OFFICE OF THE GOVERNOR

August 16, 2024

Bryan Newland
Assistant Secretary – Indian Affairs
U.S. Department of the Interior
1849 C Street, N.W., MS-4660-MIB
Washington, D.C. 20240

Re: Shiloh Resort and Casino Project (Koi Nation of Northern California)
Scotts Valley Casino and Tribal Housing Project (Scotts Valley Band of Pomo Indians)

Dear Assistant Secretary Newland:

On behalf of Governor Gavin Newsom, I write to urge the U.S. Department of the Interior not to move forward with the Shiloh Resort and Casino Project in Sonoma County and the Scotts Valley Casino and Tribal Housing Project in Solano County.

Governor Newsom and his Administration are grateful for the opportunity to share our perspective on these projects, as we are grateful to the Department for its thoughtful and constructive engagement in a wide range of other contexts. Our concerns about these specific projects, and their specific procedural pathway, should not be understood as a criticism of the Department's broader practice of taking land into trust for tribal governments—including, in appropriate cases, the Department's practice of (and time-tested procedures for) taking land into trust for gaming. The Governor recognizes the important role that this practice can play in supporting tribes' political sovereignty and economic self-sufficiency.

At the same time, however, caution is warranted when considering the potential expansion of gaming to land that is not currently eligible for gaming. This is particularly true in California, where the voters who legalized tribal gaming

were promised that such gaming would remain geographically limited. This historical context underscores the importance of striking a careful balance between the potential benefits of expanded tribal gaming and its potential impacts on surrounding communities.

Federal law contains important safeguards that have previously helped the Department strike this delicate balance. As a starting point, federal law generally prohibits gaming on new land taken into trust for a tribe, unless the land is linked to the tribe's preexisting reservation. 25 U.S.C. § 2719(a). The principal exception to this rule carefully safeguards local interests (including the interests of local tribes), allowing gaming only where the Department has determined not only that such gaming would be in the best interest of the gaming tribe, but also that it "would not be detrimental to the surrounding community"—and only where the relevant state's governor concurs in that determination. 25 U.S.C. § 2719(b)(1)(A). Governor Newsom discharges this responsibility with the utmost care, and has previously exercised this power in a manner that supports both tribal self-sufficiency and the interests of surrounding communities. *See, e.g.*, Letter from Governor Gavin Newsom to Bryan Newland, Assistant Secretary – Indian Affairs (June 13, 2022). The Governor appreciates the opportunity to engage in this important process, which appropriately balances the sovereign interests of states and tribes.

Here, however, the Governor is concerned that the Department might depart from this familiar procedure and its important safeguards. In their current form, these two projects propose to rely on a different statutory provision that allows gaming on land taken into trust—without a two-part determination or the Governor's concurrence—as part of "the restoration of lands for an Indian tribe that is restored to Federal recognition." 25 U.S.C. § 2719(b)(1)(B)(iii). Make no mistake: the Governor recognizes the profound moral value of restoring a tribe's control over its aboriginal homeland. Care must be taken, however, to ensure that this "restored lands" exception—like all exceptions—remains within appropriate limits. The "restored lands" exception must not be construed so broadly as to "give restored tribes an open-ended license to game on newly acquired lands." *Redding Rancheria v. Jewell*, 776 F.3d 706, 711 (9th Cir. 2015). On the contrary: "In administering the restored lands exception, the Secretary needs to ensure that tribes do not take advantage of the exception to expand gaming operations unduly and to the detriment of other tribes' gaming operations." *Id.*

As explained below, neither of these two proposed projects fits within the limits of the "restored lands" exception.

As to the Shiloh Resort and Casino Project, the Koi Nation of Northern California lacks sufficient historical connection to the Windsor parcel to support the "restored lands" exception. The Windsor parcel does not fall within the Koi Nation's aboriginal homeland: it lies approximately fifty miles, over winding mountain roads, from the Lake County region where (as the Koi Nation acknowledges) "the Koi Nation's ancestors had villages and sacred sites along the shores of Clearlake since time immemorial." Koi Nation's Opening Brief at 11, Koi Nation of Northern California v. City of Clearlake, No. A169438 (Cal. Ct. App. Apr. 30, 2024). The assertion that the Koi Nation sometimes used trade routes or otherwise obtained resources near modern-day Windsor cannot change this basic fact: such transient uses do not show the kind of sustained, durable presence that would be necessary to support the view that the proposed project represents a "restoration." Nor can it matter that individual members of the Koi Nation voluntarily resided in Sonoma County during the twentieth century. If the presence of individual members in modern times were conflated with a tribe's control over its aboriginal homeland, for purposes of the "restored lands" exception, the exception could swallow the rule—which, as the Ninth Circuit has warned, it must not do. *See Redding Rancheria*, 776 F.3d at 711.

The Scotts Valley Casino and Tribal Housing Project raises similar concerns. Like the Koi Nation, the Scotts Valley Band has its aboriginal homeland in modern-day Lake County. Like the Koi Nation, the Scotts Valley Band lacks the deep and enduring connection to the relevant territory (here, the Vallejo parcel) necessary to invoke the "restored lands" exception. And here again, the nearby presence of specific individuals, late in history, must not be conflated with the Tribe's collective control over its aboriginal homeland. Nor can an 1851 treaty—apparently purporting to cede a vast swath of the North Bay, Sacramento Valley, and Clear Lake regions—produce a different result. *Cf. Scotts Valley Band of Pomo Indians v. Dep't of the Interior*, 633 F. Supp. 3d 132, 168 (D.D.C. 2022). Nineteenth-century treaties were hardly models of respect for tribal sovereignty, and one cannot safely assume that they accurately reflect the boundaries of tribes' aboriginal homelands.

The Department's interpretation of the "restored lands" exception further counsels against applying that exception to the Scotts Valley project. The Department has construed the "restored lands" exception to require one or more "modern connections" between the tribe and the land. 25 C.F.R. § 292.12(a). In the context of the Scotts Valley project, no such modern connection is apparent. On the contrary, the Environmental Assessment appears to recognize that the Scotts Valley Band has no presence in Solano County: the Environmental Assessment notes that the Band's members "span[] across Alameda, Contra Costa, Lake, Mendocino, and Sonoma Counties," while omitting any reference to Solano. Envtl. Assessment at 1-2. Under the Department's view of the "restored lands" exception, embodied in its regulations, this lack of "modern connections" provides an additional reason not to use the exception to proceed with the Scotts Valley project.

Nor can the so-called "Indian canon" stretch the limits of the "restored lands" exception to encompass these two projects. *Cf. Scotts Valley Band*, 633 F. Supp. 3d at 166–68. Although that canon sometimes allows statutory ambiguity to be resolved in favor of tribal sovereignty, it has no application where—as here—"all tribal interests are not aligned." *Redding Rancheria*, 776 F.3d at 713. "An interpretation of the restored lands exception that would benefit [a] particular tribe, by allowing unlimited use of restored land for gaming purposes, would not necessarily benefit other tribes also engaged in gaming." *Id.* Here, other local tribes—tribes who truly have called the relevant lands home since time immemorial—are steadfast in their opposition to these projects. "The canon should not apply in such circumstances." *Id.*

Finally, misplaced reliance on the "restored lands" exception, in the context of these two projects, also risks leading the Department astray under the National Environmental Policy Act. As explained above, the Windsor parcel and the Vallejo parcel fall far outside the aboriginal homelands of the Koi Nation and the Scotts Valley Band, respectively. In focusing on those two parcels, the Department has thus far failed to consider whether the purposes of the proposed projects could be served by sites within the Tribes' aboriginal homelands—which is to say that the Department has, thus far, failed to adequately consider reasonable geographic alternatives as required by NEPA. *See 'Ilio'ulaokalani Coal. v. Rumsfeld*, 464 F.3d 1083, 1097–1101 (9th Cir. 2006).

Governor Newsom has deep respect for tribal sovereignty, and he has been proud to restore tribes' control over lands from which they have been dispossessed. Here, however, he is concerned by the prospect that the Department might invoke the "restored lands" exception to support projects that are focused less on restoring the relevant tribes' aboriginal homelands, and more on creating new gaming operations in desirable markets. If the Department were to embrace this view of the "restored lands" exception, it is far from obvious that the "exception" would retain a clear and durable limiting principle. This prospect is particularly troubling in California, where the voters who approved tribal gaming were promised that such gaming would remain carefully limited—including by federal law and its geographic restrictions on the categories of land open to gaming.

Governor Newsom is committed to working with tribal governments, and the Department, to support tribes' self-determination and economic development. In appropriate cases, the Governor stands ready to exercise his authority, under federal law, to concur in the Department's decision to take land into trust for gaming. Here, however, he is concerned that these specific projects are proceeding in a manner that would sidestep the State, ignore the concerns of tribal governments and other local communities, and stretch the "restored lands" exception beyond its legal limits—while failing to adequately consider whether there might be a better way. On behalf of the Governor, I urge the Department not to move forward with these proposed projects.

Sincerely,

Matthew Lee
Senior Advisor for Tribal Negotiations &
Deputy Legal Affairs Secretary
Office of Governor Gavin Newsom

Cc: Amy Dutschke, Regional Director for the Pacific Region, Bureau of Indian Affairs