**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF CALIFORNIA**
**SAN FRANCISCO DIVISION**

FEDERATED INDIANS OF GRATON RANCHERIA,

Plaintiff,

v.

DOUG BURGUM, in his official capacity as Secretary of the Interior, *et al*.,

Defendants.

FEDERATED INDIANS OF GRATON RANCHERIA,

Plaintiff,

v.

DOUG BURGUM, in his official capacity as Secretary of the Interior, *et al*.,

Defendants.

Consolidated Case Nos. 3:24-cv-8582-RFL, 3:25-cv-1640-RFL

**DECLARATION OF MATTHEW LEE**

I, Matthew Lee, hereby declare as follows:

1. I am Senior Advisor for Tribal Negotiations in the Office of Governor Gavin Newsom. I have served in that capacity since June 2024. My responsibilities include contributing to the development and implementation of California's policies regarding class III gaming, consistent with the federal Indian Gaming Regulatory Act ("IGRA") and other applicable laws; negotiating with tribal governments, on behalf of the State, for tribal-state class III gaming compacts under IGRA; and representing the Governor and the State in other aspects of their government-to-government relationships with tribal sovereigns.

2. On behalf of Governor Newsom and his Administration, I submit this declaration, in my official capacity as Senior Advisor for Tribal Negotiations, to call attention to the significant state and public interests at stake in this litigation, which impacts California residents and California's own rights as a separate sovereign.

3. On behalf of the Governor and his Administration, I have previously expressed concerns to the Department of Interior ("DOI") about the particular project at issue in this litigation—a proposed casino in Sonoma County on a parcel of land adjacent to the Town of Windsor, to be operated by the Koi Nation of Northern California.[1]

4. As I have stated in correspondence to DOI, those concerns should not be understood as a criticism of DOI's general authority to take land into trust for tribal governments, including for purposes of facilitating tribal gaming. Land taken into trust for gaming may play a critical role in supporting tribes' sovereignty and self-sufficiency.

5. Nevertheless, caution is warranted when considering the expansion of tribal gaming on land not currently eligible for it. That is particularly true in California, where the voters who legalized tribal gaming were promised that such gaming would be closely regulated and 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 and the public at large.

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[1] Letter from Matthew Lee, Senior Advisor for Trial Negotiations & Deputy Legal Affairs Secretary, Office of Governor Gavin Newsom, to Bryan Newland, Assistant Secretary – Indian Affairs (Aug. 16, 2024) (attached as Exhibit 1).

6. IGRA contains important safeguards that have helped strike this delicate balance, protecting the sovereign interests of both states and tribes.

7. As a general rule, federal law prohibits gaming on lands taken into trust for a tribe unless the land is linked to the tribe's preexisting reservation. 25 U.S.C. § 2719(a). Exceptions to this general rule are limited. *See id.* § 2719(b).

8. One often-used exception is the so-called "two-part determination" *Id.* § 2719(b)(1)(A). This applies only where DOI determines, after consultation with "appropriate State and local officials," that gaming will not be "detrimental to the surrounding community"—and only where the relevant state governor concurs in that determination. *Id.* This process thus protects the State and its communities.

9. The State has important sovereign interests at stake in the context of tribal gaming, especially where new land is taken into trust for such gaming. Congress's plenary authority over Indian affairs has always been understood to exist against the background of state sovereignty.[2] In this context, where a federal decision intersects with a state's traditional power to regulate activity within its own borders, and potential impacts to communities that remain subject to the State's own regulatory control, those sovereign interests are substantial.

10. DOI did not use the two-part determination process here, and did not seek or receive the Governor's concurrence. Instead, DOI purported to apply the "restored lands" exception, which applies to "the restoration of lands for an Indian tribe that is restored to Federal recognition." 25 U.S.C. § 2719(b)(1)(B)(iii). Crucially, that process reserves no role for the State.

11. I am unaware of any other exception (other than the two-part determination process) that would apply here. Thus, had DOI not applied the "restored lands" exception here, my understanding is that a two-part determination would been required to take this land into trust for gaming. By instead purporting to apply the "restored lands" exception here, DOI deprived the Governor and the State of their rights to engage in consultation, to be protected by the Secretary's determination that gaming would not be detrimental to surrounding communities within the State's

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[2] *See, e.g.*, *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72 (1996).

jurisdiction, and for the Governor to further protect those communities by deciding whether he concurs in the Secretary's determination.

12. I am unaware of facts (in DOI's gaming eligibility determination or elsewhere) establishing that the Koi Nation has the kind of connection to the project site that could justify invocation of the "restored lands" exception. Indeed, in prior correspondence with DOI, I noted that the proposed project lies roughly fifty miles from the Koi Nation's aboriginal homeland. As I explained in that correspondence, the fact that the Koi Nation's members may have transited that land, or that some members have used it in modern times, does not establish the kind of "significant historical connection" to the land that DOI has previously required to invoke the "restored lands" exception.

13. The prospect of such new and expansive use of the "restored lands" exception—which could allow gaming far from areas where it would otherwise be allowed, without the two-part determination's procedural protections for the State and its communities—is particularly troubling to Californians, who were promised that tribal gaming would remain geographically limited when they voted to amend the California Constitution in favor of tribes operating certain forms of gaming.[3]

14. I am also concerned that DOI's approval of this project undermines the State's interests in other ways. Because land-into-trust acquisitions (like the acquisition at issue here) limits state regulatory authority over the land in question, the State and its local governments rely on the federal government to carefully assess potential impacts of proposed projects when taking land into trust under the National Environmental Policy Act ("NEPA"). Here, as the Federated Indians of Graton Rancheria has identified, there are serious concerns about whether the federal government fulfilled its obligations under NEPA. Indeed, it is not clear (as I expressed in prior correspondence to DOI) whether DOI adequately considered reasonable geographic alternatives for the proposed project—for instance, a project site located in the Koi Nation's aboriginal homeland in Lake County.

[3] Stats. 1999, Res. c. 142 (S.C.A .11), (Prop. 1A, approved March 7, 2000, eff. March 8, 2000) (codified at Cal. Const. art. IV, § 19).

15. Likewise, the State's interests are undermined by DOI's apparent disregard for the National Historic Preservation Act—another statute that requires the federal government to consult with the State. DOI finalized the proposed project on the basis of a finding that there would be no historic properties affected. Yet California's State Historic Preservation Officer had objected to that finding and explained that the Department's efforts to identify historic properties, including those of religious and cultural significance to affected tribes, were "insufficient, inadequate, and not reasonable."[4]

16. This litigation thus vindicates public interests that are important to the State. DOI's approval of the project circumvented important safeguards that protect the State and its communities; indeed, they deprived the Governor of an opportunity (through his potential concurrence in a two-part determination) to ensure that the State's interests were protected. It is imperative that DOI's actions here be subject to judicial review, to ensure that the State's sovereignty and other important public interests are protected.

17. I declare under penalty of perjury that the foregoing is true and correct and that this Declaration was executed on April 25, 2025, in Sacramento, California.

/s/ Matthew Lee

Matthew Lee

[4] Letter from Julianne Polanco to Amy Dutschke Re: Section 106 Consultation at 3 (July 10, 2024) (attached as Exhibit 3).

# Exhibit 1

# 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

# Exhibit 2

State of California • Natural Resources Agency
Gavin Newsom, *Governor*

**DEPARTMENT OF PARKS AND RECREATION**
**OFFICE OF HISTORIC PRESERVATION**
Armando Quintero, *Director*

**Julianne Polanco, State Historic Preservation Officer**
**1725 23rd Street, Suite 100, Sacramento, CA 95816-7100**
**Telephone: (916) 445-7000 FAX: (916) 445-7053**
**calshpo.ohp@parks.ca.gov www.ohp.parks.ca.gov**

July 10, 2024

VIA EMAIL

In reply refer to: BIA_2023_0808_001

Ms. Amy Dutschke
Regional Director
Bureau of Indian Affairs
Pacific Regional Office
2800 Cottage Way, Room W-2820
Sacramento, CA 95825

RE: Section 106 Consultation, Koi Nation Shiloh Resort and Casino Project

Dear Ms. Dutschke,

The State Historic Preservation Officer (SHPO) received your consultation letter dated May 6, 2024, pursuant to Section 106 of the National Historic Preservation Act of 1966 (54 U.S.C. § 300101), as amended, and its implementing regulation, 36 CFR Part 800.

The Bureau of Indian Affairs (BIA) consults on the above referenced undertaking that involves a fee-to-trust transfer of approximately 68.6 acres of land in Windsor, Sonoma County. The Koi Nation of Northern California proposes to have the property conveyed into federal trust for the purpose of gaming. Project elements include the development of a resort that includes a casino, hotel, event center, meeting space, spa, and associated parking and infrastructure.

BIA has defined the Area of Potential Effects (APE) as the entire 68.6-acre property. Efforts to identify historic properties within the APE included background research and records search at the Northwest Information Center, pedestrian archaeological survey and expanded Phase I archaeological testing, geo-technical trenching, and a forensic canine survey. Present within the APE is a variety of pre-contact isolated artifacts (biface tip and tool fragments, broken bowl mortar, and chert and obsidian debitage) as well as the remains of a possible historic homestead "Historic Site 1" (historic ceramics, glass, brick, and metal fragments). BIA seek SHPO concurrence that this resource is not eligible for inclusion in the National Register of Historic Places (NRHP). Forensics canine survey was conducted at the request of Federated Indians of Graton Rancheria (FIGR); BIA reports that no identifiable human remains are present within the APE.

In addition to seeking SHPO concurrence that Historic Site 1 is not eligible for inclusion in the NRHP, BIA seek SHPO comments on its finding that no historic properties will be affected by the undertaking.

The following documents were provided in support of findings and determinations:

- *Historic Property Survey Report of one parcel to be transferred to trust status: Parcel 004-021-08* (Parker, March 2022)
- *Archaeological Monitoring of Soil Test Trenches on Parcel 004-021-008 (Parker, April 2022)*
- *Obsidian Hydration Results from Parcel 004-021-08* (Parker, September 2022)
- *Cultural Resources Study of the Property at 222. E. Shiloh Road, Windsor, Sonoma County, California* (Origer, May 2022)
- *Canine Field Survey Shiloh Resort and Casino* (Institute for Canine Forensics, January 2024)
- *Archaeological Testing of Forensic Dog Locations on Parcel 004-021-08* (Parker, April 2024)

Consultation occurred with FIGR, Kashia Band of Pomo Indians of the Stewarts Point Rancheria (Kashia), and Dry Creek Rancheria Band of Pomo Indians (Dry Creek). Historic property identification reports were shared, and separate consultation meetings were held in November 2023 with Dry Creek and FIGR. The SHPO was either copied on or provided copies of four consultation letters from FIGR to BIA (dated: 9/7/2023, 3/26/2024, 5/1/2024, 5/29/2024).

The letters from FIGR convey that consultation with them was initiated by letter dated August 24, 2023, following more than a year of project planning and efforts to identify historic properties which were conducted from March to May 2022. Subsequent letters express serious disappointment in the nature of the consultation that was conducted pointing out that concerns regarding effects to places of religious and cultural significance were summarily dismissed, requests to review documents ignored, and requests to participate in field surveys and other identification efforts were not taken seriously. FIGR raised concerns regarding insufficiencies in historic property identification efforts including a lack of consultation in planning for them as well as them being performed in wet weather conditions that likely led to inconclusive results, especially in the case of canine forensics survey; BIA did not respond to these concerns. FIGR dispute BIA's finding of no historic properties affected, believe that reasonable and good faith efforts to identify historic properties were not taken, find pervasive and fundamental problems with efforts that were taken, and overall claim that BIA consultation was not conducted in a meaningful manner.

Following review of the supporting documentation and correspondence pertinent to the consultation, I offer the following comments:

- Pursuant to 36 CFR § 800.2(c)(2)(ii)(A), I advise the BIA to conduct consultation in a manner that provides Indian Tribes a reasonable opportunity to identify concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate views on the undertaking's effects on such properties, and participate in the resolution of adverse effects.
- Pursuant to 36 CFR § 800.4(d)(1), **I object** to a finding of no historic properties affected. I find the efforts to identify historic properties, including those of religious and cultural significance to Tribes to be insufficient, inadequate, and not reasonable.
    - As reported in Parker March and April 2022 initial efforts to identify historic properties within the APE were designed in a manner that considered the undertaking to have no potential to affect historic properties as it consisted merely of a fee-to-trust transfer of approximately 68.6 acres of land. Efforts failed to consider the development of a resort that includes a casino, hotel, event center, meeting space, spa, and associated parking and infrastructure, were not designed in consultation with Tribes nor did it include their participation.
    - Subsequent efforts to respond to concerns raised regarding the potential for uncovering human remains or discovering buried archaeological features also seemingly were not designed in a manner that considered the varying depths and degrees of disturbance across the APE and were carried out in a manner that led to inconclusive results.
- I request that BIA reinitiate Section 106 consultation with Indian Tribes and the SHPO by redefining the APE in a manner that considers the geographic area (including vertical extents) within which the undertaking may directly or indirectly cause alterations in the character or use of historic properties and consult on the efforts it proposes to identify historic properties within the APE.

If you have any questions or concerns, please contact Senior State Archaeologist Brendon Greenaway at Brendon.Greenaway@parks.ca.gov.

Sincerely,

Julianne Polanco
State Historic Preservation Officer