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BOARD OF LEGAL SPECIALIZATION

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Board of Supervisors
County of Contra Costa
651 Pine Street
Martinez, CA 94553

Re: Intergovernmental Agreement with Guidiville Band of Indians

Dear Supervisors Bonilla, Gioia, Piepho, Uilkema, and Glover:

I write on behalf of Stanton Hatch, a resident of the County, regarding the proposal to enter into an Intergovernmental Agreement with the Guidiville Band of Pomo Indians. There are at least three legal defects with the Agreement.

- I. THE AGREEMENT IS BASED ON THE ERRONEOUS ASSUMPTION THAT WHEN THE SITE IS TAKEN IN TRUST FOR THE GUIDIVILLE, JURISDICTION OVER THE SITE WILL CHANGE

The Agreement is based on the erroneous assumption that once the Federal government accepts title to the land in trust for the Guidiville Band, state jurisdiction over the site is automatically diminished and the Guidiville suddenly become vested with jurisdiction. Recital N reads:

The County recognizes that once the United States takes into trust the ... Point Molate lands, then all such lands, although within the geographical boundaries of Contra Costa County, will be subject to Guidiville Band of Pomo Indians' tribal and applicable federal laws and regulatory authority....

This statement is not correct. The general rule is that a state has complete jurisdiction over the land within its exterior boundaries. *United States v. McBratney*, 104 U.S. 621 (1881). There are only three exceptions which result in the United States Government obtaining primary jurisdiction over land within a

state's borders. The first exception applies where on admission of the state into the Union, the Federal government reserves jurisdiction over the particular site. Second, the Federal Government can purchase lands under the Enclaves Clause of the United States Constitution and can obtain exclusive jurisdiction with the consent of the state. Third, the state can cede partial jurisdiction over land already owned by the Federal government. *State of Arizona v. Manypenny*, 445 F.Supp. 1123, 1125 (Ariz. 1977); *Coso Energy Developers v. County of Inyo* (2004) 122 Cal.App.4th 1512. See also 91 C.J.S., United States §9.

None of the three exceptions apply here. The site was in private hands when the state was created, and is currently under state jurisdiction. So the first exception does not apply. The state has not been requested to cede exclusive or partial jurisdiction over the subject parcel, and has not done so, so the second and third exceptions do not apply. These three methods are the only ways in which the Federal Government can obtain jurisdiction over state lands, and none of them apply here.

In *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005), the Supreme Court held that a tribe's reservation land which was sold by the tribe 200 years ago and then recently repurchased by them would not revert back to tribal sovereignty. By passage of time, the long-standing assumption of jurisdiction by the state, the inaction of the tribe, the lack of an Indian population, and the settled expectations of the residents and landowners in and around the area and of state and local governments, the tribe lost its sovereignty.

In this case, the tribe never had sovereignty over this site. If settled expectations of residents and state and local governments precluded land within a former reservation from claims of Indian sovereignty when repurchased by the tribe in *City of Sherrill*, all the more so in Richmond where this land was never part of an Indian reservation, and where recognition of Indian sovereignty would be inconsistent with the settled expectations of residents, businesses, and state and local governments.

The facts in this case contravene another basic tenet of Indian sovereignty, the Indians existence as a separate community. One basis of the recognition of Indian sovereignty from the start has been that an Indian community exists as a separate, distinct political community. In the first case to recognize Indian sovereignty, Chief Justice Marshall wrote, "The Indian nations had always been considered as distinct, independent, political communities, retaining their original

natural rights..." *Worcester v. Georgia*, 31 U.S. 515, 557 (1832). He further justified Indian sovereignty based on the fact that Indian territory was "completely separated from that of the states." The separateness of Indian communities became a primary justification for tribal sovereignty in *U.S. v. Kagama*, 118 U.S. 375, 381-382 (1886) which described the Indians "as having a semi-independent position when they preserved their tribal relations; not as states, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the state within whose limits they resided." (Emphasis added.) Recitation of the Indian's separateness became a mantra of the court in the 1970s and 80s in numerous cases concerning Indian sovereignty. *McClanahan v. Arizona State Tax Comm.*, 411 U.S. 164, 168, 170, 173 (1973); *U.S. v. Mazurie*, 419 U.S. 544 (1975); *U.S. v. Antelope*, 430 U.S. 641 (1977); *U.S. v. Wheeler*, 435 U.S. 313, 322; *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982).

The subject parcel does not and will not form in any way a separate political community. It is in the middle of the Bay Area, almost adjacent to Interstate 580 and the Richmond Bridge. The location was chosen so the casino would be accessible to the general population. It will be served by the same utilities, the same roads and the same emergency services which now exist and which serve the whole community. This is not an attempt to establish a separate tribal community, but is just an end run around government regulation. It should not be condoned.

II. THE AGREEMENT IS ULTRA VIRES AND ILLEGALLY BINDS FUTURE BOARDS OF SUPERVISORS

The Agreement exceeds the powers of the Board and unlawfully binds the Board to a future political position.

A. The County Lacks Power to Enter Into The Agreement

The essence of the Agreement calls for the Tribe to pay \$12 million per year to the County once it has a casino. The only consideration given by the County to the Tribe is to withdraw their opposition to the project and to support it. The County has no direct governmental approval over the project. Further, the County does not agree to use the funds to mitigate any of the negative impacts or to

provide any governmental services to the site. The County's only obligation is "to no longer oppose the Pt. Molate project" and to "cease all efforts to oppose or intervene against the Tribe's project approvals or processes." The county similarly agrees to provide documentation that the County "now supports the Pt. Molate Project and its approval."

A County cannot contract away its political influence for money. The California Constitution, Art. 11, §1(b) empowers the Legislature to "provide for County powers." Government Code §23004 grants the County to "make contracts... necessary to the exercise of its powers."

The contract here is not necessary to the exercise of the County's powers. All the County is selling is its political influence. As the court held in *COMPAC v. County of San Diego* (1998) 62 Cal.App.4th 727, a Board of Supervisors cannot "bargain away ... its municipal function." This is different from a Development Agreement in which the County secures entitlements after a General Plan amendment and after CEQA review. Here, the County is trying to have it both ways: to lock in monies but to do so early without required review. The result is that all the County is doing is selling its political influence.

In this regard, the County interest is not yet ripe. The County's interest would arise only if the land were determined not to be restored lands under section 20 (b)(1)(B)(iii) of IGRA, and the Guidiville chose to proceed under section 20(b)(1)(A), the so called two-part determination. At that point, the Secretary of the Interior would need to review detrimental impacts on the community, and the County might have some authority to make an agreement with the tribe. However, at this stage of the proceedings, the Tribe is pursuing the restored lands exemption. Impacts on the County are not an issue being considered, and the County is not empowered to sell its support.

B. The Current Board Cannot Bind Future Boards

Even if the Board of Supervisors has the right to enter into a contract with the Guidiville at this early stage, the Board cannot restrict the legislative and governmental powers of future Boards. *Alameda County Land Use Assn. v. City of Hayward* (1995) 38 Cal.App.4th 1716. In that case, an MOU provided that certain city and county governments would use their "best efforts" to adopt into their respective general plans, certain specified goals and policies concerning a certain area. The court held that the MOU divested the local governments, presently and

in the future, of its powers. See also *Trancas Property Owners Assn v. City of Malibu* (2006) 138 Cal.App.4th 172; *League of Residential Neighborhood Advocates v. City of Los Angeles*, 498 F.3d 1052; *Avco Community Developers v. South Coast Regional Comm.* (1976) 17 Cal.3d 785. The Board here cannot bind itself or future Boards to a political position.

The Agreement would prohibit the County from changing its position in the future, even if the Board decided the current position is legally wrong or that the current position does not best promote the public interest or welfare of County residents. The current Board cannot do this.

In this regard, we note that the Board has been opposed to this project since at least April 2005, when it passed a Resolution opposing the practice of reservation shopping. Similarly, in June 2006, Board passed Resolution 407 which states that "the Contra Costa Board of Supervisors has consistently opposed the establishment of Nevada-style casino gaming in the urbanized areas of Contra Costa." In February 2008, the Board submitted opposition to the Guidiville's request for a land determination under section 20 of IGRA, and the Board submitted supplemental objections in October 2008 and April 2009.

The present switch in position makes the attempt by this Board to tie the hands of a future Board all the more problematic. If a future Board were to decide to challenge the legal assumptions outlined in Part I of this letter, it could not. If a future Board opposed gambling for the many policy reasons that have been raised in public comment, it could not. Further, the Agreement binds not only the Board, but the voters. The voters are precluded from electing new Board that will oppose the expansion of Indian gaming into Contra Costa County.

III. THE COUNTY MUST COMPLY WITH CEQA BEFORE APPROVING THE AGREEMENT

The California Environmental Quality Act requires an agency to prepare an EIR if the proposed project might produce environmental effects. Public Resources Code §21082.2 provides:

- (a) The lead agency shall determine whether a project may have a significant effect on the environment....

(d) If there is substantial evidence...that a project may have a significant effect on the environment, an environmental impact report shall be prepared.

CEQA defines a project as "the whole of the action" that may result in a change to the environment. *County of Amador v. City of Plymouth* (2007) 149 Cal.App.4th 1089, 1104.

The *County of Amador* case is very illustrative. The court required that a city prepare an EIR before entering into an agreement with an Indian tribe which wanted to construct a casino. The court in that case noted that the tribe had entered into a Agreement with a city "to 'comprehensively mitigate' the environmental impacts of the Gaming Development." Similarly here, Recital L states that the Agreement is "to mitigate off-reservation impacts of the Pt. Molate Project."

In *County of Amador*, the city agreed to send a letter of support, and the court held that this was a definite course of action committing the city to certain acts. The court noted that the letter of support was the only consideration for the Tribe's entering into the MSA. Similarly, here, the City support for the project is the only consideration provided by the County.

As to the timing of preparation of an EIR, in *County of Amador*, the court held, "The economic incentives of the MSA are significant enough that delaying environmental review of the road vacation may well result in a justification of a decision already made." The court noted that the tribe has committed to pay the city millions of dollars. "By waiting to do environmental review until after the MSA provisions are implemented, the City runs the risk of succumbing to a financial momentum that provides strong incentive to ignore environmental concerns which could be more easily dealt with at this early state of the process." The court said that the question is whether the city would endorse the land into trust process after considering the environmental consequences. Similarly here, the tribe is committed to paying millions of dollars, and waiting for environmental review would risk succumbing to financial momentum. The County needs to decide if it will want to commit to the project once all the negative environmental effects are known and the required mitigations are known.

In this regard, the Agreement requires the Guidiville to implement mitigation measures required by the MSA when the Final EIS/EIR is certified. See Sections

A.1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11. However, the EIS/EIR is only in draft form, and has not been finalized and certified. Thus, the Agreement is based on unknown mitigation measures. Just as the City of Richmond cannot be bound by the Land Disposition Agreement until CEQA is performed (per litigation against the City), the County cannot base this Agreement on mitigation measures that are now unknown. The County needs to wait until the EIS is finalized and then decide if it wants to endorse the project when those mitigation measures are known.

The Agreement further requires the Guidiville to make substantial payments to the County. One of these obligations is to contribute a specified share toward certain roadway improvements. The EIS for the project contemplates mitigation measures for Richmond Parkway at the intersections of Gertrude Avenue, Parr Boulevard, Goodrick Avenue, and Pittsburg Avenue. The intersections at Parr and Pittsburg are on County land, and Gertrude marks the boundary of city and county lands.


Although the Agreement does not obligate the County to any improvements before compliance with CEQA, clearly, the County expects to undertake these. Otherwise, the County would have required the Guidiville to make some payment other than for this work. The 20% contribution likely will amount to hundreds of thousands of dollars. It is a sham to say that these are not part of the project. They are, and so require an EIR before approval of this commitment.

* * *

As a technical point, we question what the term of the Agreement is if there is Class II gaming and no compact. Section H.1. only provides the term if there is a compact.

For the reasons set forth above, the Agreement is legally defective, and should not be approved. We appreciate your consideration of these comments.

Sincerely,


Alan Titus