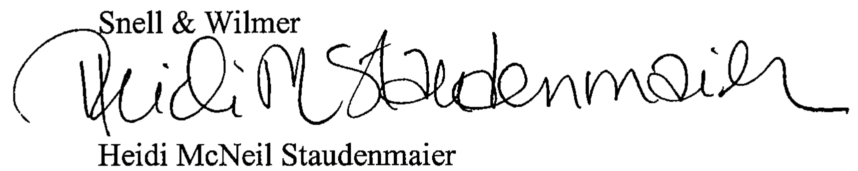
The Subject Land cannot be taken into trust under the "restored lands" exception under the IGRA. The Subject Land must instead adhere to the two-part Secretary determination process which mandates consultation with nearby tribes, including Rumsey, local communities and other officials. This process also requires concurrence by the California Governor.

Rumsey appreciates the opportunity to submit the foregoing comments and trusts that the Secretary will consider its analysis in determining whether to grant the Scotts Valley Tribe's

Request. As noted above, these comments will be supplemented in due course. If you have any questions regarding these comments, please let me know.

Very truly yours,

Snell & Wilmer



Heidi McNeil Staudenmaier

HMS:vc
Enclosures
cc: Howard Dickstein, Esq.