

Stand Up For California!
“Citizens making a difference”

www.standupca.org

P.O. Box 355
Penryn, CA 95663

November 9, 2009

Contra Costa County Board of Supervisors
651 Pine St., Room 106
Martinez, CA 94553

Re: **Guideville MOU**

Dear Honorable Members of the County Board of Supervisors:

We are writing to correct statements that were made at the November 3 Supervisors' meeting, and to provide additional information on seven subjects listed below, *including substantial problems with the November 6 MOU.*

We have no doubt --as reflected in your many past resolutions and actions -- that you are sincerely opposed to having Nevada style casinos in the County, and that this prospective change is motivated by good faith intentions and the feeling that you have no choice. But obviously, the proponents have a personal stake in your decision which affects the “facts” that were presented.

The November 16 deadline is being exaggerated by the proponents of the casino, who are eager to get the County's support while ironically claiming that the County's support is really not important. The November 16 date is just for comments on the draft EIR/EIS (“EIR”). The County can submit no comments or brief comments, and take more time to consider the MOU and your policy. You would be giving up little. The EIR has been extensively commented on already and will be subject to another round of comments later. The developer will still want this deal even after November 16.

In fact, the arguments for stampeding this MOU are circular. If the EIR is completely adequate – as the MOU and developer repeatedly state – then what is the harm in not submitting EIR comments and taking more time with the MOU? Conversely, if there really are problems in the EIR – things it does not address adequately -- then you should not sign an MOU saying that the EIR is satisfactory, you should submit comments on the EIR instead.

Anything lost by not commenting on the EIR now is far outweighed by the problems with acting too quickly, including the fact that the MOU has numerous flaws. The MOU's flaws understandably were not the primary subject of the November 3 hearing because the document had just been released, and without any staff report. But in this letter, we outline some of the problems in the revised MOU released November 6.

Acting in haste also would be a mistake for another reason. When Yolo County entered into an MOU, the Supervisors first held two workshops to explain the MOU, and in different locations of the county. There were three additional public hearings just before the Board of Supervisors. Public comment was accepted and the agreement was modified in a way acceptable to the tribe, the County and a majority of concerned citizens. The meetings were held with advance notice, and both during the day and at night so that working people could attend. When Yolo County finally decided to enter into an MOU, it was with public support.

Here, every vote or poll ever taken in the County shows overwhelming casino opposition, even in West County. The change in your position has not been adequately explained to the citizens. This reexamination of County policy demands greater scrutiny and input than can be gathered in three minute comments from proponents with an enormous financial interest in the outcome. Posting an MOU just before a Supervisors' meeting where only the proponents know the November 3rd date is coming and are prepared, also does not suffice. The crowd at the first hearing was prearranged and not representative of the county's citizens.

We urge you to take more than just a week to gather information and consider your options. In this letter, we have quickly gathered together additional information you should consider. But ultimately the Board needs to make a decision based on the best information that can be gathered even if it takes longer than a week to gather. You may need to hear from gaming experts and professionals – other than those hired by the developer. Unfortunately, the debate was framed as the County having “no choice”, and as the only choice for Richmond being a casino or nothing. Neither is true. We do not doubt the County's motives or desire to protect its citizens, but for the residents of the County, this proposal is deceiving.

Summary of Issues:

1. **Why the County's Position Matters in Washington and Sacramento.** (pp. 4-5) The County's position is significant under two sets of federal regulations for land acquisitions. The County's position also matters to the approval of a state compact. Legislators in Washington and Sacramento have supported the County; now the County is undercutting them.

In addition, the Indian Gaming Regulatory Act prohibits gaming on land acquired after 1988. The County's position matters on whether this land qualifies for an exception as “restored lands.” Here, the tribe cannot show a significant current or historical connection to this site. The tribe is from Mendocino County, and the tribe already has a rancheria more than 100 miles away. The County has submitted hundreds of pages of well researched documentation showing that this land is not eligible for gaming. But incredibly the MOU waives the County's position, paving the way for not one but three or more casinos, since the County will have no credible grounds to object to any others.

It is no wonder that the developer is doing everything possible to have the County change its position. The County's position matters. And if it does not matter, why is the developer so eager to get the County's agreement?

2. **Why there is no urgency to change positions.** *The County has much more time to evaluate its position.* The significance of the November 16 date is exaggerated. (pp. 6-7)
3. **Why – according to a study commissioned by Congress – electronic gaming devices cause social impacts on crime, insolvency, divorce, gambling addiction.** Slot machines are nothing like other forms of gambling that have existed in California since statehood. Based on studies, opening casinos of this type also will lead to economic losses for the community. That is what has happened in many other parts of the country that were bedazzled by the same grandiose visions and promises of casinos. (pp. 7-10)

4. **The tribe's waiver of Sovereign immunity may be ineffective. Even if that were not so, many County claims are not covered. A person or employee discriminated against, injured, cheated, defrauded or assaulted also cannot have their day in court. Workers will be exposed to second hand smoke.** The County is not protecting its own citizens or workers. The County may not even be protecting itself because there does not appear to be a tribal council resolution waiving the tribe's immunity from suit. (pp. 11-13)
5. **Specific Problems with the MOU.** (pp. 14-16). In this section, we list a number of problems in the November 6 MOU. For example, if the tribe does not build a casino, the County gets nothing, but the County is still obligated to provide services and improvements for the rest of the project. If the EIS or Mitigation Plan are changed, the County waives its right to comment on the changes it has yet to see. There is no restriction on underage gaming. Other tribal-county MOUs in California have better terms for the counties even where the project was already approved.
6. **There is no conceivable way this project will commence in 2011 or even 2015.** Upstream and the City entered into an agreement in 2004, five years ago, but Upstream has yet to clear even the first hurdle. The County should consider alternatives for bringing jobs to Richmond now, as outlined below. Many of the people who came to the last hearing could and would support an alternative if given another choice. (p. 16)
7. **Why the County cannot rely on the existing EIR.** (p.17) It does not matter if the EIR is 1,200 pages long or 12,000 pages long. We don't judge it by its length, but by its quality. The longer it is, the easier it is to hide its deficiencies in footnotes and appendices.

For example, the cumulative impacts section utilizes a one year time frame to 2010 to analyze the long term effects of the project for everything but traffic. The construction won't even start by then. The EIR's numbers and studies, including for traffic, ferry service, mitigation, exposure to Chevron's chemical releases, and jobs, rely on either unverified information from third parties, or nothing at all.

Who We Are. **Stand Up For California!** is a statewide organization with a focus on gambling issues. We are registered with the California Secretary of State as a non-profit, public service corporation. Our mission goals are: 1) to educate lawmakers, law enforcement, local governments and citizens about the cultural, economic and political impacts of state and tribal government gaming and 2) to develop a focused policy that safeguards communities, local governments, and tribal governments and promotes mutually cooperative and beneficial government to government relationships.

Since 1996, we have assisted individuals, community groups, elected officials, law enforcement, local public entities and the State of California with respect to gaming. We are recognized and act as a resource of information to local, state and federal policy makers. We host and assist with both state and national conferences, debates and rallies to educate lawmakers and the voting public. Based on their individual merit, we have lobbied for and against gaming compacts and intergovernmental agreements throughout the state. We support agreements with local governments. But we have been consistently opposed to "reservation shopping."

Analysis

1. Why the County's Position Matters in Washington and Sacramento.

The County's position is important in five ways.

First, the Indian Reorganization Act of 1934 allows the Secretary of Interior to take land into trust for Indian tribes. 25 U.S.C. §465. Once taken into trust, the land is withdrawn from local and state jurisdiction. The Secretary's decision is exercised pursuant to 25 Code of Fed. Reg. ("C.F.R."), pt. 151. As the distance between the tribe's reservation and the new land to be acquired increases, the tribe's justification of anticipated benefits from the acquisition will be subject to greater scrutiny, **and greater weight is given to concerns raised by state and local governments.** 25 C.F.R., pt. 151.14 (c)(3).

Second, on January 3, 2008, the Secretary of Interior issued guidelines on taking land into trust off reservation for gaming purposes. The Indian Gaming Regulatory Act was not intended to promote the establishment of Indian casinos far from existing reservations. Any casino to be located more than a commutable distance from an existing reservation would defeat the purpose of increasing tribal employment and community (forcing a choice for tribal members between working at the casino and leaving the reservation). In addition, ***any application lacking agreements with affected local governments weighs heavily against granting the application.*** To date, the Secretary has rejected more than 12 trust land applications under these rules.

For example, the Secretary refused to take land into trust for a tribe where the land was 170 miles from the tribe's reservation. The tribe could not demonstrate that there was no available site closer to its existing reservation. The decision remarked that all casino proposals provide added revenues and benefits for the tribe, but the test is whether having a casino at the particular site is necessary. (Decision, Menominee Indian Tribe of Wisconsin, 2009, at 6).

On September 19, 2009, Senators Feinstein, Reid, Boxer, Kyl, and Ensign sent a letter to the Secretary urging the Secretary not to depart from the Guidelines. (The Secretary may soon start the process of adopting formal regulations to the same effect.)

But while Congress may make policy, it does not dictate how the federal regulations and guidelines *are applied* in each case. That is why local opposition remains important. By withdrawing its opposition, the County is undercutting our legislators and enabling the approval of this application.

As the California Legislative Analyst explained in a report in February 2007:

In recent years, however, the general trend seems to have been for federal and state policymakers to make it more difficult for tribes to open casinos on recently acquired trust lands. The U.S. DOI has not approved many pending requests of tribes to acquire trust lands for the purpose of establishing casinos and has established rules requiring environmental reviews and support from nearby community leaders before approval will be granted.

Third, if land is taken into trust, the Indian Gaming Regulatory Act of 1988 §20 determines if the land is eligible for gaming. It prohibits gaming on land acquired by a tribe and taken into trust after October 17, 1988, unless as an exception to this rule, for example, the land is “restored lands” for a recently recognized tribe.¹

Under 25 CFR §292.7, restored lands requires a historical and current connection to the land. A current connection is established by whether the land is within commuting distance of the tribe’s current reservation.

The County’s position on “restored lands” has been correct, clear and consistent. In its February 27, 2008 response and two supplemental responses, the County explained at length why these are not restored lands. The Tribe already has “restored lands” in Mendocino County. Pt. Molate is not a commutable distance from its existing rancheria. All the tribal ancestral affidavits and other documentation the Tribe itself has used in the past relate to Mendocino County. They have no current or historical connection to Pt. Molate (or even a “significant” connection).

It is unbelievable for the County to have sent three packages of historical documentation to Washington, but to now reverse course. The MOU’s waiver of the restored lands argument is a blow to stopping the casino, and a boon to the developer. It is no doubt part of the reason the developer wants this MOU so badly and will still want it after November 16th. *We request that the County’s three submissions to the BIA on restored lands be included in the administrative record for the November 10 Board meeting.*

Fourth, the Governor and Legislature also must agree to a Class III compact. The Lyttons in San Pablo could not even get a single legislator to introduce a bill for their compact, let alone ever bring it to a vote. The opposition was led by Bay Area legislators protecting the County’s clear position against the compact.

Fifth, as explained in the next section, Congress is now considering statutory changes to the land into trust process. Now is not the time for the County to sign a contract requiring that the County be mute about policy issues. Congress has invited local governments to suggest changes to the federal process.

Obviously, the County’s position is important in enabling the casino to open. The developer would not be offering substantial money to the County, pressing for the County’s immediate assent after the agreement has been public barely a week, transporting people to the hearing, and handing out buttons, promises and donations, unless the County’s position matters.

¹ There are other exceptions, but they do not apply: Guideville has applied only for the restored lands exception. Guideville could ask for a “two-part” determination requiring federal and state consent, but this is covered by the 2008 Guidelines and state policy, neither of which favor this application especially if there is local opposition to the request.

2. Why there is no urgency to change positions.

There is no urgency for the County to make a decision this week on the MOU because there are many hurdles left to clear before gaming can commence. This project is years away from opening.

- The project has to complete its Environmental Review by the City and BIA. Given the volume of comments, some of the comments are a hundred pages each, and the need for each agency to respond meaningfully to each comment, both agencies cannot complete the response until next spring (even if someone in Richmond has pre-judged the comments and responses and wants to move forward sooner).
- As we explain below, the EIR cannot be adopted in its present form. It will have to be revised and re-circulated, or the EIR will be tied up in CEQA challenges, *which will take years*.
- Congress must pass a law expanding the Secretary's authority to take land into trust.
- The Secretary of Interior has to make all the findings in the tribe's favor to take the Land into Trust.
- The land must be determined to be restored by the Secretary (the land does not qualify and the County could challenge this) or the State also must agree to allow gaming.

The November 16 date is not the deadline for the County to make a final decision on its gaming policy or this MOU, nor its last chance to get money. It is only the last day for comments on this version of the Draft EIR. The developer will still want the County's support even after November 16, for all the reasons above.

The County has a number of options for November 16, including not submitting comments. In fact, the County already submitted comments to the BIA on an earlier draft EIR. The deficiencies in the EIR also are documented by many comments from others that have already been submitted.²

Moreover, the deficiencies in the EIR will certainly require changes to the EIR, which triggers a new round of public and government comments and hearings. As just one example, the San Francisco Regional Water Quality Control Board issued a November 2008 clean-up order, upon which the EIR is based. (EIR, pg. 4.12-2.) This Order was vacated on September 15, 2009, after the draft EIR was published. So the EIR has to be amended and re-circulated, and the County will have a chance again later to comment.

² Alternatively, the County could renew with one sentence the comments it submitted before, or just say that it joins the comments submitted by others. The County's prior comments – already sent to some community groups – are not confidential and must be released to the public in the interests of full disclosure before the Board votes on the MOU.

So the County can let the November 16 date pass without submitting comments, if it wishes, and without voting on the MOU. Whatever the County loses by not submitting comments, is more than made up for by making a much better informed decision on the MOU.

Furthermore, if the EIR is completely adequate – as the MOU and developer repeatedly state – then what is the harm in not submitting comments and taking more time with the MOU? If there really are problems in the EIR – things it does not address adequately -- then you should not sign an MOU saying that the EIR is just fine, the County should submit comments instead.

Finally, the County has more time for another reason. On February 24, 2009, the United States Supreme Court issued its decision in *Carcieri v. Salazar*, 172 L. Ed. 2d 791. The Court held that the Secretary exceeded his authority in taking land into trust for a tribe that was not under federal jurisdiction at the time the Indian Reorganization Act (“IRA”) was enacted in 1934. The Secretary has no authority to take land into trust for the Guideville until the law is changed. The Secretary is delaying action on potentially affected applications.

According to BIA records, on June 14, 1935, the residents of the Guideville Rancheria first voted to organize as an Indian tribe. The 1991 Stipulation with the Secretary allowed the Guideville Rancheria descendants to organize as a tribe under the IRA. But nowhere does the Stipulation state that the Guideville were recognized or under federal jurisdiction before 1934. In contrast, the Stipulation recognizes that another tribe in the case was recognized in 1934.

While the developer or tribe may argue that *Carcieri* has no effect, their actions and the facts about their recognition speak differently. On July 1, 2009, the Department of Interior held a Tribal Consultation regarding *Carcieri* in Sacramento, at which Michael Derry, representing Guideville, asked for a quick legislative fix allowing the Secretary to take land into trust. This fix would be unnecessary if the Secretary now had the authority to take Pt. Molate in trust. Regardless, until the law is clarified, the Guideville’s land acquisition is stuck. Even if the Secretary acts, any action is open to a significant legal challenge under *Carcieri*.

Congress is considering changes to the law. But not one bill has yet to pass even a committee. *Moreover, both Democrats and Republicans have said there may be provisions added to restrict gaming on newly acquired lands.* The Chair of the House Committee also said: “like his Senate counterpart, Indian Affairs Committee Chairman Byron Dorgan, D-N.D., Rahall has no timetable for committee action on the legislation to reverse the *Carcieri* decision”. Providence Journal, 7:40 PM Wed, Nov 04, 2009. The ranking member, Congressman Hastings, said: “It would be neither responsible, nor constructive, for this Committee or the Congress to attempt to rush through legislation, like the bills before us today, without considering the views of the states, counties and cities that we represent.”

3. The casino’s impacts on the community. Opening casinos of this type will lead to economic losses for the community.

Thousands of electronic gambling devices located conveniently in an urban area are unlike any gambling historically in California (horse-racing, bingo or card games).

The United States Congress commissioned a landmark study, the National Gambling Impact Study, to document the effects of different forms of gambling. It found that electronic machines – which researchers called “highly addictive” and the “crack-cocaine” of gambling (Impact Study, page 7-23), target people at the bottom of the economic ladder, and lead to compulsive gambling, bankruptcy, crime and domestic abuse. While some speakers November 3 expressed very little concern for affected people, and one asked the Board not to “muddy the waters” by talking about societal impacts, the ramifications go far beyond the persons who choose to gamble. They affect families, creditors, employers, local businesses and communities. From the Impact Study, Final Report, §7:4, 14, 23 (1999):

The evidence available to us, so far, indicates there are no measurable societal benefits to be derived from the introduction or continuation of convenience gambling facilities; ... (Impact Study, 7:10-11)

Nineteen percent of Chapter 13 bankruptcies in the State of Iowa involved gambling-related debt. Bankruptcies in Iowa increased at a rate significantly above the national average in the years following the introduction of casinos. Nine of the 12 Iowa counties with the highest bankruptcy rates in the state had gambling facilities in or directly adjacent to them. (7:10-16)

One recent study found that (youth) gambling behavior was significantly associated with multiple drug and alcohol use. For 28 percent of those surveyed in the same study, gambling was associated with carrying a weapon at least once in the past 30 days, and for those who reported a problem with gambling the figure rose to 47 percent. Violence was also associated with gambling: while nearly one-fourth of the nongambling students reported having fought in the last 30 days, the figure rose to 45 percent for those who reported gambling and 62 percent for those who reported problems attributed to gambling. In addition, the researchers suggested that the data may have been significantly underreported. (7-23).

Economic Effects. It is well documented that “destination” casinos in places like Las Vegas bring money from outside into the area. It is equally well documented that casinos that daily attract local residents as their customers cause net economic losses to the community.

Pt. Molate will not be a “destination” as that term is used in these gambling studies, even if the proponents play a vocabulary trick and call it a “resort.” The developer knows that. To avoid the established research, in meetings with community groups the developer has promised that the Pt. Molate casino will “lure Asian tourists, especially the bet-a-million “whales” so coveted by Nevada”. *The developer has said the “detrimental effects of casinos are limited to those that don’t rely on high rollers.”* He claims the players will make over \$100,000 a year. Berkeley Daily Planet, November 26, 2008, p.1.

So the developer concedes that casinos that do not rely on tourists that are high rollers have net detrimental effects for local communities.

To put it bluntly, the claim that wealthy Asian tourists and players that make over \$100,000 per year will be the bread and butter of the Pt. Molate casino is nonsense and manipulative. It is indicative of the lack of credibility in this proposal.

- Asian gamblers are staying home to go to new Asian casinos in Macau (and soon Singapore), or because of the economy. They are not going even to Las Vegas. Global Travel Industry News, Nov. 2008; Market Watch, March 8, 2008.
- The developers are planning 4,000 slot machines. They are not expecting 4,000 people to fly from Asia every day to play the slot machines. Both high rollers and Asian gamblers largely play table games. Las Vegas recognizes 80% of its revenue from slots; in Macau it is historically less than 5%. *New York Times*, (June 5, 2008) "Casino hub of Macao is cool to slot machines." (For example, the Wynn Macau has 440 slots. The Las Vegas Wynn/Encore has 2700 slot machines).
- So these 4,000 slot machines at Pt. Molate are not aimed at wealthy Asian tourists. If a large high end casino in Macao has only 10% as many slots, these 4,000 slots are aimed at people who live in the area to put their quarters in daily. Studies of similar casinos show that 90% of casino revenues will come from local residents, and more than 80% from slot machines.
- Even for those gamblers that do travel to the United States or within the United States, Richmond will not be a "destination" resort for tourists. Las Vegas has an international airport three miles from the strip, 30 four and five star hotels, more than 100 nightclubs close together, shows with international stars, more than 100 restaurants, including many with Michelin stars, and cheap flights. There are large conference facilities at most hotels plus a large convention center. People are not going to chose this as a destination over Las Vegas.
- There may well be smaller conferences booked at Pt. Molate. But these likely will be regional groups. Most of the gamblers on a daily basis will be people that live within close proximity to the casino. "The biggest victims of placing casinos conveniently around the state would be the poor who would be enticed by the illusion of instant riches. Of course that is the nature of the gaming and poor folks are usually the mark. Walk into a casino and you don't see flocks of upper-middle class suburbanites, you see working class folks." Marin I.J., Jan. 27, 2008.

What has happened elsewhere? Studies demonstrate that most revenue comes from local gamblers and *leaves* the county in which it was generated. This money is no longer spent in local retail establishments. There is a substitution effect. Money dropped in the slot machine is not spent on rent, entertainment, school books, clothing and food. Local businesses suffer causing "urban decay."

In Atlantic City and elsewhere, small business owners testified to the loss of their businesses when casinos came to town. As evidence of this impact, few businesses can be found more than a few blocks from the Atlantic City boardwalk. Many of the "local" businesses remaining are pawnshops, cash-for-gold stores and discount outlets. One witness noted that, "in 1978 [the year the first casino opened], there were 311 taverns and

restaurants in Atlantic City. Nineteen years later, only 66 remained, despite the promise that gaming would be good for the city's own." **NORC found "no change in overall per capita income" after the introduction of casinos...** (Impact Study, 7:5)

- In a survey of 900 Minnesota restaurant owners, 38 percent said they had lost business due to gambling; only 10 percent reported an increase in business due to the existence of casinos.
- In Atlantic City, within just four years of the casinos' arrival, one-third of the city's retail businesses had closed.
- The number of retail businesses in Gilpin County, Colorado, dropped from 31 before gambling to 11 within a couple of years after casinos arrived.
- More than 70 percent of businesses in Natchez, Mississippi, reported declining sales within a few months of the opening of that city's first riverboat.
- Retail and service businesses in South Dakota suffered a net loss of approximately \$60 million in anticipated sales in the year following the introduction of gambling.

Within a few years, the costs of a casino easily exceed the benefits.

Well, the casino cure for crime proved to be just as delusional as gamblers' luck, says University of Georgia economist David B. Mustard.

Mustard and Earl L. Grinols of Baylor University analyzed crime data collected from all 3,165 U.S. counties in the United States from 1977 to 1996 and looked at local crime rates before and after casinos opened.

They found that crime didn't budge when a casino began operating -- at least at first. **Crime began to rise after the first year, slowly at first and then more quickly, until it had far surpassed what it would have been if the casino had never opened.** By the fifth year of operation, robberies were up 136 percent; aggravated assaults, 91 percent; auto theft, 78 percent; burglary, 50 percent; larceny, 38 percent; and rape, 21 percent. Controlling for other factors, 8.6 percent of property crimes and 12.6 percent of violent crimes were attributed to casinos, he said.

But what about all those casino jobs and newly minted police? Mustard said the positive effects of casinos are fleeting -- payrolls and tax collections quickly plateau, and municipalities don't keep adding cops after the first wave of casino tax revenue rolls in.

What's more, Mustard said, crime rates didn't rise in neighboring counties while they soared in casino counties -- evidence that casinos create crime locally and don't merely attract it from somewhere else.

And here's sobering news for those in the District and Maryland who think casinos would jump-start the local economies: "Even using conservative estimates of costs and generous estimates of benefits, we still find the costs exceed the benefits," Mustard said. *The Washington Post, Casinos and Crime: The Luck Runs Out* May 11, 2006.

In addition, once construction is complete, the only jobs left will be low paying, without job security or legal protection. The dealers, chip runners, and servers all make minimum wage. *Dealer jobs pay just \$14,734 a year.* (Salary.Com Jan. 2009). Tribal casinos in particular are dead ends. "Other citizens testified to the lack of job security they had encountered in tribal

casinos, the absence of federal and state anti-discrimination laws, and the lack of workers' compensation benefits." (Impact Study, 7:5, 7:8)

The EIR report for its employment and revenue estimates states that the authors did not verify the information on which they relied. (EIR Appendix T: "much of the information contained in this report was received from third parties, which Gaming Market Advisors did not validate or verify. Accordingly, Gaming Market Advisors makes no warranty, real or implied, regarding the data contained in this report.").

4. The MOU may be unenforceable. Even so, a person or employee discriminated against, injured, cheated, defrauded or assaulted will find that Tribal governments, and tribal officials working in the scope of their authority, are immune to civil suits and liability. Workers also will be exposed to second hand smoke.

The MOU's waiver of sovereign immunity in contract disputes with the County may be ineffective. Moreover, the MOU does not require the tribe agree to any protection for workers, people that provide services, contractors or sub contractors, or employees. The MOU does not require the tribe to consent to state court for claims by workers or guests, nor does the MOU require that the tribe adopt a tribal ordinance that allows for arbitration with citizens and businesses. Local businesses and workers can be taken advantage of quite easily.

Tribal Sovereignty. Tribal governments assert sovereignty over their actions, and immunity from suit, even for commercial operations that cater to non-Indians, and even for events and injuries that occur off the reservation. This is a complete surprise to the people that live in the community, or visit, work or stay at tribal facilities.

The Waiver of tribal immunity from suit by the County may be Unenforceable.

The MOU states that the Tribe makes a limited waiver of its immunity from suit.

However, there is no reference to any tribal resolution authorizing this waiver. *Does the County have a copy of a tribal council resolution approving this Agreement and the waiver of tribal sovereign immunity?*

The essential element for an enforceable tribal waiver of immunity from suit is a formal resolution adopted by the tribe's governing body. "Sanderlin has not pointed to any duly-enacted tribal resolution purporting to effect a waiver in these circumstances." *Sanderlin v. Seminole Tribe*, 243 F.3d 1282, 1287 (11th Cir. 2001); *Fletcher v. United States*, 116 F.3d 1315 (10th Cir. 1997); *Pit River Home and Agricultural Cooperative Association v. United States*, 30 F.3d 1088, 1100-01 (9th Cir. 1994).

As an American Bar Association publication states:

A local government should never accept a promise to waive immunity in an agreement signed by a tribal official in the absence of a specific formal resolution of waiver adopted by the tribe's governing body. To do so is an invitation to dispute and litigation over whether a valid waiver exists.

For comparison, the waiver of sovereign immunity for Madera County by the Chukchansi Indians was adopted by tribal council resolution. Chukchansi Res. No.: 2001-27.
<http://www.coarsegold.com/casino%20mou.htm>

So the MOU does not provide any assurance that disputes between the County and tribe relating to contract terms, including payments the tribe is supposed to make to the County, can be resolved. The County cannot execute or authorize an agreement now, and find out later when the first payment is due, that it has no remedy for non-payment.³

The County's Rights as to other issues. The MOU's arbitration provision is limited to contract disputes with the County arising out of the Agreement (MOU, F2, E1a). Even were that enforceable, what happens when there is a dispute that does not relate to a specific provision in the agreement: like a tribal employee who drives a truck and hits a County car? The MOU does not cover the County or County employees in most situations, including tort claims. The MOU says no monetary amounts may be awarded to the County for any reason, except non-payment of the amounts due under the agreement. (§E (b)(ii)).

In the MOU, the County and its employees are not provided with any meaningful process to seek relief. The County cannot seek damages except in tribal court, for car accidents, fraud, waste dumping, fires, or shootings. *Ameriloan v. Superior Court*, 169 Cal.App.4th 81 (2008) (tribe's pay day loan service immune from suit).

The Rights of County Residents and Businesses. The MOU says that the tribe will consent to arbitration with the County, but no one else. (§12, F4). Even assuming that waiver is upheld, it leaves all the workers and constituents in the County out in the cold, even the people that provide services to the tribe, and even the people that buy houses or condominiums, or rent apartments at Pt. Molate. Without protection in the MOU, they will have to rely on tribal justice even where the tribe and its members are the defendants or parties, *even when there is insurance, and even when the incident happens off the reservation in other parts of the county.*

Some compacts require a tribal tort claims ordinance, but tribes are freely allowed to require in their tort ordinance that all claims be brought in tribal courts. Tribes can also adopt one ordinance today, and then a different ordinance tomorrow. *Chisley v. Barona Band of Mission Indians*, 2009 Cal. App. Unpub. LEXIS 325 (Jan. 14, 2009); *Rivera v. Hopland Band of Pomo Indians Econ. Dev. Corp.*, 2007 Cal. App. Unpub. LEXIS 6567 (Aug. 14, 2007). Even so, this MOU does not even require a tort claims procedure.

Tribal Insurance. Insurance is not triggered until there is a finding of coverage and liability by a tribal court.

³ In addition, there may be a second problem here. There is no showing here that the Guidiville Band has a constitution and by-laws approved by the Secretary under the IRA authorizing its council to adopt resolutions. If not, then the tribe cannot ratify this agreement or waive its sovereign immunity.

“Believing that the negligent person was a casino employee, the Lawrences, through an attorney, made a claim for damages of \$1 million against Tribal First, Barona's insurance carrier. Tribal First denied the Lawrences' claim in September 2004. ...The tribal court found that evidence established the negligent party to have been a casino patron rather than an employee and denied the appeal.” (Case dismissed because of tribal immunity.) *Nellie Lawrence v. Barona Valley Ranch Resort*, 2007 Cal.App.Unpub. LEXIS 5829, 4-5.

Here are examples from reported California decisions of other workers and patrons being denied their day in court.

... Sullivan claimed he suffered a cumulative trauma industrial injury to his right upper extremity while working as a security surveillance agent at Table Mountain's casino in Friant during the period ending January 9, 2002. ...Concluding Table Mountain has not clearly waived its sovereign immunity with regard to Sullivan's employment, we must deny the petition. *Raymond Sullivan v. Workers' Compensation Appeals*, 71 Cal.Comp.Cas 1065, 1066 (2006).

Suzanne Hansard (plaintiff) sued Win River Casino and several Does in Shasta County Superior Court. She alleged she was working as a bartender at a Redding hotel, attending to a party "for defendant Win River and its employees, who had booked one of the facility's banquet rooms[.]" "[O]ne or more" of the employees threw gifts into the crowd, and a package struck her, causing injury. Although the Tribe provides a mechanism to resolve civil suits, literally by means of a hearing before the sovereign, the tribal council, plaintiff refused to follow this procedure. (Her case was dismissed) *Redding Rancheria v. Superior Court*, 88 Cal. App. 4th 384, 391 (2001).

A couple bought a house from a non-tribal developer. The house was not on tribal land. When they found construction defects, they could not sue because after they bought the house, a tribe bought the development company.

.... She had no control over, and probably no notice of, the decision of J & L Properties to go out of business, transferring its assets and liabilities to a tribal business entity. Nevertheless, a court does not have power to deprive an Indian tribe of its sovereign immunity based on the equities. *Rita J. Carls v. Blue Lake Hous. Auth.*, 2007 Cal. App. Unpub. LEXIS 5785 (July 17, 2007).

Overnight hotel guests cannot sue. *Chisley v. Barona Band of Mission Indians*, 2009 Cal. App. Unpub. LEXIS 325 (Jan. 14, 2009).

Claims against individual tribal members are dismissed. They also are protected by tribal immunity when acting within the scope of their duties. *Great W. Casinos v. Morongo Band of Mission Indians*, 74 Cal. App. 4th 1407, 1411 (1999).

The usual response to this is plain indifference. The Tribes insist that lawyers will just have to study tribal law in law school. *Sacramento Bee*, April 7, 2003 (“Some learn Indian justice the hard way.”). The same article notes:

* A 65-year-old Visalia woman was accidentally crushed by a 350-pound gambler at an Indian casino near Lemoore. It took her a month to walk with crutches, and 18 confusing months to collect a settlement from the tribe.

* A San Marcos businessman tried to recover \$250,000 in equipment confiscated by the Rincon tribe in a business dispute. He sued the tribe in San Diego Superior Court and won. Four years later, the Indians still have his equipment, thanks to sovereign immunity.

* A man driving his golden retriever to the veterinarian in Coachella was injured when he crashed into a Cabazon tribal police officer who had cut in front of him. His lawsuit was thrown out based on sovereign immunity, even though the accident happened off the reservation.

Smoking. The developer says there will be a separate gambling room for people that smoke. But what about the employees?

Janitors, security, maintenance workers, hosts, floor supervisors, chip runners, and dealers all have to work on the casino floor. County and state laws bar smoking to protect workers and people that do not smoke from being in a closed room all day with second-hand smoke. Those laws do not apply on the reservation. This proposal flies directly in the face of state and county policy. Just last month, the Board recognized the effects of second-hand smoking on public health when it tightened its no-smoking ordinance. Now, the Board proposes to simply carve out 300 acres in the County from any state or local health policy. The County may bear the unreimbursed costs for heart disease, cancer and other illnesses.

Moreover, once the land is transferred, the tribe can do what it wants. Any ordinance the tribe adopts now, can be changed. The County will have no control over this.

5. Specific Problems with the MOU.

Obviously, most of the terms in the MOU were written by the developer and for its benefit. Even if the County believed an MOU was appropriate, the County is ill-served by this MOU.

A. If the tribe does not build a casino, the County gets nothing. The payments are keyed to the Project Start Date, defined as the opening of the casino. The MOU expressly says the rest of the development can occur without the annual payments to the County. (A, Project Start Date, page 5). But the County is still obligated to provide services and improvements for thousands of persons and the rest of the project. Has the County estimated its service costs for the project without a casino? Who will pay those costs?

B. The CPI cap is 4%, except for County comp costs. Especially with federal deficits and the decline of the dollar, future CPI increases could easily be much more. If other County costs go up (and casino revenues go up), why is the payment limited? Other tribal MOUs in California do not have a 4% limit.

C. There is no restriction on gambling by persons under 21. Many MOUs set a minimum age of 21.

D. In a state compact, the County can lose \$10 million in annual payments for health services. (§12, f). Given that the County has acted in advance of the state and abandoned cooperation with the state in other sections of the MOU, this seems likely.

E. The MOU bars the County from participating in State efforts to identify mitigation or conduct environmental review. §D(a)(ii).

F. The MOU says the County will tell the State that the Final EIR is adequate, but we do not have a final EIR yet. So the County is promising what its position will be in the future on a document that is not yet in existence. What if the County discovers problems in the Final EIR? (Recital E).

G. The MOU says that the Mitigation Plan in the final EIR will provide sufficient mitigation of all impacts. How do we know that? The Final Mitigation Plan document does not yet exist. What may be intended for the Final Mitigation Plan may change after November 10. But in Recital M, and sections 2-10, the County agrees that all environmental effects are covered by the Final Mitigation Plan, which does not yet exist.

H. The tribe says it will provide ferry service and transit links, but no minimum level of funding or service is promised. (§6, b). So we do not know and the tribe has not promised what may result. That skews the traffic and environmental impacts.

I. As explained above, there is no resolution by the tribal council waiving immunity from suit in contract or payment disputes with the County. In addition, the MOU's arbitration provision and waiver of sovereign immunity does not cover County tort claims, County employees, County residents or businesses. (§H, 2). The MOU does not require the tribe agree to any protection for workers, people that provide services, contractors or sub contractors, or employees. The MOU does not require the tribe to consent to state court for claims by workers or guests, nor does the MOU require that the tribe adopt a tribal ordinance that allows for arbitration with citizens and businesses. Tribal insurance claims will be decided by tribal courts.

Comparison: Other tribal-county agreements have been far more extensive and provided greater benefit to the participating county. The North Fork agreement has no cap on CPI increases, restricts gambling to persons 21 and older, does not restrict the County's views on CEQA, and was accompanied by a tribal council resolution adopting the agreement. http://www.standupca.org/tribal-gaming/mous-and-msas/agreements/north_fork_mou.pdf. The Sonoma – Dry Creek Agreement allows the arbitrator to order further mitigation and award damages. http://www.standupca.org/tribal-gaming/mous-and-msas/agreements/SCAN2755_000.pdf

Recitals. The recitals (apparently drafted by the developer) are factually untrue. They raise serious questions regarding County efforts to ensure the validity of the statements made. It is imperative that the County be certain that these recitals are in fact true as they will affect future actions of the County affecting all of its inhabitants. If you compare the Recitals in this MOU to the recitals in other MOUs, for example the Madera County MOU cited above, nothing like these factual statements appear in other County-tribal MOUs. Why are they in this MOU? It only makes it appear that the MOU is one-sided.

J. The MOU says the community involvement in the project has been unique in California and there has been widespread public participation. (Recital K) That is ironic given that the Board is doing far less in the way of public hearings and meetings than other Counties. Has the Board undertaken an independent evaluation of public participation in other casino projects in the State so it can attest that no other project in California has been vetted like this? If not, why is this here?

K. The MOU states that the County recognizes that the land will become a reservation by proclamation by the Secretary, and removed from state and local jurisdiction. That is contrary to the position of the State of California asserted by the Governor and Department of Justice. Federal law provides that the Secretary cannot issue proclamations creating reservations in California. *California Indian Reservation Act of 1864*. The Supreme Court has said: "The 1864 Act had authorized the President to "set apart" no more than four tracts for Indian reservations in California. ... Thus, recognition of a fifth reservation along the Klamath River was not permissible under the 1864 Act." *Mattz v. Arnett*, 412 U.S. 481, 493-494 (1973). The Secretary has no authority to issue such a proclamation. (Recital N)

L. The MOU adopts the developer's PR statements about how green the project is, the educational opportunities, jobs and community benefits, all exceeding other projects in the County. Why is this here? Has the Board undertaken an independent evaluation of this? If deposed could the Board members and staff testify to their independent investigation of all these factual claims? (Recital J)

M. The MOU says the County does not view this Agreement as setting a precedent for the expansion of casino gaming into other areas of the County. (Recital O) That statement is not credible. This MOU leaves no principled ground to ever oppose another casino, compact or lands determination in Contra Costa County.

If we had more time, we might find still more problems.

6. There is no conceivable way this project will commence in 2011 or even 2015. We should consider alternatives for bringing jobs to Richmond.

We appreciate that the people of Richmond want and deserve jobs. They have been promised jobs by the developer (although he cannot explain his projection).

But realistically, their hopes have been unfairly inflated. The City and Upstream signed a contract in 2004. It is now 2009, and after five years, the project has yet to clear a single hurdle or create a single job. As explained above, before this project can commence, there are five different legal hurdles the project has to clear. Many are years away from being resolved.

Worse yet, because the City entered into a contract in 2004, it has not solicited alternative development plans. Pt. Molate has lain unused. Now, the debate has been wrongly framed as a casino or nothing. We do not know what alternative proposals could be generated that would produce jobs now. The best thing is to stop the project, so we can start talking about alternatives.

We do know that at a similar bay site, Covallo Point, once owned by the Army, a developer refurbished the historic buildings, and opened a luxury resort hotel, conference center, restaurants, health and recreation facilities and education facilities. The project started right away and took only three and one half years. The project created thousands of jobs during construction, and today more jobs for its daily operation.

Pt. Molate could be developed in the same way, and with an array of other public uses, including job training centers, recreation fields (as Berkeley did on the waterfront) and community facilities. Many of the people who came to the last hearing could and would support this alternative if given another choice.

7. The County cannot rely on the existing EIR.

The EIR has significant problems. Under the MOU, the County waives its right to not only join the existing comments, but to later submit comments if the EIR or Mitigation Plan are revised and re-circulated for public comment. Among the problems:

- The Project is right on top of the Chevron refinery. What happens when that refinery has a chemical release or fire? The EIS relies on Chevron's mitigation efforts, which do not take into account housing, a casino and hotel next door. The County never wants to be able to comment on this?
- The Navy made it clear that there was contamination at the site that could not be remediated and that this site should not be used for housing or residential uses. Navy EIR/EIS (Appendix U, at pg. 4-13).
- The Navy land covenant identifies areas that are unfit for human habitation and where the soil or underground toxic tanks cannot be disturbed or remediated. The EIR identifies those same locations as where the hotel, conference center and parking structure would be built after removal of the soil and tanks (which cannot be removed). (DEIS/EIR pg. 4.12-12, 4.12-15, 4.12-16.)
- The developer attributes a 5,000 trip per day reduction due to the "unique" ferry services to the site. But there is no study or evidence of this. There is no plan, agreement, minimum funding or schedule for starting ferry service.
- The purpose of the cumulative impacts analysis is to address the *long-term* impacts of a proposed project. Except for traffic, the impact analysis ends in 2010 before construction even begins.
- The EIS punts mitigation to the City and County, and now the County is punting to the City. But the County proposes to approve its part of the project before the BIA or City has even accepted the EIS.

Conclusion

For all these reasons, the Board should not approve the MOU. The MOU is seriously flawed and has not been adequately vetted. If the EIR is completely adequate – as the MOU and developer say – the County will not be prejudiced by taking more time to analyze the MOU and whether this change in County policy is warranted. We urge you to fully inform yourselves about the implications of this action. If there are any questions regarding these comments, please contact us at any time.

Sincerely,

A handwritten signature in cursive script, appearing to read "Cheryl A. Schmit".

Cheryl A. Schmit – Director

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Honorable United States Senator Dianne Feinstein, Attn: James Peterson
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Honorable Arnold Schwarzenegger, Governor of CA. Attn: Andrea Hoch
Honorable Loni Hancock
Honorable DeSaulnier
Honorable Nancy Skinner
Honorable Gayle McLaughlin, Mayor