

Stand Up For California!
“Citizens making a difference”

www.standupca.org

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February 23, 2010

Honorable Ken Salazar
Secretary of the Interior
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Washington, D. C.
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Honorable Larry Echo Hawk
Asst. Secretary - Bureau of Indian Affairs
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Honorable Rhea S. Suh
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**RE: Restored Lands Determination – Guidiville Band of Pomo Indians
At Point Molate, Richmond, CA.**

Dear Secretary Salazar and Assistant Secretary Echo Hawk:

Stand Up For California! is a statewide organization with a focus on gambling issues affecting California, including tribal gaming, card clubs and the state lottery. We have been involved in the ongoing debate of issues raised by tribal gaming and its impacts for over a decade. Since 1996, we have assisted individuals, community groups, elected officials, and members of law enforcement, local public entities and the State of California as respects to gaming impacts. We are recognized and act as a resource of information to local, state and federal policy makers.

Stand Up For California! has attempted to acquire the purported “internal memo granting a positive determination”¹ for restored lands at Point Molate. The citizens in and around the City or Richmond as elsewhere in the State have a heightened public interest to participate in federal processes affecting potential off reservation tribal gaming developments. Residents of Richmond have actively participated in city council meetings, presentations to local neighborhood councils, public debates and regular meetings inviting elected officials to discuss the proposed comprehensive master planned attempt by the Guidiville Band of Pomo Indians to

¹ Letter dated Jan. 19, 2010, from Paula Hart, Director Office of Indian Gaming Mangement:
<http://www.standupca.org/off-reservation-gaming/contraversial-applications-in-process/guidiville-band-of-pomo-indians-ofcalifornia/Jan.%2028%2C%202010%20Response%20to%20FOIA.pdf>

develop a reservation community in the City of Richmond, 110 miles from its established Tribal Office.²

I. CITIZENS AND CITIZENS' GROUPS³ HAVE A RIGHT TO BE CONSULTED ON THE PROPOSED LAND ACQUISITION

On December 6, 2004, the Guidiville Indian Rancheria submitted a letter to the Regional Director of the Bureau of Indian Affairs, Sacramento, CA. The letter attached Tribal Resolution #04-18 outlining the Tribes intent to acquire and transfer to trust status, the former Point Molate Naval Fuel Depot and subsequently develop and operate a tribal gaming facility resort and retail complex as part of the restoration of the Tribe's status as a federally recognized Indian tribe.

The Tribe cites the *Scotts Valley et.al v. the United States of America* case (No. C-86-3660-WWS) Stipulation for Entry of Judgment filed March 15, 1991 ("Stipulation") as the authorizing language that obligates the United States Department of the Interior to process its application under 25 C.F.R. 151 regulations accepting new lands to be held in trust as restored to the Tribal land base. However, the language of the Stipulated Judgment is specific in its descriptions of eligible Indian lands to be acquired as restored.

To date, the Tribe has not submitted a fee to trust application for the lands at Point Molate ("Subject land"). Rather, the Tribal resolution initiated a National Environmental Protection Act ("NEPA") process.

The Subject Land has been without Indian character for more than 160 years. The basis of the Guidiville Indian Rancheria's claim of restored lands ignores the 1851 California Land Review Act which established a Commission to review the deeds of California settlers which also included Indian land claims.⁴ Thus, California is not subject to Indian aboriginal land claims which is the basis of the Guidiville Indian Rancheria restored lands theory.

Reservation shopping in California is driven by the restored lands exception. There are currently 22 after acquired land or administrative proposals in California which Tribes and gaming investors are continuing to promote as exceptions under section 20 of IGRA. This is being done to specifically preclude our Governor from having a say in the process, since he has made clear his opposition to such blatant reservation shopping attempts.

² Goggle Maps indicate that the Tribal Office is approximately 110 miles and a 2 hour commute to the City of Richmond. The Tribal Office is identified in the Casino Management Agreement between the Guidiville Band of Pomo Indians of the Guidiville Rancheria and Mem Sah Corporation a Tribal Corporation wholly-owned entity of the Rumsey Band of Wintun Indians.

³ *Preservation of Los Olivos v. U. S. Dept. of the Interior*, Case # CV 06-1502 AHM (CTx) **CITIZENS HAVE STANDING!**

⁴ In *Indians of California v. United States*, 98 Ct.Cl. 583, 1942 WL 4378 (1942), the United States Claims Court noted that California Indians failed to establish their title to any land within the state pursuant to the Act of March 3, 1851, 9 Stat. 631. The 1851 Act was entitled "An Act to ascertain and settle the private land claims in the State of California" and it required all claimants to land title to establish their title to the satisfaction of a Commission established pursuant thereto. The Court observed that none of the Indians of California qualified their land claims before the Commission, meaning that "whatever lands they may have claimed became a part of the public domain of the United States." *Indians of California*, 98 Ct.Cl. At 587 (citing *Barker v. Harvey*, 181 U.S. 481 (1901); *United States v. Title Insurance & Trust Co., et al*, 265 U.S. 472 (1924)) (emphasis added).

As *Stand Up For California!* will demonstrate in this letter, none of the narrow exceptions of 25 U.S.C. Section 2719 including the “restored lands” exceptions is applicable to the Guidiville Indian Rancheria request. The Guidiville Indian Rancheria has its historical, archeological, geographical and cultural roots at the Guidiville Rancheria, located in Talmage, Mendocino County, near Highway 101, South of Ukiah, in California, approximately 110 miles from the proposed casino site.

Stand Up For California! supports the efforts of citizen who want to make sure that there are adequate protections for all communities potentially adversely impacted by unregulated or illegal gambling expansion. We do not seek to impede the economic progress and advancement of California’s native peoples; rather we seek adherence to state and federal laws permitting gaming. This, we believe is in the best interests of all the inhabitants of our State.

Stand Up For California! has a clear interest in the IGRA proceedings and therefore entitled to submit these and future comments for your consideration.

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 acknowledgment; 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. Section 2719 (a), (b).

If none of these exceptions is applicable, then the two-part Secretary Determination of 25 U.S.C. Section 2719 (b) (1) (A) is the only statutorily permitted way for a tribe to conduct gaming on After-Acquired Lands.⁵

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. The BIA also must obtain a legal opinion from the Office of the Solicitor concluding that the proposed acquisition comes within one of the exceptions, or that a determination that the proposed land meets the legal threshold of IGRA. 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 Guidiville Indian Rancheria was not a federally recognized tribe and did not have a land base, did not reside on land set aside under the federal protection against other jurisdictions, and did not assert governmental powers over any land. F. Cohen, Handbook of Federal Indian law at 34-35 (1982 Ed.).

Second, the Tribe never had a recognized reservation in, or anywhere near the vicinity of, the Subject Land. Indeed the Tribe’s historical lands are located in Talmage, Mendocino County, approximately 110 miles from the Subject Land.

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

Fourth the Guidiville Indian Rancheria has not been recently acknowledged by the Secretary under the federal acknowledgement process. (Part 83 Final Rule.)

Thus, the exceptions set forth at 25 U.S.C. Section 2719 (a) (1)-(2) and (b) (1) (B) (i)-(ii) do not apply to the Guidiville Indian Rancheria.

B. Restoration is Limited by Certain Factors Prohibiting Acquisition Of Any An All Property for Gaming Purposes.

The “restored lands” exception of 25 U.S.C. Section 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 land for the Tribe.” The thrust of case law and National Indian Gaming letter opinions is that, under 25 U.S.C. Section 2719(b)(1)(B)(iii), land may be “restored” to a federally recognized tribe, provided that specific facts and other criteria are established. The perspective of case law is detailed below; the Tribe lacks the requisite criteria for “restoring” the Subject Land under this exception.

In May of 2008, the Department of the Interior adopted implementing regulations on evaluation of the fee to trust applications Subsection (c) 292.11 and 292.12 of these regulations

⁵ This statement reflects the same opinion as Acting Deputy Assistant Secretary for Policy and Economics Development, George T. Skibine in a letter dated May 12, 2006 to Chairwoman Merlene Sanchez

will apply to the restored land application when the Guidiville Indian Rancheria submits its application. These new regulations provide guidance in making a determination.

IGRA itself does not define “restoration of lands,” and the case law and other precedent interpreting whether lands taken into trust are properly “restored” within the meaning of 25 U.S.C. section 2719(b)(1)(B)(iii) is sparse. *See, e.g., City of Roseville vs. Norton*, 219 F. Supp. 2d 130 (D.D.C. 2002), *aff’d*, 348 F.3d 1020 (D.C. Cir. 2003), *cert. denied, Citizens for Safer Cmty. v Norton*, 541 U.S. 974 (2004); *Grand Traverse Band of Ottawa and Chippewa Indians vs. United States Atty, for the W. Dist of Mich.*, 198 F. Supp. 2d 920 (W.D. Mich. 2002), *aff’d*, 369 F.3d 960 (6th Cir. 2004); *Oregon vs. Norton*, 271 F. Supp. 2d 1270 (D. Ore. 2003) (reviewing decision of Secretary following remand by court in *Confederated Tribes of Coos v. Babbitt*, 116 F. Supp. 2d 155 (D.D.C. 2000)). *See also, in re Wyandotte Nation Amended Gaming Ordinance*, NIGC Final Decision (September 10, 2004) (“*Wyandotte Decision*”); *NIGC Letter to B. Downes re Karuk Tribe of California* (October 12, 2004) (“*Karuk case*” or “*Karuk Opinion*”); *NIGC Memorandum Mechoopda Indian Tribe of the Chico Rancheria* (March 14, 2003) (“*Mechoopda case*” or *Mechoopda Opinion*”); *NIGC Memorandum re Bear River Band of Rohnerville Rancheria* (August 5, 2002) (“*Bear River case*” or *Bear River Opinion*”).

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

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

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

[W]e believe the phrase “restoration of lands” is a difficult hurdle and may not necessarily be extended, for example, to any lands that the tribe conceivably once occupied through its history.

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

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

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

Placement within a prior reservation of the tribe also is significant evidence that the land may be considered in some sense restored.

The Guidiville Indian Rancheria does not pass the *Coos* test and therefore falls outside the narrow limits of the restoration exception.

1. Factual Circumstances Do Not prove “Restoration”

The factual circumstances of the proposed acquisition for gaming of the Subject Land fail to provide any evidence 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.” Therefore, there must be other evidence that the proposed acquisition of the Subject Land “restores” to the Tribe what is previously had.

The 85th *Congress 2d Session July 22, 1958* Report to accompany H. R. 2824 provided for the distribution of the land and assets of certain Indian Rancherias and Reservation in California. The Guidiville Rancheria was a named Rancheria. The report was favorable to the terminations and recommended that the bill be passed. The legislation provided options to, (1) transfer assets of Rancheria properties to individual Indians, or (2) sell the asset and distribute the proceeds to the individual Indians, or (3) convey such assets to the corporation⁶ or legal entity organized or designated by the group or (4) convey such assets to the group as tenants in common.

The termination of the Guidiville Rancheria became federal statute. The Report identifies the land:

Guidiville Rancheria was established in 1909 when a 50 acre tract was purchased for \$2000. The plot was enlarged by the purchase of another 34 acres in 1912 for \$2,200. Executive order of 1912 added further to the lands. The present acreage in 1958 is 243.

The Report identifies people or persons residing at Guidiville Indian Rancheria who may be considered distributees, dependent members or successors in interest, of the distribution plan. The report states:

The people living here belong to the Pomo Tribe. This general area is the traditional homeland of these Indians and the rancheria was established where they have always lived. The group living here now has an informal tribal organization. They are not formally organized. There are 12 families and 12 minors.

It is apparent that the 243 acre tract would meet the *Coos* test!

⁶ The Regional Office of the Bureau of Indian Affairs used California State Corporation Law to organize tribes as Homeowner Associations in order to distribute federal funds thus providing services or maintenance to the trust lands.

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 evidence that the land has been in some respect recognized as having a “significant relation” to the tribe. *Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney for the Western District of Michigan* (“*Grand Traverse Band I*”), 46 F. supp. 2d 689,702 (W.D. Mich. 1999). The location factor has been deemed particularly critical by all of the courts and other authorities reviewing restoration situations.

In 2000, the voters in California supported Proposition 1A, (a consitutional Amendment by 64%) which provided a ‘limited exception’ for the use of casino style gaming, i.e. slot machines and banking games to federally recognized tribes on California Indian lands. It was understood that tribal gaming would only occur on Indian lands in mostly rural locations. Tribal leaders and campaign consultants stated regularly in the statewide press, on TV and radio that Indian casinos would not spring up anywhere.

The Guidiville Band of Pomo Indians has gained federal restoration by a stipulated judgment in which neither the State nor the County was included as affected parties in 1991. The Tribe now wants to acquire land for gaming in a metropolitan commercially-viable location, even though it is not in the immediate area of the Tribes’ historic occupancy. The Tribe is making the claim of restored lands under IGRA Section 20, 25 U.S.C. 2719, (b) (B) (iii) restored lands.

The Subject land is located in the City of Richmond. The City of Richmond was chartered on August 7, 1905, one year before Congress appropriated money for the purchase of federal lands for homeless Indians of no specific tribal affiliation in California and four years before the Guidiville Band of Pomo Indians was administratively grouped or offered use of federal lands for a home site.

On the chartering of the City of Richmond there was a population of 2,150 residents and today that population has grown to 103,464 (source: City of Richmond estimated growth 2007). The racial demographics of the City indicate a 0.4% urban American Indian and Alaska Natives population.

The Guidiville Indian Rancheria and its gaming investors are asserting that this is equitable and reasonable relief for the termination of their status as Indians which the group voluntarily asked for by way of a resolution on October 20, 1955. The band was not formerly organized. The majority of the Band resides and receives governmental services at the Rancheria in Talmage, Mendocino County. (*See - Dr. Stephen Dow Beckham Report, submitted to Office of the Solicitor Department of the Interior April 14, 2009*)

In the Stipulation, the federal defendants agreed to accept in trust lands “outside the boundaries” of the former Rancheria which were currently owned by certain Indians. However, the Stipulation restricts these outside properties to any fee interests in trust or former trust

allotments issued to successors-in-interest of the Rancheria. The City of Richmond is 110 miles outside of the purview of this stipulation⁷.

The Guidiville Band of Pomo Indians has neither exercised governance nor jurisdiction over the proposed lands at Point Molate. Dr. Stephen Dow Beckham has thoroughly researched the Guidiville Band of Pomo Indians traditional use and occupancy areas and residency in Mendocino County. Dr. Beckham has provided a detailed response to the assertions of modern and aboriginal claims to the lands at Point Molate on behalf of the County of Contra Costa. These reports have been provided to the United States Department of the Interior, the Bureau of Indian Affairs, to the California Congressional Delegation.⁸ The reports must be given your review and consideration.

Overwhelming Evidence of ‘Reservation Shopping’: The Guidiville Indian Rancheria has been reservation shopping since early 2002. This has been documented in the press and in County Board of Supervisor meeting minutes. Prominent investors, law firms and elected officials are named. Curiously, an Oakland real estate broker has stated in the press he is owed money for finding a location.⁹ Each location is in non-compliance with the Stipulation.

Site: Nov. 2002¹⁰ to Present: Point Molate, City of Richmond Contra Costa County. The project is being promoted by a consortium created by Berkeley developer and former environmental consultant James D. Levine, former Secretary of Defense William Cohen, Napa developer John Salmon and the Rumsey Band of Wintun, who operate one of California’s richest gambling resorts, the Cache Creek Casino in Yolo County’s Capay Valley which has a management contract submitted to the NIGC.

Site(s) Jan. 5, 2004: The Guidiville Band and real estate broker, John Troughton’s firm, Cusman and Wakefield, continue to shop in Contra Costa County for a casino site. John Troughton claims the City of Richmond agreed to pay him \$1.5 million if the Guidiville Band of Pomo Indians came to Point Molate.¹¹ Developers previously proposed a casino in Hercules¹² after failing in an attempted bid with the City of Antioch.¹³ At some point, the Tribe’s investor is NVG, Alan Ginsberg of Florida, and then Harrah’s of Las Vegas. A financial dispute between NVG and Harrah’s is not resolved until Dec. 2009.¹⁴

⁷ See footnote #2.

⁸ Dr. Beckham's reports are also available online at: www.standupca.org

⁹ See footnote #11, note the name of Council Member Bates previously investigated for alleged developer kick-backs by the FBI. Newstory of investigation attached to letter: <http://www.standupca.org/off-reservation-gaming/contraversial-applications-in-process/guidiville-band-of-pomo-indians-of-california/Ltr%20to%20City%20Attorney%20from%20Schmit%20re%20Nathaniel%20Bates.pdf>

¹⁰ See footnote #11 – Developer has a letter dated Nov. 2002.

¹¹ Josh Wolf, Richmond Confidential, January 18, 2010, *Broker Claims city owes \$1.5 million for Point Molate*

¹² Tom Lochner, Contra Costa Times, Jan 5, 2004 *Casino may be in the cards for Hercules*

¹³ Jane Ramsey, Contra Costa Times, October 15, 2003, *Casino opponents pact Antioch council meeting*

¹⁴ *Guidiville Indian Rancheria v. NVG and v. Harrah’s* June 2008 http://www.standupca.org/off-reservation-gaming/contraversial-applications-in-process/guidiville-band-of-pomo-indians-of-california/2008_wl_2521901_6-27-08_1239.pdf

Site(s) Dec. 2002 - Nov. 4, 2003: Solano County enters a Resolution No. 2003-242 opposing casino projects in the unincorporated areas of Solano County. The Guidiville Band and former developers promoted a casino on Hwy 37. Solano County Supervisors further noted in the minutes their opposition to additional locations of Mare Island¹⁵ ¹⁶, Solano County Fairgrounds, and the City of Suisun.¹⁷ The firm of Latham and Watkins, a Los Angeles based powerhouse law firm with offices in 14 countries and employer of fast-track Washington, D.C. Attorney Phillip Perry, son-in-law of Vice President Dick Cheney, member of the Bush Justice Department and former Clinton Secretary of the Interior Bureau of Indian Affairs Bruce Babbitt, were reported as being eyed to provide a casino report.¹⁸

It appears that this proposed project has had tremendous political momentum while at the same time, there has been a disregard for the rule of law.

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 a Stipulation dated September 6, 1991, (NO. C-86-3660-VRW). The Tribes termination occurred in 1955, 65 years ago on land 110 miles from the Subject Land. The Guidiville Rancheria restoration to federal recognition in 1991 and the numerous casino market 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. Section 2719(b) (1) (B) (iii).

However, the new acquisition of 44 acres at Talmage, Mendocino County in 1999 does represent a *continuous transaction*. Housing and Urban Development money has been granted for the development of homes for tribal membership at this location.

C. The Stipulated Judgment Does Not Constitute a Restoration Act Mandating Acquisition of the Subject Land.

The services, rights and benefits accorded to the Guidiville Indian Band are pursuant to the Stipulation and specifically mandated by the Indian Reorganization Act (“IRA”), 25 U.S.C.

¹⁵ Dan Judge, Vallejo Times-Herald, December 11, 2002, *Ukiah tribe hopes for Vallejo casino*

¹⁶ Uclia Wang, The Press Democrat, Jan. 10, 2003, *Pomo casino at mare Island rejected*

¹⁷ Minutes for November 4, 2003 BOS Meeting.: The Solano County Board of Supervisors, Item #22 Resolution 2003-242 Opposing casino projects in the unincorporated areas of Solano County adopted 4-1.

¹⁸ Rebbecca Rosen Lum, April 3, 2003, Contra Costa Times, *Big law firm eyed for port casino study*

There is no reference to Section 20 of the IGRA or “restoration” of lands as defined in 25 U.S.C. Section 2719(b)(1)(B)(iii).

Specifically, the Stipulation proves that the Federal government agrees to accept into trust status any land “within the boundaries of the former Guidiville Rancheria” that:

1. Is currently in Indian ownership, and
2. Was deeded or passed as a direct consequence to termination to certain entities or individuals.

The subject land at Point Molate is neither of the above.

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.

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). If the Guidiville Indian Rancheria is entitled to some form of restitution, it still must be equitable. The form of restitution which may ultimately be conferred upon the Guidiville Indian Rancheria depends on the impacts such restitution would, on balance, have on all the other affected parties, including other federally recognized tribes in Northern California.¹⁹ See *British Motor Car Distrib.*, 882 F 2d at 372; *H.N. Singer*, 668 F.2d at 1113.

In addition to being a general rule of equity, such a balancing of interest – when making a 25 U.S.C Section 2719 (b)(1)(B)(iii) determination - is plainly required by the Indian Reorganization Act, NEPA, and IGRA itself. The Secretary of the Interior must consider whether “restoring” the Subject Land to the Guidiville Indian Rancheria for gaming purposes would:

- (1) truly restore a sense of parity with other tribes²⁰;
- (2) eliminate disadvantages as against other tribes²¹; and
- (3) place the Tribe in a comparable position with earlier recognized and landed tribes.²²

¹⁹ Northern California is home to approximately 60 Rancheria Tribes that will be unfairly affected by a positive determination of a restored lands at the Point Molate location. In addition California has 67 tribal groups petitioning for federal recognition. At least 11 of these groups are in major metropolitan locations in Southern California, Los Angeles, Orange, San Diego, and San Bernardino Counties. A positive determination would motive additional developers, investors to “tribe and reservation shop” in California further disrupting our State’s Consitutional gaming policy and fairly negotiated tribal state compacts for tribal gaming.

²⁰ *The City of Roseville* 219 F. supp. at 1661

²¹ *The City of Roseville* 348 F. 3d at 1030

²² *Grand Traverse Band of Ottawa and Chippewa Indians* 198 F. Supp.2d at 935

- (4) while, the Secretary must conclude the acquisition (i) is in the “best interest” of the Tribe and its members’ the Secretary must also determine that it will not be (ii) “detrimental” to the surrounding community. 25 U.S.C. Section 2719 (b) (1) (A).

Compare, however, does not mean providing an extraordinary advantage as is presented in the case here!

Even more important to the equities analysis is recognition that the Tribe cannot be put into a better position than what it previously had – the Tribe can only be placed in a position comparable to its prior position. In short, the equities of this case mandate against finding the restoration exception as applicable. Acquiring the Subject Land for casino gaming purposes would grant the Guidiville Indian Rancheria the right to operate a casino in a location that is in one of California’s densest metropolitan areas.

The Subject Land is accessible by Highway 580 which traverses the Richmond-San Rafael Bridge. The Point Molate exit is the last exit before the toll plaza and is ~ 200 yards from the toll booth. Casino gaming on the Subject Land would certainly divert gaming that would otherwise occur at already operating tribal casinos in more remote locations. In fact, right in Guidiville’s historic area, the Pinoleville and Upper Lake Pomo are establishing their casinos on their historic lands.

The 1923 records of the Reno Indian Agency²³ (“Agency”) indicate an approximate population of 1,754 Indians comprising sixteen groups residing in Mendocino County, California. 690 Indians reside on the Round Valley Reservation, leaving 1064 non-reservation Indians living in Mendocino County.²⁴ One of the sixteen groups, the Guidiville band consisted of 12 families; with 12 minors. The people of the Rancheria are Northern Pomo. The aboriginal territory of the Northern Pomo is in Mendocino and Sonoma Counties.

In 1850, California became a State and exercised governance over the Subject Land. For approximately the last 50 years, the Subject Land has been under the authority of the United States Navy. Without dispute for 160 years no Indian lands have existed in this regional area at the site of the proposed casino (i.e. all land has been subject to local, state and federal law). Common sense dictates that it is unreasonable to place a new political entity for the purpose of establishing a casino on land that for 160 years has been subject to local, state and federal law and in the private ownership of generations of private citizens.

In reality, the Guidiville Indian Rancheria is asking for a remedy of a multi-million dollar casino, asserting that this is equitable and reasonable relief for the termination of their status as Indians which the unorganized group voluntarily requested and for which it received assets and real property on September 29, 1955.

²³ Annual Report 1923 Reno Indian Agency: RG 75 Reno Indian Annual narrative and Statistical Reports 1912-1924 Box 6; Folder (Annual Narrative Reports 1923 Reno Ind. Ag.) pages 12-13

²⁴ This statement in the Reno Indian Agency Survey of 1923 raises a significant *Carciari v. Salazar* question. Sec. 19 of the IRA defines Indians living on “Reservations” as eligible for land acquisitions. Does the Secretary of the Interior have the authority to transfer lands for the Guidiville Indian Rancheria? Clearly, this will require further investigation.

The Guidiville Indian Rancheria and Upstream LLC are simply trying to do an “end run” around the two-step Secretary Determination process, whereby local communities, nearby tribes 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.

The Subject Land is not restored lands and must abide by a two-step Secretary Determination process.

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 must follow a correct order. The order is as follows:

1. A determination of whether the Subject Land can lawfully be used for casino gaming under 25U.S.C. section 2719
2. A completion of the Environmental Impact Statement (“EIS”) underlying the acquisition;
3. A determination whether acquiring the Subject Land would be appropriate under the test set forth in the IRA, 25 U.S.C. Section 465.

The order of this process is mandated by the applicable statutes and rules.

A. **There is no posting of a land determination for gaming on Subject Land on the NIGC Web Site.**

The Subject Land is not located “within the exterior boundaries of the tribe’s reservation or adjacent thereto.” The Guidiville Indian Rancheria, a federally recognized tribe, has a land base in Talmage, Mendocino County. The Tribe resides on land set aside under federal protection against other jurisdictions and asserts governmental powers over the land in Talmage, Mendocino County. F. Cohen, Handbook of Federal Indian law at 34-35 (1982 Ed.).

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 at Point Molate, City of Richmond.

Yet, there is still a very strong rumor that an internal memo granting a positive determination was made by a BIA Solicitor in 2006. In July of 2005, Chairman Walter Gray of the Guidiville Indian Rancheria testified before the Senate Indian Affairs Committee asserting a California timeline that alleged a historic connection to the Subject Land. In September of 2005, *Stand Up For California!* submitted a letter²⁵ to the Senate Indian Affairs Committee asking for the record to be corrected due to the many errors and omissions in the Guidiville Indian

²⁵ <http://www.standupca.org/off-reservation-gaming/contraversial-applications-in-process/guidiville-band-of-pomo-indians-of-california/Stand%20Up%20for%20Calif%20letter.pdf>

Rancheria chairman's testimony. *Stand Up For California's!* letter included a documented California timeline.

B. Potential violation of IGRA's sole proprietary interest requirement

The Subject Land is encumbered by the title of the land. It is currently U.S. Navy lands that are to be transferred to the City of Richmond in accordance with specific use guidelines and deed restrictions for development through perpetuity. Upstream LLC is to purchase the land from the City of Richmond. Upstream LLC is then to clean up the land for the casino development. The City of Richmond must comply with California Environmental Quality Act law. The current proposal does not appear to meet the stringent criteria.

The Subject land is highly toxic and may not meet the regulatory standards put forward in 25 CFR 151.10 (b) 602 DM Hazardous Substances Determination. When the U.S. Navy ceased fueling operations at the project site, four contaminated locations were identified as IR-01, IR-02, IR-03 and IR-04. IR-01 consists of an unlined waste disposal area, IR-02 is a sandblast grit disposal area, IR-03 consists of an old treatment pond site, and IR-04 the fuel storage areas along the shoreline. These sites are subject to "ongoing remediation," according to the recent DEIS/EIR. (DEIS/EIR, pg 3.12-16 to 3.12-20) The cause of the site's contamination was many years of minimally regulated naval activities at Point Molate.²⁶

Additional comments on the contamination of the Subject land were presented in a report by Environ International Corporation.²⁷ Environ cited the following:

- Soil and groundwater contamination is present beneath many areas of the site, and will require significant remediation and long-term monitoring. Further, additional environmental investigation and characterization is necessary in several areas of the site.
- Existing deed restrictions for certain areas of the site will be replaced by land use controls (LUCs) which may include cleanup goals and objectives that would be difficult to achieve and could limit site redevelopment alternatives. **READ MORE** http://www.standupca.org/off-reservation-gaming/contraversial-applications-in-process/guidiville-band-of-pomo-indians-of-california/2173_001.pdf

Upstream LLC has listed in the Land Disposition Agreement the need for Secretarial approvals of land leases to other investors. Herein lays a potential violation of IGRA's sole proprietary interest requirement. IGRA requires, as one of the necessary conditions for a tribe to open and operate a casino, a gaming ordinance approved by the National Indian Gaming Commission. 25 USC Section 2710(b) (B); 2710(d) (1) (A). For approval of a gaming ordinance, IGRA requires, among other things, that "the Indian tribe will have the sole

²⁶ Letter of comment in the DEIS/EIR regulatory process, dated October 23, 2009, Stoel Rives LLP, Attorney Timonth M. Taylor http://www.standupca.org/off-reservation-gaming/contraversial-applications-in-process/guidiville-band-of-pomo-indians-of-california/2173_001.pdf

²⁷ Environ International Corporation Report September 22, 2009: http://www.standupca.org/off-reservation-gaming/contraversial-applications-in-process/guidiville-band-of-pomo-indians-of-california/2173_001.pdf

proprietary interest and responsibility for the conduct of any gaming activity.”25 USC 2710(b) (2) (A).

As such, should a tribe and a contractor execute an agreement that gives to the contractor some proprietary interest in the gaming operation, the agreement violates both the tribal gaming ordinance and IGRA, which empowers the NIGC to correct those and all other violations through enforcement actions. Therefore, any agreement that violates IGRA’s sole proprietary interest requirement places the tribe at risk of fines and closure of its casino.

We have just witnessed the denial of the Scotts Valley Management Contract with NVG, Alan Ginsberg of Florida. NVG was the original investor of Guidiville, prior to Harrah’s. Harrah’s is no longer involved. Upstream LLC has not made public nor provided banks statements as agreed in the Land Disposition Agreement of the current investors demonstrating their ability to move forward.²⁸

C. Non-Compliance of State Constitutional Law and Policy

In May of 2005 Governor Schwarzenegger introduced a Proclamation setting forth a general policy on specified matters related to tribal gaming. It is clear that the Subject Land proposed for a casino by the Guidiville Indian Rancheria is non-compliant with this proclamation. The Governor said:

1. I shall oppose proposals for the federal acquisition of lands within any urbanized area where the lands sought to be acquired in trust are to be used to conduct or facilitate gaming activities.
2. I shall decline to engage in negotiations for tribal-state gaming compacts where the Indian tribe does not have Indian lands eligible for class III gaming.
3. I shall consider requests for a gubernatorial concurrence under section 20(b) (1) (A) of IGRA, that would allow a tribe to conduct class III gaming on newly acquired land, only in cases where each of the following criteria is satisfied:
 - a) The land that is sought for class III gaming is not within any urbanized area.
 - b) The local jurisdiction in which the tribe’s proposed gaming project is located supports the project.
 - c) The tribe and the local jurisdiction demonstrate that the affected local community supports the project, such as by a local advisory vote.
 - d) The project substantially serves a clear, independent public policy, separate and apart from any increased economic benefit or financial contribution to the State, community, or the Indian tribe that may arise from gaming.

²⁸ Josh Wolf, Richmond Confidential, January 12, 2010, *Council approves extension for Point Molate developer*
This article is a must read – it demonstrates a break down between council members and staff.

The governor makes clear his opposition to urban casinos:

“For purpose of this Proclamation, "urbanized area" means the definition of that term as defined in Public Resources Code section 21071, subdivision (a). A list of the cities meeting this definition as of the date of this Proclamation is attached hereto.”

The proposed Subject Land if approved for gaming will undermine the constitutionality of California’s Indian gaming regime. As you may be aware, the State has successfully defend a challenge to the constitutionality of Proposition 1A²⁹, which challenge alleged that California violated the Equal Protection Clause of the United States constitution when it permitted Indian tribes to conduct class III gaming on Indian lands, to the exclusion of all others. *Artichoke Joe’s*, supra, 353 F. 3d at 731. In upholding Proposition 1A, the Ninth Circuit Court of Appeals relied upon the State’s restriction of tribal gaming “to carefully limited locations” as a reasonable means of serving the State’s interest in protecting the public health, safety, welfare and good order.

The proposed Subject Land if approved for gaming will undermine the sovereign authority of tribal governance. In a letter dated January 10, 2010, the Honorable Nelson Pinola, Tribal Chairman of the Manchester-Point Arena Band of Pomo Indians alerts fellow tribal leaders of a pending BIA action that he believes poses a very serious and immediate threat to tribal government gaming. “I believe that if we allow the strong clear, historical, governmental and cultural connection between our land and our sovereignty to be broken we are playing into the hands of the enemies of tribal sovereignty. Their arguments will be strengthened by a BIA decision to simply create sovereign authority over any land that looks good for a business.”

The propose Subject Land if approved for gaming will disenfranchise the electorate.

V. CONCLUSION

The subject land cannot be taken into trust under the “restored lands” exception under IGRA. The Subject Land must instead adhere to the two-part Secretarial determination. Moreover, the Subject Land must be unencumbered and owned in fee by the Guidiville Indian Rancheria.

We ask the Secretary of the Interior to give serious consideration to establishing a fair, open and transparent regulatory process for the determination of Indian lands. Before any other step is taken, a fair and equitable lands determination for restored land must be made. This should be a separate process that focuses on the determination of restored lands. All affected parties, the Governor, Attorney General, nearby federally recognized Indian tribes and affected local jurisdictions should be involved in the determination.

There should be a notification, comment, and a review and appeal process specific to the

²⁹ Proposition 1A provided for a limited exception for federally recognized Indian Tribes on California Indian Lands in the States prohibition on Casino style gaming. This statewide ballot measure was supported by 64% of California voters on March 7, 2000.

determination of whether or not certain lands are Indian lands. Such a process would eliminate the ability of unscrupulous gaming investors to “tribe and reservation shop” abusing the spirit and intent of IGRA.

The non-tribal populations of the City of Richmond, surrounding cities, and the counties of Contra Costa and Marin have justifiable expectations that the land remains similar in character. If changes regarding zoning, jurisdiction and critical health and safety issues regarding a change in the governing authority occur, then it should be determined in an open, fair and transparent process. This cannot be an overreaching administrative determination by the Secretary of the Interior.

Stand Up For California! and citizens in and around the City of Richmond appreciate the opportunity to submit the foregoing comments and trust that the Secretary will consider this analysis. We hope you will find these comments helpful and useful in your decision making process. An Indian lands determination at Point Molate will have far reaching impacts. Please do not hesitate to contact us if you require additional information or have questions.

Sincerely,

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CC: Honorable Dianne Feinstein, US Senator
Honorable Barbara Boxer, US Senator
Paula Hart, Director Office of Indian Gaming Management
George Skibine, Chairman, National Indian Gaming Commission
Honorable Arnold Schwarzenegger, Governor of California
City of Richmond