

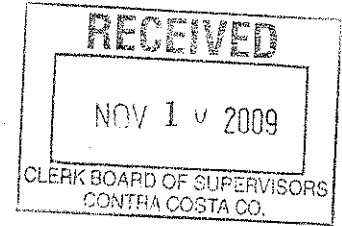
DIANNE FEINSTEIN
CALIFORNIA



SELECT COMMITTEE ON INTELLIGENCE - CHAIRMAN
COMMITTEE ON APPROPRIATIONS
COMMITTEE ON THE JUDICIARY
COMMITTEE ON RULES AND ADMINISTRATION

United States Senate
WASHINGTON, DC 20510-0504
<http://feinstein.senate.gov>

November 9, 2009



The Honorable Susan A. Bonilla
Chair, Board of Supervisors
Contra Costa County
651 Pine Street, 11th Floor
Martinez, California 94553

Dear Supervisor Bonilla:

I write to express my view regarding the Board's consideration of a Memorandum of Understanding with the Guidiville Band of Pomo Indians which would require the County to lift its opposition to the proposed casino at Point Molate.

I understand that the Board of Supervisors has opposed additional Indian gaming in the Bay Area and I appreciate those efforts. Consistent opposition to these projects by local, state, and federal representatives has made a difference in highlighting the consequences of gaming on local communities.

As you know, in 2000, 61% of voters in Contra Costa County and 65% of voters statewide cast their ballots in support of proposition 1A, allowing gaming "by federally recognized Indian tribes on Indian lands in California in accordance with federal law." During the campaign, tribes advocating for proposition 1A made a commitment that gaming would be limited to Indian lands only. The phrase "on Indian lands" was included to make that point exceptionally clear.

So, voters cast their votes based on language that precluded gaming other than on tribal land. In the case of the Guidiville Band of Pomo Indians, there is an issue as to whether the proposed site of the Point Molate casino qualifies as Indian land. It is my understanding that the tribe cannot demonstrate a significant historical connection to the site, meaning the land should not be eligible as the tribes restored lands.

CC: BOS, CAO
BGO

W/D.2

November 10, 2009

Contra Costa County Board of Supervisors
651 Pine St.
Martinez, CA. 94533

Attn: John Gioia, Supervisor District 1
Gayle Uilkema, Supervisor District 2
Mary Nejedly Piepho, Supervisor District 3
Susan Bonilla, Supervisor District 4
Federal D. Glover, Supervisor District 5

Re: Revised MOU – Intergovernmental Agreement between CC County and Guidiville Band of Pomo Indians for Pt. Molate Mixed Use Tribal Destination and Resort

Dear Mesdammes/Sirs,

Thank you for the opportunity to provide comments on the proposed Intergovernmental Agreement between Contra Costa County and the Guidiville Band of Pomo Indians for the Pt. Molate Casino Project.

Contra Costa County's decision to enter into an Intergovernmental Agreement with the Guidiville Band of Pomo Indians regarding the Pt. Molate Casino project is a stunning reversal of the county's historical opposition to the project, along with associated positions and pledges made.

This reversal is in direct violation of the November 18, 2004 CSAC policy regarding development on Tribal Lands. CSAC's policy affirms that CSAC supports cooperative and respectful government-to-government relations that recognize the interdependent role of tribes, counties and other local governments to be responsive to the needs and concerns of all members of their respective communities. CSAC's policy also supports federal legislation to provide that lands are not to be placed in trust and removed from the land use jurisdiction of local governments without the consent of the State and affected County.

Additionally, the county's newly adopted position is directly in opposition to the county's 2009 Federal Legislative Platform wherein the CSAC's policy documents regarding tribal land and prerequisites to Indian Gaming were endorsed and the county advocated for limitations on reservation shopping with assurances that the county's first duty was to protect the environment, public health and safety of county lands and residents. Most notably the county's newly adopted position is in direct violation of its declaration of advocacy of sequencing processes so that Indian Lands Determination comes first, prior to initiation of a land trust request and associated environmental review.

The County now seeks to enter a mitigation agreement with the Guidiville Band of Pomos prior to approval of a fee to trust land request and prior to finalization of the project's EIR/EIS - definitively out of sequence to the logical and necessary process for approval of the project or appropriate evaluation of mitigation requirements. The proposed agreement depends on mitigation assumptions drawn from the draft EIR/EIS published in July 2009. The draft EIR/EIS has been found by a no. of agencies and reviewers to be woefully lacking in both compliance to requirements for an EIR/EIS by NEPA, CEQA and in valid assumptions, time frames and scope.

It is clear that the developer is attempting to engage in negotiations and contracts in an attempt to short-circuit the environmental review process. In rushing an agreement with the County, the developer hopes to relieve themselves of their responsibilities under NEPA and CEQA, curtail mitigation efforts appropriate for the project, and moreover present an air of acceptance of this project at the community and county levels to further their federal application for land disposition.

This MOU is non-binding and the efforts to construct one at this time are wasted. The Guidiville Band of Pomos cannot enter into a contract or compact until which time they have been approved in trust as the responsible entity for Pt. Molate. S.613 - The Indian Tribal Economic Development and Contract Encouragement Act of 1999 - amends Federal law to revise provisions regarding contracts with Indian tribes to invalidate any contract with an Indian tribe that encumbers Indian lands for seven or more years unless it is approved by the Secretary of the Interior. The Act applies such requirement to Indian lands the title to which is held by the United States in trust for a tribe or held by a tribe subject to a restriction by the United States against alienation.

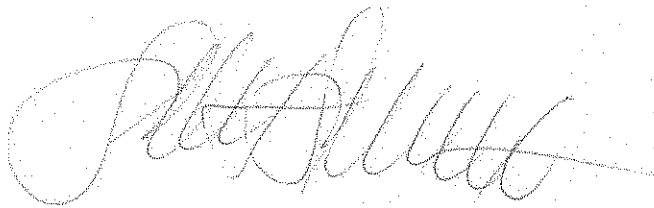
Indeed this has been previously tested by the Guidiville Band of Pomos in the matter of NGV vs. Guidiville and Harrah's Appeal. In a letter dated July 21, 2004 the Gaming Commission explained that the Tribe's contract with NGV violated Section 2710(b)(2)(A) of the IGRA, stating that "the Agreements evidence Developer's proprietary interest in the Tribe's gaming activity" and that such a proprietary interest contravened the Indian Gaming Regulatory Act ("IGRA").

The Act also directs the Secretary to refuse to approve a contract if it: (1) violates Federal law; or (2) does not include provisions that provide for remedies in case of breach of contract, that reference a tribal code, ordinance, or court ruling that discloses the tribe's right to assert sovereign immunity as a defense in an action brought against the tribe, or that include an express waiver of such right to sovereign immunity.

Likewise the County cannot commit to mitigations and waivers of requirements under NEPA and CEQA in advance of final approval of the EIS/EIR.

Until and at which time the county can show the legal, environmental, or community development requirements that would trump federal and state law and policy, and until and at which time the Guidiville Band of Pomos are legally viable to enter into a compact with the County, the County cannot engage in a mitigation agreement with the Guidiville Band of Pomos.

Sincerely,

A handwritten signature in black ink, appearing to read 'Joan Garrett', with a large, stylized flourish at the end.

Joan Garrett
417 High St.
Pt. Richmond CA 94801
510-235-8210
joan@vbsi.com

W.D.2

**Michael W. Graf
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October 23, 2009

City of Richmond
City Manager's Office
450 Civic Center Plaza
Richmond, CA 94804

U.S. Department of the Interior
Bureau of Indian Affairs
Pacific Region
2800 Cottage Way
Room W-2820
Sacramento, CA 95825

RE: Pt. Molate Mixed Use Tribal Destination Resort and Casino Draft EIS/EIR

To Whom it May Concern:

I am writing on behalf of the East Bay Chapter of the California Native Plant Society (CNPS) regarding the Pt. Molate Mixed Use Tribal Destination Resort and Casino Draft EIS/EIR ("DEIS/DEIR"). As set forth in the attached comments from CNPS, the DEIS/DEIR raises numerous issues that have not been adequately addressed in the environmental review documents. The purpose of this letter is to raise two issues in particular, which render the DEIS/DEIR inadequate as an informational document.

First, the DEIS/DEIR does not provide an adequate description of the environmental and regulatory setting of this project – and the project itself – because it does not inform the public that the tribe which proposes to operate the casino described in the proposed action does not in fact meet federal legal requirements that limit gaming to existing reservations or to newly acquired lands to which the tribe demonstrates a "significant historical connection."

Second, the DEIS/DEIR fails to provide an adequate project description because it does not acknowledge that the City's actions agreeing to sell land pursuant to the November 9, 2004 Land Disposition Agreement (LDA) are in fact within the scope of the proposed project, given that the LDA never underwent CEQA review and has been challenged legally in court.

The failure of the DEIS/DEIR to provide the required information on these items results



in an environmental review document that provides an inaccurate view of the project context and scope. Here, the public and decision-makers are led to believe – and thereby assume – that the proposed action is legal under federal law as an appropriate venue for tribal gaming, when in fact this is not the case. Further, the public and decision-makers are falsely informed that the City has an obligation – as part of the project purpose – to fulfill its “obligations” under the LDA even though the City’s decision to enter into the LDA and thereby sell public land for the purpose of tribal gaming is in fact one of the discretionary actions that will occur as part of the overall project. As a result, the public is falsely informed that the central decision before the City Council is not whether or not to dispense with public lands to private operators – the decision taken in the LDA – but instead is a choice between a range of private development options, each of which assume that the land transfer has already occurred.

A. INFORMATIONAL REQUIREMENTS FOR ENVIRONMENTAL REVIEW

In reviewing the adequacy of an EIS under NEPA, Courts apply a “rule of reason” standard. *Churchill County v. Norton*, 276 F.3d 1060, 1071 (9th Cir.2001). An EIS must “provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.” 40 C.F.R. § 1502.1.

CEQA requires that an EIR to “include detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised.” *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal. 3d 376, 405. The EIR must reflect the analytical route the agency traveled from evidence to action. *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal. App.3d 692, 733.

The right of the public to review and comment is essential to the proceedings under CEQA. Public review and comment informs those who ultimately make important decisions regarding the environment. The public’s right to review an EIR also serves the complementary purpose of informing citizens as to the intended actions of their elected and appointed officials:

Because the EIR must be certified or rejected by public officials, it is a document of accountability. If CEQA is scrupulously followed, the public will know the basis on which its responsible officials either approve or reject environmentally significant action, and the public, being duly informed, can respond accordingly to action with which it disagrees. The EIR process protects not only the environment but also informed self-government.

*47 Cal. 3d at 392.*¹

¹These purposes are cited repeatedly by a number of CEQA decisions that emphasize the importance of public review. See *Mountain Lion Coalition v. Fish & Game Com.* (1989) 214 Cal. App. 3d 1043, 1052; *Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 197 (“One of [an



B. FAILURE OF DEIS/DEIR TO DESCRIBE THE ENVIRONMENTAL AND REGULATORY SETTING AND PROJECT

The DEIS/DEIR does not describe the environmental and regulatory setting of the project because it does not explain that the Point Molate property proposed for casino development does not in fact qualify for the Restored Lands exception or that the Guidiville Band of Pomo Indians of the Guidiville Rancheria ("Pomo") tribe do not have a "significant historical connection" to the land. Further, the DEIS/DEIR does not explain that the parcel was in fact historically used by local Bay Area tribes, but not by the Pomo.

As a result, the DEIR's project purpose and overall discussion provides the public and decision-makers false information that the proposed casino to be operated by the Pomo tribe is a legal use under federal law.

Federal law prohibits gaming on tribal lands acquired after 1988 unless criteria for an exception are met. See 25 U.S.C. § 2719(a)-(b). The "exception" apparently being proposed for this project is that the lands will be taken into trust 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.) To meet this criteria, the tribe must show that it possesses "a significant historical connection" to the land. 25 C.F.R. § 292.11.²

Prior to the issuance of the DEIR, the County of Contra Costa submitted a detailed report demonstrating that the Pomo tribe, located in Mendocino County, has no historical connection to the Point Molate parcel:

The Guidiville Band is a Mendocino County Tribe, with trust lands in Mendocino County. It has no geographic, historic, cultural or modern connection to the Point Molate property. The factual circumstances of the property acquisition and the temporal

EIR's major functions . . . is to ensure that all reasonable alternatives to proposed projects are thoroughly assessed"); *Sutter Sensible Planning, Inc. v. Board of Supervisors* (1981) 122 Cal. App.3d 813, 823 ("The requirement of public review has been called "the strongest assurance of the adequacy of the EIR"); *Mira Monte Homeowners Assn. v. County of Ventura* (1985) 165 Cal. App.3d 357, 365 ("The value of an EIR is as an informational document...It is 'the heart' of CEQA, the principal method by which environmental data are brought to the attention of the agency and the public"); *Citizens to Preserve the Ojai v. County of Ventura* (1985) 176 Cal. App.3d 421, 431 ("A cumulative impact analysis which understates information concerning the severity and significance of cumulative impacts impedes meaningful public discussion and skews the decisionmaker's perspective concerning the environmental consequences of the project, the necessity for mitigation measures, and the appropriateness of project approval.")

² Here, the Governor of the State of California is opposing this project, and thus the alternative criteria of Section 292.13 is not available.



relationship with the Band's federal recognition reinstatement are also not sufficient to qualify the property as restored land.

See Contra Costa County letter dated February 27, 2008. Instead, the County concluded:

[T]he acquisition of the Point Molate property is more about economic opportunity than restoration of the Band's aboriginal land. Outside investors acquired the property for the sole purpose of using the Band to build an urban casino in Contra Costa County and thus tap into the lucrative San Francisco Bay Area market.

Id.

The DEIR provides no information that the Pomo do not qualify under the gaming exception, which precludes the public and decision-makers from having accurate information about whether to approve a casino project that would be illegal under federal law. Instead, the DEIR/DEIS states (p. 1-9) that the "Secretary of Interior has the discretion and authority...to acquire lands in trust for Indian tribes." This assertion does not address the point that the Secretary lacks discretion to allow tribal casino gaming for the Pomo at the Point Molate site.

The DEIS/DEIR asserts that this is an "issue unrelated to the EIS/EIR;" (See p. viiii.) This is not correct. Here, the information that the Pomo are not historically tied to the land undermines the entire DEIS/DEIR discussion because it suggests that the proposed action – as well as each of the casino alternatives – are legal under Federal law when that is not the case. This violates CEQA and NEPA's requirements for an accurate project description, as well as substantive requirements that actions taken by federal and state/local agencies be consistent with federal and state laws.

In sum, the DEIS/DEIR does not provide an adequate discussion of this issue. As a result, the public and decision-makers are falsely informed that project purpose to locate a casino at Point Molate for a tribe is legal and valid under federal law. Further, the DEIS/DEIR does not provide information about the past uses of the property by other local Bay Area tribes, and instead assumes that any rights based on such uses may be superseded by the Pomo. This failure leads to a skewed and distorted decision-making process, contrary to CEQA and NEPA.

C. Failure to Provide an Accurate Project Description

CEQA and NEPA requires that the environmental review document contain a full and accurate description of the proposed project. Here, the DEIS/DEIR does not provide information that 1) the City's approval of the Land Disposition Agreement (LDA) was done without any CEQA review; 2) that such approval without review has been legally challenged; and that 3) as a result, the City's decision in adopting the LDA is part of the scope of the proposed action.

The DEIS/DEIR suggests that the City's determination to convey public land and



resources to private entities is part of the environmental baseline for the proposed project. For example, the DEIS/DEIR states (p. 1-11) as a project objective to "satisf[y] the City's obligations pursuant to the stipulations of the LDA."

The problem with this approach is that the LDA was adopted without CEQA review, yet now is being touted as an "obligation" that must be met as a component of the proposed action.

In *Save Tara v. City of West Hollywood* (2008) 45 Cal. 4th 116, the Supreme Court reiterated that CEQA review must occur at the earliest possible time that the agency is considering committing itself to a certain course of action:

In summary, [the] City's ...its willingness to bind itself, by the May 3 draft agreement, to convey the property if the developer "satisfied" CEQA's "requirements, as reasonably determined by the City Manager," all demonstrate that City committed itself to a definite course of action regarding the project before fully evaluating its environmental effects.

Id. at 142. Here, the City's adoption of the LDA has limited the City's options in preparing the DEIR and considering the proposed project development by committing the City to a course of action - the sale of valuable City property - that should be considered as part of the overall project presented in the DEIS/DEIR.

Instead, the DEIS/DEIR does not provide information that the LDA was adopted unlawfully by the City and does not create any legal "obligations" as a result that must be satisfied to meet the project purposes. As a result, the DEIS/DEIR should be recirculated with a new project description that includes a thorough discussion of whether it is appropriate for the City to convey the Point Molate parcel as a component of the overall CEQA/NEPA project.

The failure to take such action leads to two legal violations. First, it results in inadequate information being provided to the public and decision-makers regarding the scope of the decision to be made, as described in the DEIS/DEIR. Instead, the public and decision-makers may assume that the City's conveyance is necessary and required, thereby limiting the feasibility and consideration of *numerous* other potential alternatives for the subject parcel that would retain the land in local ownership.

Second, the DEIS/DEIR's assumption that the City is obliged to convey the land leads to post-hoc decisionmaking in order to justify the action already taken. This violates a fundamental CEQA principle that the lead agency consider all relevant information, assess impacts, and adopt feasible mitigation *prior* to making any decision on a proposed project.³ In *Laurel Heights I*, the

³This principle is set forth in CEQA, which requires agencies to identify, "at the earliest possible time in the environmental review process, potential significant effects of a project, alternatives, and mitigation measures which would substantially reduce the effects." Pub. Res. Code § 21003.1. See also 14 Cal. Code Reg. § 15004(b) (environmental review should be conducted "as



Supreme Court noted:

CEQA requires that an agency determine whether a project may have a significant environmental impact, and thus whether an EIR is required, before it approves that project. [] This requirement is obvious in several sections of CEQA. For example, section 21081 refers to approval of a project for which an EIR "has been completed," and section 21151 requires an EIR for a project an agency "[intends] to carry out or approve." (Italics added.) The Guidelines provide even more explicitly that "Before granting any approval of a project subject to CEQA, every lead agency . . . shall consider a final EIR . . ." (Guidelines, § 15004 subd. (a), italics added.) A fundamental purpose of an EIR is to provide decision makers with information they can use in deciding whether to approve a proposed project, not to inform them of the environmental effects of projects that they have already approved. *If post approval environmental review were allowed, EIR's would likely become nothing more than post hoc rationalizations to support action already taken.* We have expressly condemned this use of EIR's.

47 Cal. 3d at 394 (emphasis added.) As noted by the Supreme Court and numerous other court decisions, the problem with allowing environmental review after project approval is that it creates an incentive on the part of the agency to rationalize the initial approval of a project on a "post-hoc" basis, thus narrowing the range of options available to the decision making body. *See also Citizens to Preserve Overton Park v. Volpe* (1971) 401 U.S. 402, 420; *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 79, 86; *Village Laguna of Laguna Beach, Inc. v. Board of Supervisors* (1982) 134 Cal. App.3d 1022, 1026; *Environmental Defense Fund, Inc. v. Coastside County Water Dist.* (1972) 27 Cal. App.3d 695, 706.⁴

Here, the entire DEIS/DEIR is skewed in favor of casino development dependent on a land conveyance, to which the City has purportedly already committed itself. Thus, to avoid a CEQA/NEPA violation, the LDA must be set aside, and the DEIS/DEIR recirculated with a new — and broader — project description that includes a thorough discussion of the pros and cons of conveying public land for private development.


early as possible in the planning process.")

⁴*See also Berkeley Keep Jets Over the Bay Committee, supra*, 91 Cal. App. 4th at 1359; ("Environmental review which comes too late runs the risk of being simply a burdensome reconsideration of decisions already made and becoming the sort of "post hoc rationalization [] to support action already taken"); *Gentry v. City of Murrieta* (1995) 36 Cal. App.4th 1359, 1402 (if a court were to address the merits of post-approval environmental review "CEQA would become nothing more than post hoc rationalizations to support actions already taken."); *City of Santee v. County of San Diego* (1989) 214 Cal. App.3d 1438, 1451 (major purpose of an "EIR is to provide the decisionmaking agency with information to use in deciding whether to approve a proposed project, and not to inform them of the environmental effects of projects after the fact.")



In conclusion, the DEIS/DEIR fails as an informational document and for that reason should be revised and recirculated in order to comply with NEPA and CEQA requirements.

Sincerely,



Michael W. Graf
(On Behalf of East Bay Chapter of the California Native Plant Society)

Comment Letter.wpd





California Native Plant Society

East Bay Chapter
Conservation Committee

October 23, 2009

Bill Lindsay
City of Richmond
City Manager's Office
450 Civic Center Plaza
Richmond, CA 94804

U.S. Department of the Interior
Bureau of Indian Affairs
Pacific Region
2800 Cottage Way
Room W-2820
Sacramento, CA 95825

RE: Comment Letter on Pt. Molate Mixed Use Tribal Destination Resort and Casino DEIR/EIS

We appreciate the opportunity to comment on the City of Richmond's Pt. Molate Mixed Use Tribal Destination Resort and Casino Draft Environmental Impact Report/Environmental Impact Statement (hereafter abbreviated DEIR). The California Native Plant Society is a non-profit organization of more than 10,000 laypersons, professional botanists, and academics organized into 32 chapters throughout California. The Society's mission is to increase the understanding and appreciation of California's native plants and to preserve them in their natural habitat through scientific activities, education, and conservation.

Many of our local members reside in the City of Richmond, and the East Bay Chapter of CNPS (EBCNPS) has a long history of volunteerism, advocacy, and conservation in the City. This is our fourth formal letter to the City regarding the Pt. Molate area. We want to reiterate that this is a Priority Plant Protection Area, one of 15 in the East Bay, that has invaluable and irreplaceable resources. The number of rare and unusual plants known from the Molate area are as numerous as any given botanical preserve in the East Bay; we provide our list of rare and unusual plants that are extremely limited and locally rare (Appendix A). We would like to share our appreciation of the City staff and elected officials in coordinating meetings with stakeholders and the community. EBCNPS thanks all the community members and elected officials who helped provide insight into this cumbersome proposal and how it will impact Richmond and Richmond's biological resources.



Dedicated to the preservation of California native flora

Pt. Molate Casino DEIR comments 8

EBCNPS believes that the proposed project alternatives are not sufficiently analyzed in this project. We find irregularities, inadequacies, and contingencies that are hidden in nearly 5,300 pages of review documents. If this project is approved and built, the City of Richmond, the County of Contra Costa, and the greater Bay Area will feel the unaddressed impacts of this project for years to come. **Our position is that the DEIR is inadequate and must be revised and recirculated to address its informational inadequacies, procedure problems and policy inconsistencies.**

Point Molate: The Crown Jewel of the North Richmond Shoreline

Any attempt to describe the project site should begin with an appreciation of the uniqueness of Point Molate. It is one of the last large relatively undeveloped tracts of shoreline habitat in the East Bay where the hills come right down to the bay. Point Molate is the western point along the western side of the Potrero Hills that extends from Point Potrero at the head of the Richmond Bay to the narrow gap that separates San Francisco Bay from San Pablo Bay. Driving east across the Richmond-San Rafael Bridge gives the best perspective of the huge length of shoreline encompassing Point Molate. Thanks to the Potrero Hills of the point, the viewer is spared most of the visual impact of the oil refinery that lies just beyond.

Point Molate is uniquely situated, sitting in the rainshadow of Mt. Tamalpais so that it gets less rainfall than other areas of East Bay shoreline. Geologically and botanically, the point is related to the other highlands in this part of the bay: the islands and China Camp in Marin. In the distant past rivers cut down through the sandstone and shale in the Bay separating the east and west shores. Today there are some native plants that occur only in China Camp on the west side and Point Molate on the east. The Molate block is the geologic substrate found only in these remaining sites and it supports unique and diverse flora. The special combination of climate and topography creates some rare plant communities, thus earning its status as one of our Priority Plant Protection Areas. Point Molate's beauty and the place that it holds along the bayshore should be kept firmly in mind when attempting to imagine how a casino complex will affect this treasure.

GENERAL CONSIDERATIONS

A Developer-Driven Plan

The DEIR presents a casino proposal - a proposal from a single private entity whose sole goal is profit - which fails to embody a collaborative process, thus limiting the ability for the City to fulfill the goals promulgated in the Pt. Molate Reuse Plan. Of the four "development" alternatives presented, three include a casino. Therefore, the provided alternatives do not reflect the scope of possibilities envisioned for this site.



By contrast, the Concord Naval Weapons Station Reuse process, in Concord California (Contra Costa County), serves as a modern, applicable example of a collaborative planning process which responds to community needs, not simply developer demands.

After speaking with members of the community and elected officials at all levels of jurisdiction, we observed a common thread in each response. "We don't want a casino, but we want the money from it." Clearly, there is an interest in developing a reasonable palette of alternatives that do not include a casino but this developer-driven process fails to take into account those community needs.

Scope of Project

This project and the process by which it was created fails to uphold reasonable environmental review standards. The City of Richmond, Contra Costa County, and the Bay Area community have much at risk in this regional level project, including loss of resources, pollution, increased traffic, increased crime, and additional impacts to community services from addiction and social problems. The scope of the project should reflect the entire Bay Area as it will directly affect at least two counties: Contra Costa and Marin.

Manipulation of Proper Review Procedure

Land Disposition Argeement

We believe CEQA was violated by the City's approval of the Land Disposition Agreement (LDA) without any CEQA process. We believe the City's adoption of the LDA has limited the City's options in preparing the DEIR and considering the proposed project development. Specifically, the LDA commits the City to a course of action – the sale of valuable City property – that should be considered as part of the overall project presented in the DEIR. We note that the City of Richmond is bound in a legal suit with CESP and SPRAWLDEF addressing the legality of the LDA, yet this fact is not presented in the DEIR. Further, changes have been made to the LDA since its approval.

EBCNPS thus requests that the LDA agreement be reviewed concurrently as part of the overall project being proposed in the DEIR. This CEQA document provides no review of the LDA explicitly. Since an LDA commits the City to a definite course of action and is part of the overall proposed "project" under CEQA, the review of its impacts are required.

Further, the current LDA, with all its amendments, is required to be attached to the DEIR in order to properly review its impacts. The DEIR does not provide the amendments for the LDA, thus making the document incomplete.



Public Comment on the Proposed Project

EBCNPS has been party to a variety of discussions regarding this project. Our organization has been approached by both the developer and various environmental advocacy organizations. Our discussions revealed that certain organizations had been offered "mitigations" in order to satisfy their needs. Namely, we understand that Citizens for East Shore State Parks (CESP) and SPRAWLDEF have entered into formal discussions with the developer regarding settlement of a suit. CESP and SPRAWLDEF asked other environmental organizations and community members not to challenge the DEIR in writing, otherwise the agreement would be canceled. Notably, these two organizations are currently negotiating also with the City of Richmond with regard to the earlier lawsuit challenging the LDA process.

These confidential agreements between the developer and interested parties have altered perceptions and affected proper review of this document.

Discussion of Alternatives

The consultant has failed to present a well-rounded set of alternatives that would meet the goals outlined in the Reuse documents. Other alternatives for this site could have included projects that benefit the community educationally, artistically, or environmentally, while producing fiscal benefit to the City. For instance, there is discussion about using a portion of this former public land (Navy Fuels Depot) for a public education institute like a university or college that would benefit the greater region while providing long-term benefits to the City of Richmond. It is well within the intent of CEQA to consider this scale and kind of alternative especially in the transfer of public resources.

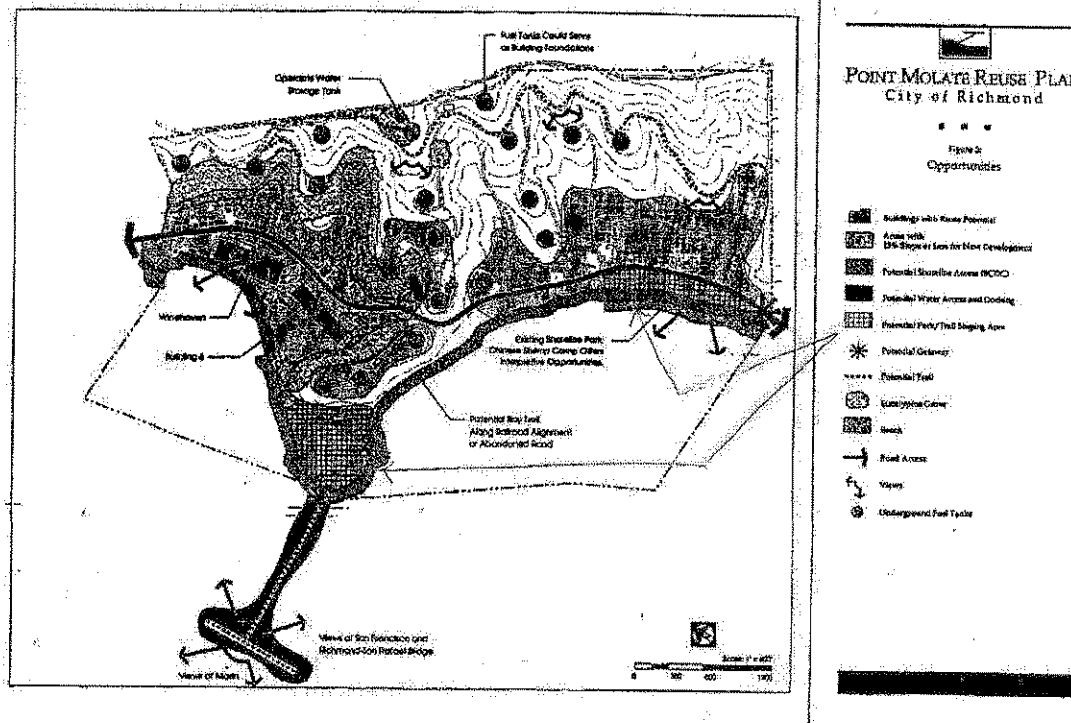
Of the alternatives presented, we believe E is the best use for this land and provides the highest level of compliance with existing law and documents. This alternative is also fully compliant with the BCDC Plan which is discussed later in this document. We would like to see a process that emphasizes community input and a democratic process in order to expand alternatives rather than being presented by an interested developer.

Alternative F is a no project alternative. This alternative is not preferable since the site is in need of stewardship before encroaching invasive species convert all of the intact habitat. The historic Winehaven area should be treasured and preserved. We support efforts to restore this area and develop this as the heart and soul of any development proposal, not simply a footnote. The casino plan does not help preserve the historic nature of this site as it is destroying some buildings and preserving others as it best fits the developer's plans.

Conflict with Point Molate Reuse Plan

The proposed project has several major conflicts with the Point Molate Reuse Plan. The Reuse plan is intended to be a guiding document which is being ignored in this process. See Figure 1 for the map of proposed uses.

FIGURE 1: Point Molate Reuse Plan Recommendations



In this figure, we've highlighted areas of parkland that have been designated by the Pt. Molate Reuse Plan. We note that the A, B, and C Alternatives encroach on this recommended parkland.

Additional conflicts with the "Goals and Objectives" (page I-11, Brady and Associates, 1997) of the Reuse Plan are as follows:

- Promote Richmond as a destination point for non-residents by building on [sic] shoreline, waterfront, scenic, historic and cultural resources.
- Improve the aesthetic, cultural, and recreational value of individual sites.
- Enhance sites or areas of natural or cultural history.
- Minimize impacts of future development on natural resources.
- Limit development to areas previously developed.
- Preserve hillsides from future development.



- Protect natural resources with emphasis on wetland, riparian habitat and critical habitat areas.
- Preserve visual access to the bay and other features.

Transparency and a Public Process

EBCNPS believes that the developer is attempting to engage in negotiations and contracts with certain agencies such as the East Bay Regional Park District (O'Brien Oct. 8, 2008 letter) and environmental organizations (Citizens for East Shore State Park and SPRAWLDEF) that may short-circuit the environmental review process. These agreements and intention of agreements should be disclosed so that they can be reviewed in the scope of the entirety of the project.

Agreements, especially with public agencies and not-for-profit, public benefit organizations, should be disclosed as they may or may not affect the project and its impact to the environment. Since those agreements are not available in the EIR, a complete analysis of the project is not possible. EBCNPS requests that all contacts the developer has made with public trust agencies and non-profits organizations should be disclosed.

Significant New Information

CEQA and NEPA both require that the lead agency publish a supplemental DEIR/S or recirculate the current DEIR/EIS if significant new information is presented. The CEQA Guidelines state if there are "[s]ignificant new circumstances or information relevant to environmental concerns" then the EIR must be recirculated [Section 150.88.5]. The review of the current DEIR therefore requires recirculation given the new information from County, State, and Federal agencies (See Appendices B-D). These three letters from responsible agencies present a clear interpretation of germane laws that apply to this project. Formal interpretation of these laws, in the context of the proposed project, is "new information" requiring recirculation of a DEIR/S. Additional new information includes, but is not limited to:

- A. Three letters from Contra Costa County demonstrating that the Point Molate property does not qualify for the Restored Lands Exception and the Guidiville Band of Pomo Indians of the Guidiville Rancheria tribe do not meet the criteria for significant historic required for a granting exemption.
- B. Letter from the Governor of California's office stating that the proposal is in conflict with California State Law, Proposition 1A, which limits casino gaming to existing tribal reservation lands.
- C. One letter from US Senators stating that federal law would be incorrectly interpreted if the Tribe were granted an exemption.
- D. Distribution of eelgrass resources in the greater San Francisco Bay (Report on Subtidal Habitats and Associated Biological Taxa in the San Francisco Bay)
- E. Amendments to the Land Disposition Agreement (LDA) as approved by City Council (current LDA not found in DEIR/S)



- F. Updated City of Richmond General Plan has been released and the DEIR must consider consistency with the City's General Plan.

SPECIFIC CONSIDERATIONS

Conflict with Richmond General Plan

The programmatic environmental document for the 2010 General Plan Update has not undergone CEQA review. EBCNPS commented on the General Plan (GP) DEIR, stating that such an analysis should be carried out simultaneously. The GP allows for some development at Point Molate, but cumulative impacts on the City are not reviewed. The General Plan Update should be included in this analysis, since its review and approval are imminent.

Additionally, there are a host of *Open Space and Conservation Element* policies that inconsistent with the proposed project alternatives A-C.

Policy CN2.1 Open Space and Conservation Areas

Preserve, enhance and restore open space areas along the shoreline, creeks and in the hills to protect natural habitat and provide recreational opportunities. Maintain the integrity of hillsides, creeks and wetlands, and enhance access from all parts of the City (see also elements: Land Use and Urban Design, Policy LU 4.2; Community Health and Wellness, Policy HW9.6).

Policy CN2.2 Richmond Shoreline

Conserve, protect and enhance natural and cultural resources along the Richmond shoreline. Promote a balance of uses along the shoreline that supports multiple community needs such as economic development, recreation, historic preservation and natural resource protection. Identify areas of the shoreline that will primarily remain in active industrial use; have public access for recreation, education and interpretation; and be designated as natural habitat and open space.

The City should promote a mix of residential and recreation uses in the Southern Shoreline area, east of the Port; support an active industrial waterfront in the Ford Peninsula and port area; promote a "cultural heritage shoreline" west of the Port; maintain the area north of Point San Pablo as a natural area for scenic recreation and conservation; and allow a mix of open space, recreation, residential and light industrial uses in the north shoreline area around Parchester Village.

The City should protect and restore wetlands, native habitats and open space, develop shoreline parks and trails to increase public access, encourage recreation and tourism activities, and enhance and showcase historic and cultural resources. The City should also protect natural and built environments from adverse potential impacts of sea level rise due to climate



change (see also Land Use and Urban Design Element, Policy LU 4.1).

Alternatives A-C do not enhance or protect the natural and cultural resources of the site. The plans include the following actions that are in conflict: 1) destruction and impact to eelgrass beds, 2) impact to state protected plants and animals, 3) impact to intact wetland resources, 4) destruction of Winehaven Building 6, one of the most prominent historic features on this site, and 5) no recognition of historic Chinese Shrimp Camp located near Southern end of site. The casino project is in direct conflict with General Plan Policies CN2.1 and CN2.2.

Policy CN2.7 Quality Parklands and Play Areas

Maintain adequate and quality parklands and play areas to serve current and future residents. The City should require new development and redevelopment projects to provide additional parkland or funding to purchase and maintain parklands.

EBCNPS is unclear if an open space within 100 feet of a Las Vegas style casino is considered a "Quality Parkland and Play Area". We see that the "parklands" adjacent to the proposed casino may not be safe areas nor will they be quiet or pollution free. The casino proposal is in direct conflict with CN2.7.

Policy CN3.4 Water Conservation

Promote water conservation. Encourage residents, businesses and industry to conserve water especially during drought years. Work with East Bay Municipal Utility District to advance water recycling programs including using treated wastewater to irrigate parks, golf courses and roadway landscaping and by encouraging

The proposed casino plan will require substantial water from the City's existing water budget. EBCNPS does not believe that this project is in compliance with Water Conservation efforts on a City-wide level.

Policy CN4.1 Air Quality

Improve air quality to protect human and environmental health and minimize disproportionate impacts on sensitive population groups. The City should work with businesses and industries, residents and partner agencies to reduce the impact of direct, indirect and cumulative impacts of stationary and non-stationary sources of pollution such as heavy industry, the port, railroads, diesel trucks and busy roadways. The City should also ensure that sensitive uses such as schools, childcare centers, parks and playgrounds, housing and community gathering places are protected from adverse impacts of emissions.

Action CN4.B Air Pollution Reduction Strategy

Develop strategies that reduce air pollution in the City. This may include measures to reduce auto use, expand transit and non-motorized transportation



options and reduce congestion and idling time. Include programs to reduce air pollution from stationary sources such as power plants, oil refineries and commercial and residential buildings, among others. Work with these entities to closely monitor air quality impacts and establish best practices for reducing emissions (see also Community Health and Wellness Element, Action HW9.B).

The proposed casino plan will greatly increase traffic, car trips, and pollution to the Point Molate area. In fact, approving this plan, with its proposed traffic impacts will increase air pollution and air emissions for the City and especially in parklands. This project does not comply with Policy CN4.1 or Action CN4.B.

Additionally, OSC-C.2 asks that a “reasonable buffer” be created between development and adjacent marsh and mudflat areas. We do not believe that the casino project’s proposed buffer protects marine or shoreline resources. Given the scale of impact presented and the special sensitivity of the habitat, the proposed buffer cannot be considered a “reasonable buffer” for a resource this important.

Conflict with County Interpretation of Indian Lands Designation (ILD)

Contra Costa County has undertaken an in-depth review of the application of the Tribe for an Indian Lands Determination Request. Notably, the County is concerned with an equitable Indian Lands Designation (Appendix B). This historic and cultural information is germane to the environmental setting of this project and should be included in the analysis.

Since the Tribe’s original application and two subsequent supplemental requests have not been approved, we believe this information should be reported as it is critical to the City’s understanding of the possibility of the different alternatives embodied in the DEIR/EIS.

Conflict with California State Law

Section 2.1.4 asks for an *early transfer with privatized remediation* – thus laying even more responsibility on the City of Richmond and Upstream. This process needs to be approved by the Governor of California, and the Governor’s office has written a formal letter from Counsel deeming this project illegal (Appendix C). What additional risk of exposure occurs from “early transfer with private remediation” projects? Procedures, standards and goals of a private remediation proposal should be presented for CEQA review concurrent with the project. Mitigation measures and best management practices should also be presented. This information is lacking from the EIR thus impeding full review of environmental impacts of this document.



Conflict with United States Law

The Casino project is based on the assumption that the tribe will be allowed to develop this land. (Appendix D) Current US law would deny the fee-to trust application The EIR/EIS. must disclose this conflict with the law that is raised by federal elected officials.

Conflict with San Francisco Bay Conservation and Development Commission Plan

The McAteer-Petris Act directs the San Francisco Bay Conservation and Development Commission to exercise its authority to deny permit applications for changes in the use of land, water, or structure within its jurisdiction. The BCDC Section 3(a) outlines guidelines for "Use of Shoreline". This section states that (2) "all other shoreline areas should be used in any manner that would not adversely affect enjoyment of the Bay and shoreline by residents..." A large scale, high rise casino facility will "adversely affect enjoyment of the Bay." In order for the project to accommodate a Bay Trail, the trail would have to pass through one of the project's buildings. In addition the casino complex will adversely affect viewsheds from various cities, the Richmond-San Rafael Bridge, and natural area destinations in the Central Bay, and must be considered as significant impacts of this project. The aesthetic impacts of this project need to be considered by the Design Review board.

Additionally, the unreported hydrology impacts (Discussed later in document), would conflict with run-off and pollution policies set forth by the BCDC.

The BCDC Plan Map 4 provides a policy for the "Former Naval Fuel Depot Point Molate". That text reads as follows:

"Develop for park use. Landward of Western Drive should be developed consistent with policy 4-b . Provide trail system linking shoreline park areas and vista points in hillside open space areas. Provide public access to historical district with interpretation of this resource. ... Protect existing eelgrass beds."

Given the potential for significant impacts to eelgrass beds, the casino project may require a change in the Bay Plan and the Bay Plan maps

The BCDC is required to conduct a public hearing on this specific proposal and the changes that would be required to amend the BCDC plan.

Environmental Setting

The document fails to present an environmental setting for the document that reflects aboriginal peoples and uses of this site: this is a critical failure, since the project (an Indian Gaming Casino) depends on demonstrating that the project proponents have ancestral ties to Point Molate. EBCNPS was surprised to find that no Native American uses of this landscape were discussed in the EIR/EIS. We note that no other alternatives to the project require such evidence to fulfill an accurate description of the environmental

setting. Contra Costa County has made a detailed determination regarding the original Native American inhabitants of Point Molate. Of the many factors considered in establishing ancestral ties, tribal uses of the land and its natural resources (e.g., shellfish for food, native plants for basketry, etc.), no such evidence could be found for the casino project proponents who are the Guidiville Band of Pomo Indians—and indeed no evidence of any kind could be found to determine that they have ancestral connection to the land. By contrast, previous work by Beckham and others indicate that the original inhabitants were Costanoan. It is noteworthy that this important aspect of the environmental setting as well as legal context is never raised.

ANALYSIS OF ENVIRONMENTAL ISSUES

Geology and Soils (Sections 3.2 and 4.2)

The consultant has mentioned restoration of upland habitats on this site, but has failed to take into account the impacts of this action. Removal of exotics, like *Genista sp.* and *Eucalyptus sp.* can be a source of major disturbance, especially since portions of the site are mapped as “invasive brush” cover. Often removal of these species can lead to increased soil erosion, slope instability, and increased runoff. The DEIR must analyze impacts of vegetation management. For a reference, see the East Bay Park District’s *Draft Wildfire Hazard Reduction and Vegetation Management Plan* which addresses some of the impacts to soils and slope stability from vegetation management.

Geology and Soils impacts are not fully disclosed or analyzed, and these impacts are therefore not appropriately mitigated.

Hydrology and Water Quality (Sections 3.3 and 4.3)

The project clearly states that “Operation of Alternatives [A-D] would introduce an additional source of pollutants to surface water and groundwater. This would be a less than significant impact”. Based on information about the sensitivity of eelgrass and subtidal habitats (NOAA NMFS, 2007), the proximity of eelgrass beds to the project, and the fact that no data are presented to support the finding of levels of significance, no such conclusion can be drawn. Therefore, the analysis is inadequate and cannot conclude that the Impacts have been sufficiently avoided or mitigated.

The EIR fails to address additional freshwater inflows from this project. We did not find this presented in the Executive Summary-Table of the document. Large amounts of freshwater influence in this area would alter pH, salinity, nutrient cycling and a myriad of other ecosystem functions that rely on specific water conditions. This area is mapped as having polyhaline and even euhaline conditions depending on the season and annual climate (NOAA NMFS, 2009). These conditions are some of the more saline near-shore conditions found in the SF Bay. The EIR/EIS must analyze the impacts of water use and runoff patterns for this project.



The project will utilize at least 700,000 gallons of water per day (or about 2 acre-feet per day). It will also increase the amount of impermeable surface dramatically, given the building envelope, paved roads, and large parking structures. In addition proposed landscaping includes tree plantings and other vegetation that will require irrigation. All of these will result in a large increase in the amount of stormwater runoff and freshwater inputs into the immediate shoreline areas. Such inputs have the potential to alter salinity which could have impacts to resources such as eelgrass beds which are found in euhaline conditions..

Runoff, erosion and pollution from the grading, construction, and operation of the development of this site may have regional impacts to open space and conservation areas and to regional resources, including endangered species and sensitive plants and animals found in adjacent areas that are preserved: Wildcat Creek, Wildcat marsh, Breuner marsh, and Point Pinole Regional Park.

Additionally, EBCNPS is concerned that with increased ground disturbance and construction activities, toxins and pollutants from this contaminated site will be likely released into the environment. The Governor's letter (Appendix C) underlined the seriousness of this situation in terms of the on-going requirements for site clean-up because of the petroleum-contaminated soil. Although the site will be "cleaned-up" there are often performance standards that allow some "reasonable" amount of pollutants to remain. These pollutants may also leach into the Bay with storms and improper storm water management. The EIR fails to discuss impacts of these releases or the possibility of those releases. The San Francisco Bay is already listed as impaired under Section 303(d) of the Clean Water Act, and any potential releases must be closely reviewed by the EPA. The threshold levels (acceptable concentrations of target pollutants) of the private remediation are required to be disclosed so a full analysis of these risks and impacts can be quantified by the consultants.

Hydrology and Water Quality impacts area not fully disclosed or analyzed, and these impacts are therefore not appropriately mitigated.

Biological Resources (Sections 3.5 and 4.5)

Special Plant Communities

Entry 4.5.1 (and associated entries for the various alternatives, i.e. 4.5.9) in Table ES-1 contains inaccurate baseline survey information (Appendix J, Figure 6). Vegetation communities are not properly identified in this project; therefore, impacts that follow are inaccurate. EBCNPS has visited this site many times and been active in Pt. Molate restoration and outreach projects for over a decade. The failure to mention California native coastal grasslands/coastal prairie is an enormous oversight in this review process. This habitat has been identified in the development envelope by the California Native Grassland Association, California Native Plant Society and others. Additionally, coastal bluff and coastal strand communities will be impacted with the development of the "shoreline park" that shows trees planted in these herbaceous and grassland habitats.



EBCNPS requests that the vegetation surveys be re-commissioned and an updated map published indicating the presence of these habitats.

Protected Plant Species

Entry 4.5.3 (and associated entries for the various alternatives, i.e. 4.5.19) in Table ES-1 contains an inaccurate assumption that “development will not impact special status plant species” because the project fails to properly survey for *Fritillaria liliaceae*. Botanical surveys missed the proper survey period for the CNPS 1B plant – *Fritillaria liliaceae*. The closest survey date was Apr 14/15, which is too early for this plant given the local climate. This plant was historically found on site and has a record reported to the California Department of Fish and Game (CNDDDB, 2009).

Entry 4.5.3 fails to report locally rare and unusual plants of this site (Appendix A), which are protected by CEQA. Locally rare species listed in Dianne Lake’s *Rare, Unusual and Significant Plants of Alameda and Contra Costa Counties*¹, have very limited ranges within the two East Bay counties. A1, A2, and A1x species are protected under sections 15380 and 15125(a) of the California Environmental Quality Act (CEQA), which addresses species of local concern and places special emphasis on environmental resources that are rare or unique to the area. The Point Molate area is the only known site in the East Bay for the following A1 species: sea lettuce (*Dudleya farinosa*), dicondra (*Dichondra donnelliana*) and pacific gumweed (*Grindelia stricta* var. *platyphylla*). Examples of the List A2 species found in Point Molate include; squirreltail (*Elymus elymoides* ssp. *elymoides*) and brownie thistle (*Cirsium quercetorum*). Both are found in grasslands. All plants on the attached list require appropriate protection and management to minimize fragmentation and ensure the survival of the remaining populations.

EBCNPS believes the *Grindelia* species may be misidentified, as this is a difficult plant to identify. It is possible that the species in question could be *Grindelia hirsutula* var. *maritima* (a State- listed plant, CNPS 1B). We ask that individuals in this genus be re-surveyed and a voucher sent to the Jepson Herbarium at University of California at Berkeley, care of John L. Strother and Bruce Baldwin.

In order for 4.5.3 (Table ES-1) to be valid in “not affecting special-status species”, the proper surveys need to be completed by botanists with knowledge of these habitats and this flora. We request that a thorough biological site assessment be conducted at the project site by qualified botanists and wildlife biologists to determine if suitable habitat exists for special-status plant, bryophyte, and wildlife species. If suitable habitat exists, in order for a project to comply with CEQA, focused protocol-level special-status species surveys should be conducted at the site prior to issuing a permit. CNPS requests that protocol-level plant surveys be conducted during the appropriate active growing stage of the life cycle of the target species. The surveys require adequate advance planning. Furthermore, we recommend that in addition to addressing federal and state listed species and CNPS List 1A, 1B and 2 species, the following species should also be addressed

¹ Lake, Dianne. *Rare, Unusual and Significant Plants of Alameda and Contra Costa Counties*. Seventh Edition. East Bay Chapter, California Native Plant Society. 2007. (periodically updated)



prior to issuing permits: plants and bryophytes that are CNPS List 1A, 1B, 2, 3 or 4 species, lichens on CDFG's Special Vascular Plants, Bryophytes, and Lichens List², plants listed in the *Rare, Unusual and Significant Plants of Alameda and Contra Costa Counties*, and plants that are federal species of concern or federally-listed as species of local concern. This request is in accordance with CDFG Habitat Conservation Planning Branch recommendations for "...protection of plants which are regionally significant, such as locally rare species, disjunct populations of more common plants, or plants on the CNPS Lists 3 and 4."³ CNPS would also like to request that sensitive plant communities that are tracked by CDFG be addressed during the EIS/EIR process.

Notably, there is no indication that a survey for bryophytes was completed. Point Molate is situated at a unique climatological and geological interface where bryophytes would be expected to be found. CEQA requires that appropriate surveys are fulfilled for this situation, in an appropriate season.

Entry 4.5.9 discusses impact to 1.796 acres of mixed riparian habitat. This is in direct conflict with the Point Molate Reuse Plan goals and objectives that state the project should "protect natural resources with an emphasis on wetland, **riparian habitat**, and critical habitat areas" [Point Molate Reuse Plan, I-12]. MM 4-4 calls for a 3:1 mitigation ratio for this loss. All impacts to this area should be fully avoided: we are not aware of a reasonable alternative location for "creation of ca. 6 acres of mixed riparian" since certain hydrological and soil conditions must be present for this habitat type to become established. We require a map indicating all areas where "mitigation" will occur clearly defining what habitats will be "taken" or converted in the mitigation process. A critical challenge for mitigation is that using other sites that have existing good quality habitat will require mitigation of that loss, while using degraded sites makes it nearly impossible to effect a successful mitigation.

The project determines that a 50-foot buffer from existing tidal marsh resources is sufficient for meeting environmental protection standards (MM 4-7). The statement that "[t]he 50-foot setback buffer **shall** be approved by the BCDC through consultation" is premature. These set-backs should be promulgated by the appropriate resource agencies, not the developer.

Entry 4.5.11 (and associated impacts) reports impact to a state-listed plant (*Aster lentus* (JM93)/*Symphotrichum lentum*) which is in direct conflict with the Pt. Molate Reuse Plan goal stated as follows, "[i]dentify rare, threatened, and endangered species and ensure protection of them and their habitat". Notably, the project only "ensures their protection" in MM 4-13 "if feasible". EBCNPS believes that the only legitimate mitigation measure is avoidance.

² CDFG. California Department of Fish and Game Natural Diversity Database; Special Vascular Plants, Bryophytes, and Lichens List. 2007 (periodically updated).

³ Department of Fish and Game Habitat Conservation Branch.
http://www.dfg.ca.gov/hcpb/species/t_e_spp/nat_plnt_consv.shtml.



Eelgrass Beds (*Zostera marina*)

In the subtidal habitat just offshore of Point Molate are some of the Bay's largest, and most significant eelgrass beds (Figure 2: Reproduced from NMFS, 2007). This invaluable habitat has been vanishing from the Bay over the past 100 years.

"Eelgrass is a particularly important plant species found in the upper reaches of shallow bays and on mudflats in Central Bay. The Bay's only rooted seagrass, eelgrass provides feeding, escape, or breeding habitat for many species of invertebrates, fishes, and some waterfowl. The economically important Pacific herring spawns in eelgrass beds, and least terns forage on small fishes that are found there.." (Einarsen 1965)

"Shallow bays and channels account for about two-thirds of the Bay's area, and they occur in all four subregions. A good example of this habitat type is at the northern edge of San Pablo Bay." (Einarsen, 1965, pg 76)

"Eelgrass beds are important habitats in euhaline and polyhaline waters because they are home to many small organisms that are food for larger species and they provide protective cover for migrating salmon, provide spawning substrate for Pacific herring and act as a nursery for many other smaller fish such as gobies. Eelgrass stabilizes and binds substrates and absorbs nutrient from sediments. They reduce water currents by frictional forces, dampen wave energy, and slow erosional processes. They are primary producers removing inorganic nutrients from the sediments and the water column and through photosynthesis convert them into organic material." (NOAA NMFS, 2007, Pg/ 61)



Figure 2: Distribution of Eelgrass in the San Francisco Bay

HABITAT TYPE AND ASSOCIATED BIOLOGICAL ASSEMBLAGES – Plant Beds

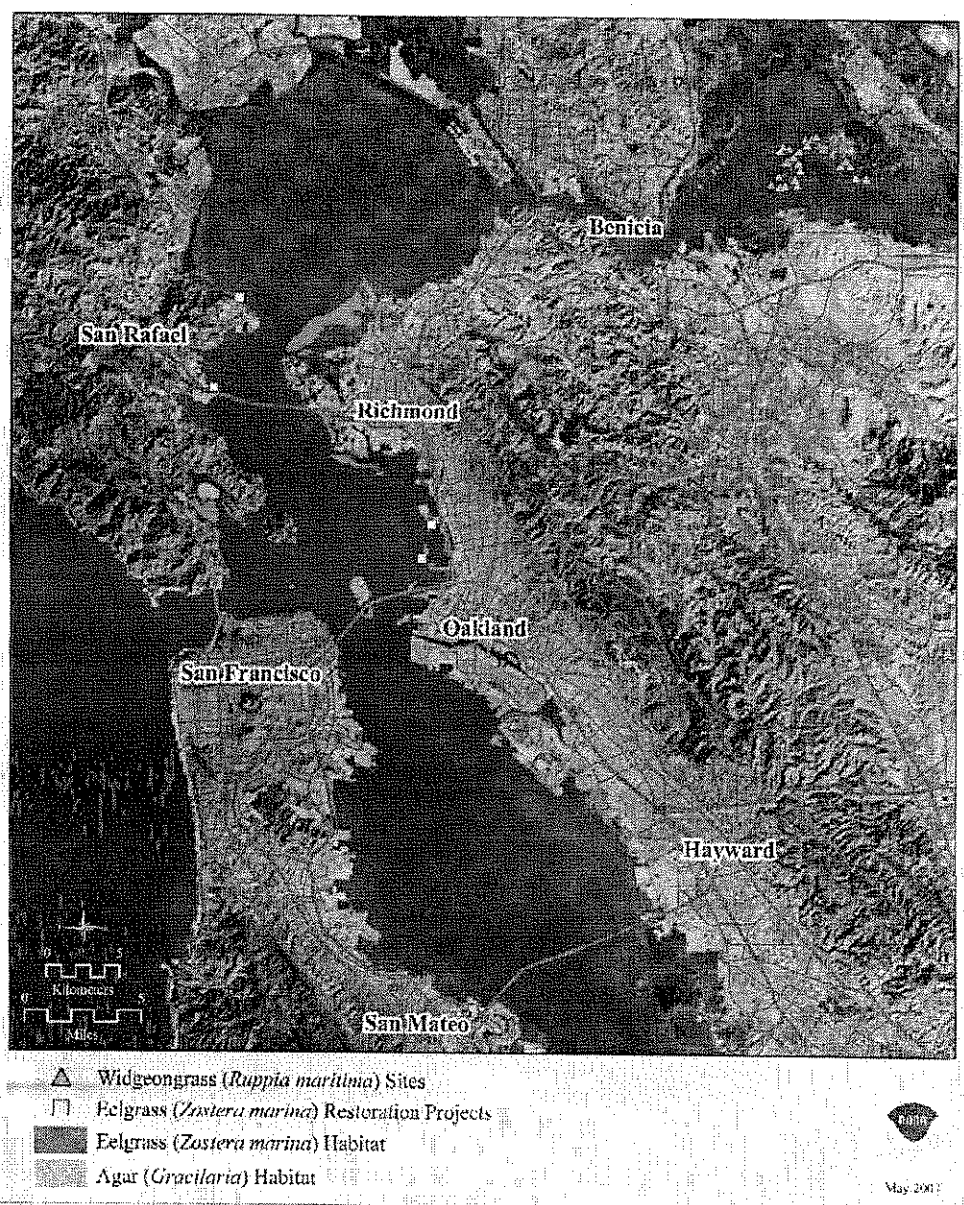


Figure 12. Distribution of eelgrass (*Zostera marina*), the marine alga, *Gracilaria*, and widgeon grass (*Ruppia maritima*) in San Francisco Bay after Merkel & Associates (2003) and N. Cosentino-Manning (NMFS, pers. comm.).

As indicated in the quotes and map above, and as detailed in the report by NOAA NMFS (Report on the Subtidal Habitats of the San Francisco Bay, 2007), large intact eelgrass beds are important habitat and form the basis for a number of critical food chains for species of both economic important and environmental sensitivity. This year the Pacific herring fishery was suspended because of low population numbers. Any potential impacts to the eelgrass beds lying offshore of Pt. Molate must be considered significant. (see Impacts to Birds below).

MM 4-8 is incomplete because the mapping of eelgrass beds does not extend far enough into the bay (see Figure 6, Appendix J. Eelgrass beds must be mapped beyond the development boundary and be considered in terms of whole habitat.

Additionally, the Coastal Zone Mgmt Act (CZMA) should apply to this project which will have impacts on the Coastal Zone. The Coastal Conservancy has guidelines from 1994. NOAA interprets the applicability of the CZMA and oversees federal compliance. We ask NOAA and reviewers to consider this project in the context of the 2007 Report (by NOAA NMFS) on the Subtidal Habitats of the San Francisco Bay.

Eelgrass beds were found to disappear from the site location in 2006 (at the time surveys were completed) according to San Francisco State University reports (pers.comm. K.Boyer). This highly unusual event indicates that this population is extremely sensitive and additional development may tilt the balance such that this bed could be eradicated. Therefore, we believe the utmost caution should be used when considering impacts to this population.

The City of Richmond should require that the approximately 140 acres of the property that are submerged in the Bay be retained by the City and be protected by a zero-development Conservation Easement. This easement and its terms should be written and presented at the time of the EIR so that the appropriate procedures and guidelines will be used to govern the Easement text.

Seasonal Wetlands

Seasonal wetlands are found on site – ca. 3 acres – these coastal seasonal wetlands are important and limited to few other sites in the East Bay, i.e. Warm Springs. These are rare habitats that should be avoided and protected with a buffer. The development of these areas is in conflict with the approved Pt. Molate Reuse Plan.

Open Space

There is no indication in the document that the upland acres of “open space” will be preserved in perpetuity as easement, but instead as the deed is transferred over this area that it will only be “zoned” open space. As a result, this open space may be developed in the future with another proposal (Personal communication, Councilmember Rodgers).



Dedicated to the preservation of California native flora

Seasonal Wetlands

EBCNPS challenges that this "temporary protection" is not an adequate plan for "open space," and parkland commitments that are promulgated in the associated plans require permanent protection of the full undeveloped acreage.

We see almost all "open space" described as parklands (minus some land preserved for the Suisun marsh aster). Without clear designations of what these parklands entail, there is the possibility, even the likelihood, that these will be heavily managed for recreational purposes and not as set asides of quality habitat for flora and fauna. Some of the potentially most heavily impacted areas proposed for recreation occur along the most sensitive bayland-terrestrial interface.

"Conceptual drawings" indicate trees throughout remnant coastal prairie habitat. Coastal prairie is a habitat type tracked by the California Department of Fish and Game. Development/conversion of these areas must be considered a significant impact. The document contains no discussion of such an impact.

The project proponent has promised large restoration efforts for the upland open space, but it is unclear how this will be executed and what/if there will be performance standards. (Personal communication, Jim Levine) Removing french broom and eucalyptus is an expensive and long-term undertaking, requiring multiple treatments over many years. The EIR/EIS should contain detailed costs and plans for these mitigations. Local public agencies, such as the East Bay Regional Park District, have taken on eucalyptus removal projects and they can attest to the need for follow up treatments and monitoring to ensure sites are properly restored.

Impacts to Birds

Among the most imperiled of the bird species that depend upon eelgrass beds lying in the subtidal habitat of Point Molate is the California Least Tern (*Sterna antillarum Browni*) a federal and state listed endangered subspecies known to forage on the fish found in eelgrass beds. Section 7 Consultation with the US Fish and Wildlife Service for a biological opinion must be initiated because of possible impacts to the California Least Tern from the project via impacts to the large eelgrass beds. These impacts would include but not be limited to wave shock from ferry operation, pollutants and other change in water quality affecting salinity, sedimentation, etc.

Additionally, the site falls within the North Richmond Wetlands Important Bird Area. In order to understand the significance of the IBAs, we cite Audubon California. According to Audubon California, "there are 145 Important Bird Areas in California. Audubon California has used the best science to identify and map these IBAs. These sites are selected according to strict criteria and are part of an international effort." Therefore, the absence of any reference in the DEIR to the inclusion of Point Molate in the North Richmond Wetlands IBA is a major omission.

The North Richmond Wetlands is one of 4 IBAs in the Golden Gate Audubon's chapter area. Golden Gate Audubon's shoreline census for 2007-2008 for this IBA reported 92



species of birds, including the federally and state endangered Clapper Rail and the threatened Red Knot. Among the Audubon's Watchlist species detected were Marbled godwit, Clark's grebe, Long-billed curlew, Sanderling, Black Skimmer, and Thayer's gull.

The project site includes habitat for Clapper Rail (*Rallus longirostris*). All impacts to this habitat must be completely avoided.

Other surveyed taxa from the North Richmond Wetlands IBA include Short-eared owl, black rail, Forester's tern, Least tern, Northern Harrier, Loggerhead shrike, song sparrow and savannah sparrow. (Important Bird Areas, Audubon CA)

Although "FLAP" (bird friendly) lighting and procedures are to be used on site, the lighting methods will only remain intact if "nighttime lighting ... [is not] essential for security purposes". Given the proximity to existing high crime areas, the likelihood of increased crime because of gambling, the presence of large sums of money, and the threat of fire (see WUI Fire Considerations), these "security purposes" are likely to become a reality. The claim by the developer indicates that possible safety concerns will over-ride this mitigation measure. In that case the EIR/S fails to make clear that lighting, noise, and pollution impacts may likely occur 24 hours a day thus eliminating any sensitive species habitat. This level of impacts should be considered with respect to all wildlife, including birds, and sea mammals. If mitigation measures contain a contingency, then those measures should be viewed as insufficient mitigation measures.

Hazards and Hazardous Materials (Sections 3.12 and 4.12)

Ammonia Release from Chevron

The Executive Summary and other portions of this DEIR fail to report the risk of exposure of the public to Anhydrous Ammonia. This potential impact was reported by the 2002 Navy EIR/EIS as **significant and unmitigable**.

The DEIR states that the 2002 Navy EIR/EIS determined the project site was within the scenario circle under a Worst Case Scenario (WCS) event of an ammonia release (Pg. 3.12-26). The US Navy DEIR/S judged this finding to have a significant and unmitigable impact. This document presents conflicting information. An additional analysis in 2007 by Marine Research Specialists found that ammonia release would be transported away by prevailing winds 84% percent of the time. Yet, according to our calculations, the remaining 16% of the time, the wind would blow the exposure onto this development which is located less than 1 mile away (4,690 linear ft.). Therefore the document should clearly present the conclusions and caveats of this MRS report. Namely, the Introduction to this document (Appendix M in DEIR) clearly states a great degree of uncertainty associated with their analysis.



“However, in this case, intervening terrain complicates the analysis since there are no models available that can adequately simulate the release of a denser-than-air aerosol mixture in the presence of complex terrain.” (Pg. 1)

Additionally, the MRS model doesn't take into account other factors such as how foreseeable human changes to the environment might change this model: i.e. removal of eucalyptus trees.

Additionally, the WCS probabilities do not take into account the added effect of a potential wildfire and how that might impact existing “Active Mitigation Systems” in place that should protect the public from a release. For example, loss of power would affect these systems, or wildfire. Therefore these estimates do not provide a reliable estimate on risk to the population. This impact must be listed as significant and unmitigable.

WUI Fire Considerations

Although Section 2-33 notes that “Pursuant to Section 2.3 of the Municipal Services Agreement (MSA), the Tribe would provide an on-site fire station, to be operated by the City, with all necessary fire apparatus and equipment sized to reasonably add fire and emergency response needs for the Proposed Project,” this is not a sufficient level of detail to assure the public that all necessary precautions to protect the public safety from fire hazards have been analyzed. First, the site must be considered to be located at a Wildland Urban Interface (WUI) and in a “Very High Fire Severity Zone” (Figure 3: reproduced from DEIR – Figure 3.12-4). It contains steep slopes (the Potrero Hills are over 400 feet high), a high level of vegetation such as eucalyptus that are considered dangerous fuels, and it is located near a major oil refinery. Given these factors, the on-site fire station which would be the first responder to a fire must be equipped to fight a WUI fire. That means that the station must have the proper equipment and staff trained to be able to fight both structural and wildland fire. The DEIR fails to clearly convey in its text that this area is a “Very High Fire Sensitivity Zone” and present the possible range of local and regional impacts of a catastrophic fire in this area.

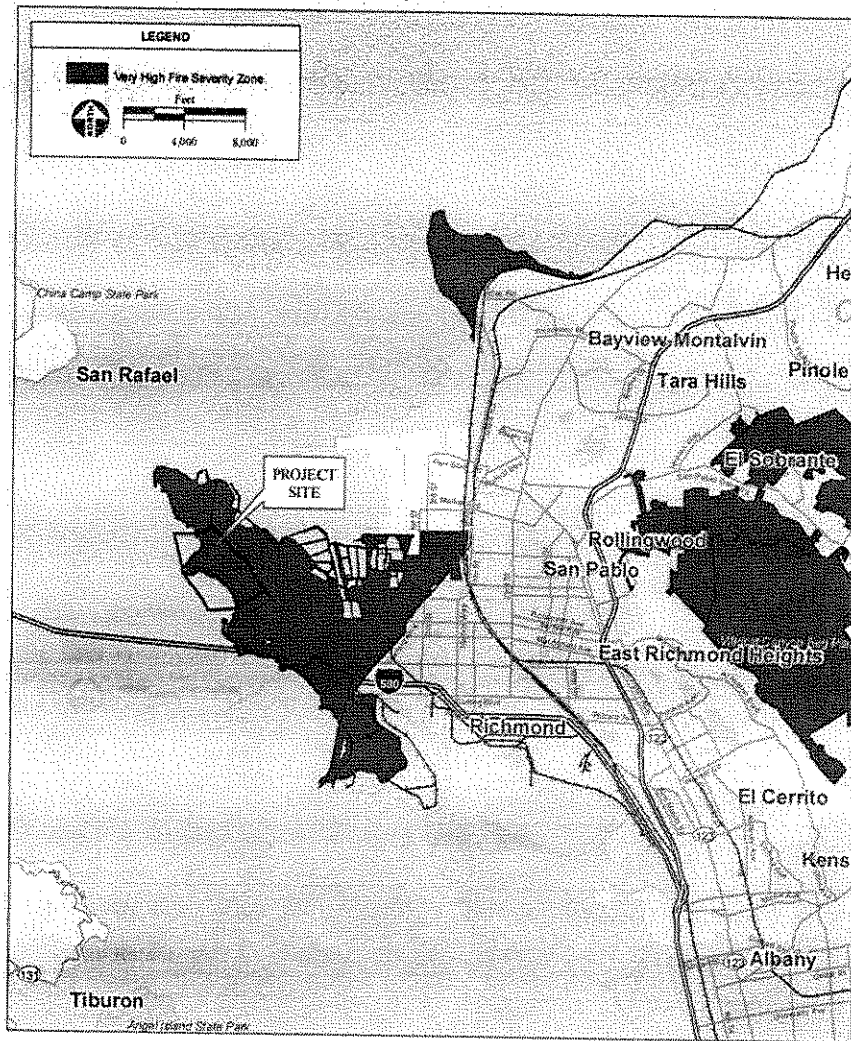
Patrons of casinos include more smokers than the general population. Will smoking be banned from the site? Tossing of cigarettes from cars or even by pedestrians can ignite roadside vegetation—one of the most common ways that wildland fires begin in California. Because the casino will be active 24 hours a day with the projection of thousands of patrons on-site, fires must be considered an ever-present danger. In addition, there is only one road leading into and out of the project site. Should a major fire result, the simultaneous evacuation of people with the attendant need for access to emergency vehicles will present a major bottleneck. EBCNPS has addressed many different projects that are located along the WUI, and we find that once the agencies recognize the potential for disastrous fires, projects are then required to increase their road infrastructure as well as the development footprint by requiring the clearing of vegetation up to 300 feet from structures. The EIR fails to address all of these potential impacts.



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Pt. Molate Casino DEIR comments 27

Figure 3: Very High Fire Severity Zone



SOURCE: City of Richmond, 2008; ESRJ Data, 2007; AES 2008

Pt. Molate Mixed-Use Tribal Destination Resort and Casino / 204536-W

Figure 3.12-4
Very High Fire Severity Zone

Climate Change

Given the proximity of the development to the Bay, sea level rise impacts should be made clear. Impacts of this level of climate change were not presented. Sea level rise would impact this development given its proximity to the shoreline. Additionally, we believe development activities will increase erosion from both beach/bayside, including wave action from the proposed ferry, and upland habitat due to habitat modifications. This analysis of sediment flow into the coastal habitats is not found in the EIR/S. This is required by AB32.



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Cumulative Impacts: Growth Inducing Impacts, Socioeconomic Conditions

Community Impacts - Pt. Molate is one of two proposed casinos in Richmond, and one of three in this general area. The other is "Sugar Bowl" planned for N. Richmond. This one has been halted by a lawsuit questioning the adequacy of its analysis. Pt. Molate casino, if approved, will be the third casino in this area. Many residents have raised the fear of the increase in crime and gambling addiction associated with casinos. The EIR/EIS must address the impacts to the community environment and public safety by the concentration of casino-style gambling in Richmond and in the region. These can also be considered to be growth-inducing impacts.

Other types of cumulative impacts which should be addressed are other shoreline development, changes in freshwater inflow from water diversions in the Delta, traffic impacts along the Richmond-San Rafael Bridge and 580 corridor, and air quality emissions from heavy industry, including Chevron, and automobile emissions.

Approved, will be the third casino in this area.

impacts along the Richmond-San Rafael Bridge and 580 corridor.

Conclusions

The EIR/EIS fails to meet appropriate standards for adequacy in the identification, analysis, and mitigation of impacts for the casino project. There are several separate responsible actions open to the Richmond City Council. It can find that the document is inadequate in disclosing critical information with respect to the legal status of the project proponent, the Guidiville Band of Pomo Indians, as well as with respect to key environmental impacts whereupon it can reject the document and the project and embrace Alternative E, the parklands alternative.


EBCNPS strongly recommends that the Council reject the EIR/EIS. We find that the process of analyzing the casino project has brought a new level of understanding to the community in terms of Point Molate's unique resources. Further, it has informed the community as well as all levels of government of the legal, logistic, and environmental hurdles involved in attempting to locate major development at this site. In essence, the proposed casino project has been an excellent test as to "quality of fit" for the future disposition of this key regional resource. And it has failed the test.

Based on this new level of understanding and information, we encourage the City to adopt a community visioning and planning effort that aligns the needs of the community for high quality open space and parklands, habitat protection, and low-impact development. Lessons have been learned in the Concord Naval Weapons Station re-use process that should be applied to Point Molate.

EBCNPS would welcome participating in such an effort in Richmond as we have in Concord.

If you would like further information, please feel free to call me at 510-734-0335.

Sincerely,


Lech Naumovich, Conservation Analyst
East Bay Chapter of the California Native Plant Society

LIST OF APPENDICIES

- 1) List of Rare and Unusual Plants, Molate Region
- 2) Excerpt of Letters from Contra Costa County
- 3) Letter from Governor Swartzenegger
- 4) Letter from US Senators



**Appendix A: CEQA-Protected Rare and Unusual Plants
of the Molate Region
2005**

(Statewide Rare Plants in Upper Case)

Rank in East Bay	Species	Common Name	Habitat
A2	<i>Ambrosia chamissonis</i>	beach-bur	Coastal Strand; Sand or Sandstone
*A1	ARABIS BLEPHAROPHYLLA	coast rock cress	Coastal Bluff; Rock, Tallus or Scree
A1	<i>Atriplex leucophylla</i>	beach saltbush	Coastal Strand; Sand or Sandstone
*A1x	CALYSTEGIA PURPURATA SSP. SAXICOLA (historical-1893) (ssp. purpurata is more common)	coastal bluff morning-glory	Scrub
A2	<i>Carex nebrascensis</i>	Nebraska sedge	Misc. Wetlands
A1	<i>Carex obnupta</i>	slough sedge	Misc. Wetlands
A1	<i>Castilleja ambigua</i> ssp. <i>ambigua</i>	Johnny-nip	Coastal Bluff; Grassland
A2	<i>Castilleja subinclusa</i> ssp. <i>franciscana</i>	Franciscan Indian paintbrush	Chaparral; Scrub
A2	<i>Ceanothus thyrsiflorus</i> var. <i>thyrsiflorus</i>	blue blossom; California-lilac	Misc. habitats
A1	<i>Centunculus minimus</i>	chaffweed	Vernal Pools; Misc. Wetlands
A2	<i>Cirsium quercetorum</i>	brownie thistle	Grassland; Woodland
A1	<i>Cirsium remotifolium</i>	remote-leaved thistle	Forest; Grassland; Serpentine; Woodland
A2	<i>Cryptantha muricata</i>	prickly cryptantha	Rock, Tallus or Scree; Sand or Sandstone areas
A2	<i>Deinandra corymbosa</i> ssp. <i>corymbosa</i> (<i>Hemizonia corymbosa</i> in Jepson Manual)	coast tarweed	Coastal Bluff
A1	<i>Dichelostemma multiflorum</i>	many-flowered brodiaea	Grassland; Scrub; Woodland
A1	<i>Dichondra donnelliana</i>	dichondra	Misc. habitats
A1	<i>Dudleya farinosa</i>	powdery dudleya	Rock, Tallus or Scree
A2	<i>Elymus elymoides</i> ssp. <i>elymoides</i>	squirreltail	Grassland
A1	<i>Elymus glaucus</i> ssp. <i>jepsonii</i> (ssp. <i>glaucus</i> is more common)	blue wildrye	Grassland
A2	<i>Elymus X hansenii</i>	Hansen squirreltail	Grassland
A1?	<i>Eriogonum latifolium</i> (?)	coast buckwheat	Coastal Bluff; Scrub
A2	<i>Eriophyllum staechadifolium</i>	seaside woolly-sunflower; lizard-tail	Coastal Bluff; Scrub
*A1	FRITILLARIA LILIACEA	fragrant fritillary	Grassland; Serpentine; Vernal Pools
A2	<i>Gnaphalium bicolor</i>	Bioletti's cudweed	Dry Open Slopes; Sand or Sandstone
A2	<i>Gnaphalium canescens</i> ssp. <i>microcephalum</i>	white everlasting	Chaparral; Dry Open Slopes
A1	<i>Grindelia stricta</i> var. <i>platyphylla</i> (var. <i>angustifolia</i> is more common)	Pacific grindelia	Coastal Bluff
A1	<i>Lasthenia maritima</i>	Farallon weed	Rock, Tallus or Scree; Sand or Sandstone areas
A1	<i>Lupinus affinis</i>	lupine	Misc. habitats
A2	<i>Lupinus arboreus</i>	yellow bush lupine	Coastal Bluff; Coastal Strand; Sand or Sandstone
A1	<i>Lupinus bicolor</i> var. <i>tridentatus</i> (var. <i>umbellatus</i> is more common)	miniature lupine	Misc. habitats



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*A1	PERIDERIDIA GAIRDNERI SSP. GAIRDNERI	Gairdner's yampah	Misc. Wetlands
A2	Piperia elongata	elongate piperia	Forest; Scrub
*A2	PIPERIA MICHAELII	Michael's rein orchid	Forest; Scrub; Woodland
A2	Piperia transversa	transverse piperia	Dry Open Slopes; Forest; Scrub; Woodland
A1	Piperia unalascensis	Alaska piperia	Forest; Scrub; Woodland
A1x	Plantago maritima (historical-1959)	Pacific seaside plantain	Salt Marsh
A1	Romanzoffia californica	Suksdorf's romanzoffia	Coastal Bluff; Rock, Tallus or Scree
A2	Rumex maritimus	golden dock	Brackish Marsh; Salt Marsh
A1	Rumex salicifolius var. crassus	willow dock	Coastal Bluff; Coastal Strand; Misc. Wetlands
A2	Rumex salicifolius var. denticulatus	willow dock	Misc. Wetlands
A2	Spergularia macrotheca var. leucantha	large-flowered sand spurry	Alkali areas; Vernal Pools
A2	Spergularia macrotheca var. macrotheca	large-flowered sand spurry	Alkali areas; Coastal Bluff; Rock, Tallus or Scree; Misc. Wetlands
*A1x	TRIFOLIUM DEPAUPERATUM VAR. HYDROPHILUM (vars. ampletens and truncatum are more common)	saline clover	Alkali areas; Salt Marsh
A2	Vulpia microstachys var. microstachys (var. pauciflora is more common)	Nuttall's fescue	Dry Open Slopes; Rock, Tallus or Scree; Sand or Sandstone; Serpentine; Woodland
A1x	Vulpia octoflora var. octoflora (historical-1936)	slender fescue	Chaparral; Dry Open Slopes; Dry Washes; Sand or Sandstone

NOTE: Plant species followed by "(?)" have taxonomic or distribution problems and it is not clear if they occur here.

Dates indicated for historical species refer to last known record in the Alameda-Contra Costa Counties area.

Explanation of Ranks

***A1 and *A2:** Species in Alameda and Contra Costa counties listed as rare, threatened or endangered statewide by federal or state agencies or by the state level of CNPS.

A1x: Species previously known from Alameda or Contra Costa Counties, but now believed to have been extirpated, and no longer occurring here.

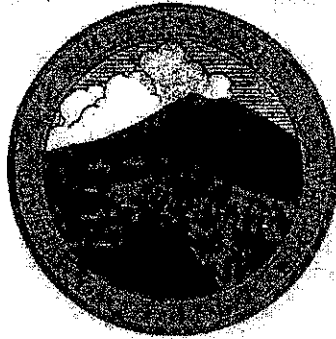
A1: Species currently known from 2 or less regions in Alameda and Contra Costa Counties.

A2: Species currently known from 3 to 5 regions in the two counties, or, if more, meeting other important criteria such as small populations, stressed or declining populations, small geographical range, limited or threatened habitat, etc.



APPENDIX B: EXCERPTS OF LETTERS FROM CONTRA COSTA COUNTY
(Each Cover letter, Introduction, and Conclusion section is included)





Contra Costa County

Response in Opposition

to

Indian Lands Determination Request

Guidiville Band of Pomo Indians'

Fee-to-Trust Application

and

Gaming Development Project

Submitted to

Office of the Solicitor

Indian Affairs

February 27, 2008



Dedicated to the preservation of California native flora

The Board of Supervisors

County Administration Building
651 Pine Street, Room 100
Martinez, California 94553

John Gioia, 1st District
Gayle B. Ulkeha, 2nd District
Mary N. Piepho, 3rd District
Susan A. Bonilla, 4th District
Federal D. Glover, 5th District

**Contra
Costa
County**



John Cullen,
Clerk of the Board
and
County Administrator
(925) 335-1900

February 27, 2008

Kaush Arha, Associate Solicitor
Scott Keep, Assistant Solicitor
Jon Damm, Attorney-Advisor
Office of the Solicitor
Indian Affairs Division
1849 C Street NW
Washington, D.C. 20240
Mailstop MIB 6513

Dear Messrs. Arha, Keep and Damm:

Thank you for the opportunity to respond to the Guidiville Band of Pomo Indians' Indian Lands Determination Request which would place approximately 415 acres of land located in Contra Costa County into trust for the Band to use for casino gambling, under the Restored Lands Exception of the Indian Gaming Regulatory Act.

The attached submittal documents the facts and legal authorities that clearly demonstrate that the Point Molate property does not qualify for the Restored Lands Exception.

The Guidiville Band is a Mendocino County Tribe, with trust land in Mendocino County. It has no geographic, historic, cultural or modern connection to the Point Molate property. The factual circumstances of the property acquisition and the temporal relationship with the Band's federal recognition reinstatement are also not sufficient to qualify the property as restored land. Unfortunately, the acquisition of the Point Molate property is more about economic opportunity than restoration of the Band's aboriginal land. Outside investors acquired the property for the sole purpose of using the Band to build an urban casino in Contra Costa County and thus tap into the lucrative San Francisco Bay Area market.

Again, thank you for the opportunity to respond to the Request. If you have questions, please feel free to contact Silvano Marchesi, Contra Costa County Counsel, at 925-335-1810; Cathy Christian, Contra Costa County legal advisor, Nielsen, Merksamer, at 916-446-6752; or Sara Hoffman, Assistant County Administrator, at 925-335-1090.

Sincerely,

Federal D. Glover, Chair
Board of Supervisors



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I. INTRODUCTION

The Guidiville Band of Pomo Indians ("Band") has requested that the Department of the Interior take approximately 415 acres of lands comprising the former Naval Fuel Depot Richmond (generally referred to as "Point Molate") in Contra Costa County into trust for the Band to use for casino gaming under the Restored Lands exception of the Indian Gaming Regulatory Act ("IGRA").

This response to that Request sets forth the facts and legal authorities that clearly demonstrate that this Contra Costa County property does not qualify for the Restored Lands exception.

Part II is a brief summary of the Guidiville Band, a Mendocino County tribe today and historically. There is well-documented evidence that proves the Mendocino County affiliation through language, dialect, ethno-geography, and residency and use areas of the Pomo Indians. Research dating back to the 1850s and affidavits of Band members themselves consistently document the Guidiville Band's connections to Mendocino County. Linguistically and by location, the Guidiville Band was not connected to the San Francisco Bay Area or Contra Costa County; its trade routes went east and west, not south.

Part III includes two location maps showing the distance between the Guidiville Rancheria site, existing Guidiville trust land and the Point Molate property.

Part IV is a detailed analysis of the legal standard for qualification under the Restored Lands exception, including court decisions and federal policy. The Band has no geographic, historical, or cultural connection to the property. There is also no valid modern connection. The factual circumstances of the property acquisition and the temporal relationship of the Band's restoration are not sufficient to qualify the property as restored land.

Part V is a detailed analysis of the Indian Lands Determination Request submitted by the Band that identifies false, misleading, unsubstantiated, and irrelevant statements made by the Band in its attempt to show a connection to the Point Molate property.

Exhibit A is a report by ethnohistorian Dr. Stephen Dow Beckham entitled *The Guidiville Band of Pomo Indians: Traditional Use and Occupancy Areas and Residency in Mendocino County, California* (Beckham Report). Dr. Beckham's report chronicles scholarly research – beginning in 1851 by George Gibbs and followed by 12 other studies – that confirms the Band's use and occupancy in Mendocino County, and overall absence from the Bay Area. The report also includes historic census and tribal enrollment data of the federal government about the identity and residency of the Pomo Indians at the Guidiville Rancheria and elsewhere in Mendocino County. The report identifies the tribes that occupied land between Mendocino County and the property in Point Molate as



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includes historic census and tribal enrollment data of the federal government about the identity and residency of the Pomo Indians at the Guidiville Rancheria and elsewhere in Mendocino County.

the Coast Miwok, Lake Miwok, Patwin, and Costanoans. Exhibit B is Dr. Beckham's *Addendum to the Beckham Report*, which provides additional information on the history and ethnogeography of the Guidiville Band of Pomo Indians.

The remaining exhibits are various documents from the Guidiville Band itself, which confirm their Mendocino County residency. Exhibit C is the Band's Resolution (#98-13) to request that the 42 acres it purchased in Mendocino County be put into trust. Using "Guidiville Indian Rancheria" letterhead with a Talmage, CA, address, the Band identifies the proposed trust land as "land near the city of Ukiah in Mendocino County, known as Mendocino County Assessor's Parcel NO. 178-200-05." Exhibit D is the Band's Fee-to-Trust Application and Exhibit E is the Grant Deed, both regarding the Department of the Interior's acceptance into trust of the Guidiville Band's Mendocino County property.

Exhibits F and G provide examples of the Band's ongoing relationship with the U.S. Department of Housing and Urban Development (HUD) concerning the Band's residency in Talmage, an unincorporated community approximately four miles southeast of Ukiah, in northwestern California. Exhibit F is a copy of the introductory pages of Band's original 2002 Application for Federal Assistance through HUD's Rural Housing and Economic Development (RHED) Program. Exhibit G is the Grant Agreement pertaining to the same property (Rural grant number RH-02-CA-0037). The Band has reported on its progress in pursuing housing and other economic development activities under this grant as recently as 2006, demonstrating that the Band continues to consider their Mendocino property its primary use and occupancy site today.

Together these documents provide ample evidence that the Guidiville Band of Pomo Indians have lived and continue to live in Mendocino County. They have no historical or modern claim to the Bay Area. Consequently, the Band's proposed trust acquisition of Point Molate, Contra Costa County, does not qualify for the Restored Lands exception under the IGRA.



D. CONCLUSION

The Guidiville Band of Pomo Indians asserts that the IGRA's Restored Lands exception should apply to the subject property. However, the Band's Request is grounded in irrelevant, unsubstantiated, misleading, and false information, wholly failing to meet the legally established standards for the restoration of land to a tribe.

When viewed objectively, the factual circumstances do not support a finding that land in Contra Costa County should be restored to the Band. The Band is not landless; it owns 42 acres of property in Mendocino County. Rather than seeking to develop that land, the Band has joined with outside investors to pursue alternative and distant land for restoration, outside the Band's historical territory, in the interest of acquiring a more lucrative location for a casino.

The Band's claims of historical ties to Contra Costa County are contradicted not only by years of scholarly research, but also by declarations of the Band's own members. The Band's alleged modern ties to Contra Costa County are tenuous at best, and its assertions regarding its modern residence locations have fluctuated in accordance with the Band's pursuit of an Indian Lands Determination. There is an insufficient temporal connection between the Band's 1991 restoration and its recent land acquisition in Contra Costa County, which further demonstrates that this request is more about economic opportunism than the restoration of the Band's aboriginal land.

In light of these significant deficiencies, Contra Costa County urges the Department of the Interior to deny the Guidiville Band's request for determination under the Restored Lands exception.



The Board of Supervisors

County Administration Building
651 Pine Street, Room 106
Martinez, California 94553

John Gioia, 1st District
Gayle B. Uilkema, 2nd District
Mary N. Pisphe, 3rd District
Susan A. Bonilla, 4th District
Federal D. Glover, 5th District

**Contra
Costa
County**



David Twa
Clerk of the Board
and
County Administrator
(925) 335-1900

April 14, 2009

Scott Keep, Assistant Solicitor
Jonathan Damm, Attorney-Advisor
Office of the Solicitor, Indian Affairs Division
1849 C Street NW, Mailstop MfB 6513
Washington, D.C. 20240

RE: Guidiville Band of Pomo Indians--Indian Lands Determination Request

Dear Messrs. Keep and Damm:

Attached please find Contra Costa County's *Second Supplemental Response in Opposition to the Guidiville Band's Indians Lands Determination Request and Fee-to-Trust Application*. In this third submittal, we respond to documents released to us since our last submittal. As you know, however, there are still outstanding documents. We believe that the County should have the opportunity to review all documents which will be considered in making the Indian Lands Determination. We also hope that we will be accorded sufficient time to prepare comments on those documents.

In this Second Supplemental, we point out that the Band cannot meet the criteria for "significant historic connection," as included in the Federal Register notice on Final Rule 25 CFR Part 292. There are no tribal villages, burial grounds, occupancy or subsistence use by any Pomo peoples at Point Molate or in Contra Costa County generally. The aboriginal inhabitants were the Costanoans. Point Molate is not within the boundaries of any Guidiville reservation subject to any treaty either. The referenced, unratified Treaty of Camp Lu-Piyu-ma ceded lands in Lake and Mendocino Counties occupied by seven bands (not including the Guidiville Band). In an attempt to bridge this deficiency, the Band claims common ancestry with the Scotts Valley Band. However, this claim is also without merit.

Over the past 100 years, the Band has maintained a sustained presence in Mendocino County through the residency of its members and its governmental activities. We recount this history, from 1905 to 2001. We also analyze the Outing Program (1920's and 1930's) and found it to be a very temporary, voluntary employment program, with only 3 confirmed Guidiville member participants (none worked at Point Molate and only one worked in Contra Costa County, and that was for 17 days/13 workdays). All returned home to Mendocino County following employment. In addition, we point out that the Band's Fee-to-Trust application was initiated in 2004, the same year that the Band opened its governmental offices at Point Molate. Therefore, these offices do not meet the 2 year prior existence rule necessary for a modern connection.

ceded lands in Lake and Mendocino Counties occupied by seven bands (not including the Guidiville Band). In an attempt to bridge this deficiency, the Band claims common ancestry with the Scotts Valley Band.

April 14, 2009

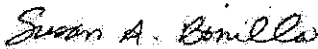
Guidiville Band of Pomo Indians--Indian Lands Determination Request

Page 2

The standard for a Restored Indian Lands Determination is clear: There must be a significant historic connection between the Band and the property that was sustained over time, into the modern era. Individually and collectively, the County's *Response in Opposition to the Guidiville Band's Indians Lands Determination Request and Fee-to-Trust Application*, its *Supplemental Response* and its *Second Supplemental Response* has shown that the Guidiville Band cannot demonstrate either a historic or a modern connection to Point Molate. Consequently, the Band does not meet the standard for a Restored Indian Lands Determination.

If you have questions, please feel free to contact Silvano Marchesi, Contra Costa County Counsel, at 925-335-1810 or Cathy Christian, Contra Costa County legal advisor, Nielsen, Merksamer, Parrinello, Mueller & Naylor, LLP, at 916-446-6752.

Sincerely,



SUSAN A. BONILLA, Chair
Board of Supervisors

cc: (Letter & Exhibits A-E only)

George Skibine, Acting Assistant Secretary for Indian Affairs
Bureau of Indian Affairs, Pacific Regional Office
Senator Dianne Feinstein
Senator Barbara Boxer
Congressman George Miller
Congresswoman Ellen O. Tauscher
Congressman Gerald McNerney
Governor Arnold Schwarzenegger
Andrea Hoch, Legal Affairs Secretary, Office of the Governor, State of California
Senator Mark DeSaulnier
Senator Lori Hancock
Assemblymember Tom Torlakson
Assemblymember Joan Buchanan
Assemblymember Nancy Skinner
Sara Drake, Deputy Attorney General, Office of the Attorney General, State of California
Randy Pinal, Deputy Attorney General, Office of the Attorney General, State of California
Members, Contra Costa Board of Supervisors
Silvano Marchesi, Contra Costa County Counsel
David Twa, Contra Costa County Administrator
Sara Hoffman, Contra Costa County Indian Affairs Advisor
Cathy Christian, Nielsen, Merksamer, Parrinello, Mueller & Naylor, LLP
Stephan Dow Beckham, Professor of History
Guidiville Band of Pomo Indians, via Little Fawn Boland, Esq., Rosette & Associates

Senator Dianne Feinstein
Senator Barbara Boxer



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Pt. Molate Casino DEIR comments 41

I. INTRODUCTION.

Pursuant to a Freedom of Information Act request, Contra Costa County, California recently received numerous documents which attempt to establish an historical and modern nexus between the Guidiville Band of Pomo Indians and Point Molate, site of the Band's proposed casino project in Contra Costa County. The County has reviewed many of these documents and re-reviewed the report by the Band's researchers, Heather A. Howard, and James M. McClurken, entitled "*The Guidiville Band of Pomo Indians — Use and Occupancy of the San Francisco Bay Area*" in light of the new regulations adopted by the Department of Interior on evaluation of fee-to-trust applications. Subsection (c) Section 292.11 of those regulations applies to the Guidiville Band's fee-to-trust application.

We have identified additional fatal flaws in the Guidiville's contention that the Point Molate property meets the standard for taking land into trust under the "restored lands" exception of the Indian Gaming Regulatory Act. Consequently, this document supplements the County's "*Response in Opposition to Indian Lands Determination Request: Guidiville Band of Pomo Indians' Fee-to-Trust Application and Gaming Development Project*" dated February 27, 2008 ("*Contra Costa Response in Opposition*").

II. GUIDIVILLE BAND DOES NOT MEET STANDARDS FOR TAKING LAND INTO TRUST UNDER THE "RESTORED LANDS" EXCEPTION OF THE INDIAN GAMING REGULATORY ACT (IGRA).

Through the provided documents, the Band futilely attempts to establish its historical and modern ties to the former Naval Fuel Depot Richmond (generally referred to as "Point Molate"), which consists of approximately 415 acres in Contra Costa County, for which a trust application is currently pending with the Secretary for gaming purposes. In truth, the Band does not even come close to establishing its entitlement to gaming at Point Molate under the "restored lands" exception. The Band can establish *neither* of two necessary prerequisites: that it has a significant historical connection to Point Molate, *or* that it has substantial modern connections to the land in question. Failure to establish *either* one *or* the other is fatal to the Band's claim; but failure to establish *both* reveals the emptiness of the Band's position. The Band's desire to locate a casino in Contra Costa County is not the result of any legitimate attachment to Point Molate, but is mere forum-shopping—seeking to tap into the lucrative Bay Area market and avoid competition from other casinos nearer the Band's traditional and current homeland in Mendocino County, California.

It is well-established, however, that the "restored lands" exception must be read in a manner that "place[s] belatedly restored tribes in a comparable position to



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Pt. Molate Casino DEIR comments 42

Contra Costa County is not the

The Band's researchers ignore key scholarly writings -- Numerous scholars have traced the history of the Indian peoples who lived in Northern California, including the Guidiville and other Pomo Bands. There is over a century of scholarly writing founded on historical documents, oral information dictated by Indian elders, and the assessment of residency patterns published, in many instances, in "juried" journal articles, monographs, and books by anthropologists, linguists, and historians. The scholarly literature provides a clear, consistent and well-documented account of Indian tribes, bands and villages in California during the early historic period.

Unfortunately, the Band's researchers have chosen to ignore, dismiss or mischaracterize much of this literature in their attempt to link the Guidiville Band to Point Molate. Exhibit A of the *Contra Costa Response in Opposition* is the report by Dr. Stephen Dow Beckham, entitled "*The Guidiville Band of Pomo Indians: Traditional Use and Occupancy Areas and Residency in Mendocino County, California.*" The report provides documentation from George Gibbs (1851), Stephen Powers (1877), Samuel A. Barrett (1908), C. Hart Merriam (1905-08), Alfred L. Kroeber (1925), Edward Winslow Gifford (1926, 1967), Edwin M. Loeb (1926), Fred B. Kniffen (1939), Omer Call Stewart (1943), Andrew P. Vayda (1967), Sally McLendon and Robert L. Oswalt (1978), John Lowell Bean and Dorothea Theodoratus (1978) and Randall Milliken (1995). The clear conclusion is that the Guidiville Band is a northern Pomo Band from Mendocino County.

The Band has also chosen to ignore documented evidence regarding the Costanoans occupancy and use of Contra Costa County, Coast Miwok occupancy and use of the Marin Peninsula and Patwin occupancy and use of Napa Valley, Sand Pablo Bay and Suisun Bay.

These and other deficiencies in the *Band's Use and Occupancy Report* render it unreliable as a source of information on the history of the Guidiville Band. Certainly, the Band's researchers have not made the case for acquisition of restored land in Contra Costa County.

V. CONCLUSION—THE GUIDIVILLE BAND'S INDIAN LANDS DETERMINATION REQUEST SHOULD BE DENIED.

It is well-established that "restoration" does not mean "acquired." *Rohnerville Opinion, supra*, p. 11. Rather, "[u]nder a natural (and broad) reading of the provision, restored tribes which reacquire[] lands previously held by the tribe would qualify for the exception." *Confederated Tribes of Coos*, 116 F.Supp.2d at 162. To conduct gaming at Point Molate under the "restored lands of a restored tribe" exception found in Section 20 of IGRA, the Band must establish an historical and a modern connection to Point Molate; it has failed to show either required connection, demonstrating that *the Band's claim has no merit*.



Ultimately, what is at issue in this case is nothing more than the Band's desire to forum-shop for a good gaming site, in the lucrative Bay Area, and far from existing casinos near its historical and modern land base. If the "restored lands" exception were read to permit gaming at Point Molate by the Guidiville Band, the restrictions of IGRA, interpreted by the courts in *Confederated Tribes of Coos, Grand Traverse II*, and subsequent cases, would be entirely meaningless. Contrary to IGRA and the holding of those cases, "any and all property acquired by restored tribes would be eligible for gaming." *Confederated Tribes of Coos*, 116 F.Supp.2d at 164. As the courts and the Bureau have previously recognized, that is clearly not the result that Congress intended.

The Band's request should be denied.

existing casinos near its historical and modern land base.

the Band's request should be denied.



The Board of Supervisors

County Administration Building
651 Pine Street, Room 106
Martinez, California 94553

John Giola, 1st District
Joe B. Urlikema, 2nd District
Mary N. Piepho, 3rd District
Susan A. Bonilla, 4th District
Federal D. Glover, 5th District

**Contra
Costa
County**



David Twa
Clerk of the Board
and
County Administrator
(925) 335-1900

October 30, 2008

Scott Keep, Assistant Solicitor
Jonathan Damm, Attorney-Advisor
Office of the Solicitor, Indian Affairs Division
1849 C Street NW, Mailstop MIB 6513
Washington, D.C. 20240

RE: Guidiville Band of Pomo Indians--Indian Lands Determination Request

Dear Messrs. Keep and Damm:

Pursuant to a Freedom of Information Act request, Contra Costa County, California recently received numerous documents regarding Guidiville Band of Pomo Indians' *Indian Lands Determination Request and Fee-to-Trust Application*. Thank you for those documents, however the County notes that these documents are incomplete in that many were redacted. Counsel for the County continues to discuss this issue with Mr. Damm and this response, which relied on a review of the redacted documents, should not be considered as a concession by the County that its FOIA request is complete. The County reserves all rights to challenge the FOIA response and may provide further argument concerning the Indian Lands Determination Request if a more complete response is received.

We have reviewed many of those documents as well as the Band's *Indian Lands Determination Request* in light of the new regulations adopted by the Department of Interior on evaluation of fee-to-trust applications. Subsection (c) Section 292.11 of those regulations applies to the Guidiville Band's fee-to-trust application.

That review resulted in our identifying additional fatal flaws in the Guidiville's contention that the Point Molate property meets the standard for taking land into trust under the "restored lands" exception of the Indian Gaming Regulatory Act. Consequently we have prepared the attached "Supplement" for your review and consideration.

If you have questions, please feel free to contact Silvano Marchesi, Contra Costa County Counsel, at 925-335-1810; Cathy Christian, Contra Costa County legal advisor, Nielsen, Merksamer, Parrinello, Mueller & Naylor, LLP, at 916-446-6752; or Sara Hoffman, Contra Costa County Indian Affairs Advisor, at 925-890-1344.

Sincerely,

FEDERAL D. GLOVER, Chair
Board of Supervisors

attached "Supplement" (FOIA redacted) and ...

I. INTRODUCTION

In its October 30, 2008 *Supplement to Response in Opposition to Indian Lands Determination Request – Guidiville Band of Pomo Indians*, Contra Costa County provided additional evidence that demonstrated that the Guidiville Band's proposed trust acquisition of the Point Molate property in Contra Costa County does not meet the standards for taking land into trust under the "restored lands" exception of the Indian Gaming Regulatory Act (IGRA), Court opinions or Sections 292.11 and 292.12 of the Department of the Interior's regulations on evaluation of fee-to-trust applications.

Since submitting its *Supplemental Response*, the County has received more documents in which the Guidiville Band advances new arguments to support its alleged connection to Point Molate. However, these arguments also are without merit, as demonstrated below. The Band utterly fails to establish a significant historic or modern connection to this land in Contra Costa County.

II. GUIDIVILLE BAND HAS NO MODERN CONNECTION TO POINT MOLATE

A. Band's Governmental Facilities on and near Point Molate do not constitute a modern connection between the Band and Point Molate or Contra Costa County

In an October 7, 2008 memorandum to the Department of the Interior, Office of the Solicitor, the Band states that it "has yet to submit a land-into-trust application"¹ and therefore its governmental facilities on and near Point Molate qualify as a modern connection between the Band and Point Molate. According to the Band, it opened two governmental offices in 2004, one on the Point Molate property and the other in the nearby City of Emeryville,² so that "by the time the application for land-into-trust will be filed, the Parcel will be within a 25-mile radius of the tribe's governmental facilities that have existed for approximately 4 years. This is 2 years longer than [Section 292.12 (3) of] the regulation requires."³

Section 292.12(a)(3) specifies that one of the tests of a modern connection to the land is that "the land is within a 25-mile radius of the tribe's headquarters or other

¹ October 7, 2008 Memorandum from Melene Sanchez to Jonathan Damm RE: Modern Nexus "Facilities Test" p.2

² *Id.*, p.1

³ *Id.*, p.2



Fee-to-Trust Application and Gaming Development Project,²⁹⁶ there is no evidence in the negotiations of Commissioner Redick McKee in 1851 that he met with or secured the cession of any Coast Miwok, Patwin, or Wappo lands abutting San Francisco and San Pablo Bays. On August 20, 1851, McKee held a council at "Camp Lu-Piyu-ma" near Clear Lake with seven bands of Indians. On August 22, 1851, McKee held a council at "Camp Fernando Feliz" in the Russian River Valley with the Sai-nell, Yu-ki-as, Mas-su-ta-ho-ya, and Pomo.

McKee's treaties were secured with the Pomo in Lake and Mendocino counties—dozens of miles north of the San Francisco Bay area. The signatories agreed to cede the "lands they occupied," not vast tracts of land belonging to other tribes. McKee's cession language did not identify specific boundaries of lands ceded—only that the signatories were willing to cede the lands they then occupied. There is no evidence that any bands of Wappo, Patwin, or Coast Miwok participated in these meetings. None of McKee's treaties was ratified; they are merely interesting historical documents and do nothing to buttress any claim of the Guidiville Band to ancestral ties or interests to lands south of San Francisco or San Pablo Bays, in Contra Costa County.

IV. CONCLUSION — GUIDIVILLE BAND'S RESTORED INDIAN LANDS DETERMINATION REQUEST SHOULD BE DENIED

To date the Guidiville Band of Pomo has refused to release its base roll. The Band's law firm of Rosette & Associates has also declined to provide to Contra Costa County a copy of "Appendix A, Genealogical Outlines Compiled by Family Tree Maker," a key document that allegedly supports McClurken's 2008 *Summary of New Research*. Other documents that purport to support the Band's restored Indian Lands Determination Request have also been redacted or are missing from the materials made available to the County.

It is significant to note that when Contra Costa County has had access to source documents, these documents have invariably revealed that the evidence does not support the claims of the Band to an historic or modern connection to Point Molate in Contra Costa County. The County pointed this out in its October 30, 2008 *Supplement to Response in Opposition* (see pages 20-25). It is no different here.

Source documents unarguably reveal that the Band's representations regarding the scope, impact and relevance of the Outing Program are just not true. Similarly, facts contradict its claims of a modern connection due to the timing of

²⁹⁶ July 23, 2008 Contra Costa County *Supplement to Response in Opposition to Indian Lands Determination Request — Scouts Valley Band of Pomo Indians' Fee-to-Trust Application and Gaming Development Project*, pp 14-15



its fee-to-trust application. Today, and for the past 100 years, the Band has been firmly rooted in Mendocino County.

The evidence unequivocally confirms that the Guidiville Band's aboriginal territory was also in Mendocino County near Ukiah, more than 110 miles north of Contra Costa County. The Band is now trying to obscure this total lack of historic connection to Point Molate in Contra Costa County by claiming that the Guidiville Band and Scotts Valley Band a common ancestral base and identical territory.

However, the Scotts Valley Band's aboriginal territory and modern community is on the west side of Clear Lake in Lake County, about 100 miles north of Contra Costa County. Recent marriages, or even not so recent marriages, between Guidiville Band members and Scotts Valley Band members cannot create new claims to aboriginal territory or a modern nexus to lands. Neither Band has any historic or modern connection to the Point Molate or North Richmond properties in Contra Costa County.

The Guidiville Band's request for a restored Indian Lands Determination at Point Molate in Contra Costa County is without merit, and should be denied.

was also in Mendocino County, near Ukiah, more than 110 miles north of Contra Costa County.

However, the Scotts Valley Band's aboriginal territory and modern community is on the west side of Clear Lake in Lake County, about 100 miles north of Contra Costa County. Recent marriages, or even not so recent marriages, between Guidiville Band members and Scotts Valley Band members cannot create new claims to aboriginal territory or a modern nexus to lands. Neither Band has any historic or modern connection to the Point Molate or North Richmond properties in Contra Costa County.



APPENDIX C: LETTER FROM GOVERNOR'S OFFICE



OFFICE OF THE GOVERNOR

October 12, 2009

Via Facsimile (916) 978-6099 & U.S. Mail

Mr. Dale Morris, Regional Director
Bureau of Indian Affairs
Pacific Region
2800 Cottage Way
Sacramento, CA 95825

Honorable Gayle McLaughlin, Mayor
City of Richmond
405 Civil Center Plaza
Richmond, CA 94804

Re: Draft Environmental Impact Statement/Environmental Impact Report
Point Molate Mixed-Use Tribal Destination Resort and Casino

Dear Mr. Morris and Mayor McLaughlin:

The Governor's Office of Legal Affairs has reviewed the Draft Environmental Impact Statement/Environmental Impact Report (DEIS/R) for the Point Molate Mixed - Use Tribal Destination Resort and Casino dated July 2009, for which the Bureau of Indian Affairs (BIA), Pacific Region Office, and the City of Richmond are lead agencies. Thank you for the opportunity to comment on the proposed acquisition of land in Contra Costa County, California, by the Bureau of Indian Affairs in trust for the benefit of the Guidiville Band of Pomo Indians of the Guidiville Rancheria (Guidiville or Tribe), and on the adequacy of the DEIS/R.

We write to express opposition to this land acquisition. We also address the necessity for an explicit waiver of sovereign immunity by the United States, as trustee, and the Tribe with regard to the State's right of oversight for ongoing remediation and/or monitoring of the Point Molate site, should the BIA decide that any portion of such site be taken into trust for the Tribe.

405 Civil Center Plaza

VERNOR ARNOLD SCHWARZENEGGER • SACRAMENTO, CALIFORNIA 95814 • (916) 445-2841



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Pt. Molate Casino DEIR comments 50

Mr. Dale Morris, Regional Director
Honorable Gayle McLaughlin, Mayor
October 12, 2009
Page 2

There have been different extensions of the comment deadline. We are informed that the BIA extended the deadline to September 30th and the City of Richmond extended the comment deadline to October 23rd. As a result of these conflicting deadlines from the two lead agencies, there continues to be confusion regarding the deadline for comments. I respectfully request that the Governor's Office comments be considered by both lead agencies.

Opposition to Urban Gaming

First, the Governor's Office opposes this project because it violates Governor Schwarzenegger's proclamation opposing urban casinos. In May 2005, the Governor issued a Proclamation on Tribal Gaming (Proclamation) in which he stated that he would "oppose proposals for the federal acquisition of lands within any urbanized area where the lands sought to be acquired are to be used to conduct or facilitate gaming facilities." The Proclamation utilizes the definition of "urbanized area" found in California Public Resources Code section 21071(a), which defines an urbanized area to include cities with a population of at least 100,000 persons. The Tribe proposes to locate its casino within the City of Richmond. Because Richmond's population is currently 104,513, it is considered an urbanized area for purposes of the Governor's Proclamation. (City Facts, City of Richmond, California, Planning & Building Services Dept. <http://www.ci.richmond.ca.us/DocumentView.aspx?DID=301> (last updated Jul. 28, 2009).) Therefore, pursuant to the Proclamation, the Governor's Office opposes the Project's proposed location of the Tribe's gaming facility.

On April 5, 2005, in testimony before the Senate Committee on Indian Affairs, the principal spokesperson for the proponents of Proposition 5 and Proposition 1A, Mark Macarro, Chairman of the Temecula Band of Luiseno Mission Indians of the Pechanga Reservation, located in Riverside County, California, acknowledged that Proposition 1A was never intended to result in Indian gaming in urban locales. In support of legislation that would require the Lytton Band of Pomo Indians to submit land in San Pablo, California, to the post-1988 gaming land acquisition requirements of 25 U.S.C. § 2719, Chairman Macarro provided the following testimony:

The other reason we support this legislation is that it will reverse an action which violates a promise that all California Indian tribes made to the citizens of California when propositions 5 and 1A were considered and approved. During the time those propositions were considered, tribes in California pledged that the passage of those propositions would not result in the proliferation of urban gaming, but would be confined to a tribe's existing reservation lands, the vast majority of which are not located in urban areas.



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Mr. Dale Morris, Regional Director
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(Testimony of Mark Macarro, Oversight Hearing Before the Senate Committee on Indian Affairs on S. 113, a bill to modify the date as of which certain tribal land of the Lytton Rancheria of California is deemed to be held in trust, Tuesday, April 5, 2005; see also *Proposition 5 Stakes are High, Indian Gaming: Tribal Interests, Gambling Revenues Ride on Political Wheel of Fortune*, San Jose Mercury News (Aug. 31, 1998) [describing the Proposition 5 campaign]; *Gambling Battle Quieter, Cheaper Prop. 1A Ad Gives Incomplete Picture*, Fresno Bee, (Jan. 15, 2000) [describing the Proposition 1A campaign], copies attached.) It is indisputable that the purpose of Proposition 1A was to create a limited exception to the State's general public policy prohibiting casino-style gaming, and to allow "remote" Indian tribes an opportunity for economic and governmental advancement. Proposition 1A was not intended to expose the most populous areas of the State to the effects of casino-style gaming.

Allowing the Guidiville Tribe's casino project to proceed would violate the State's public policy and the California electorate's good faith, and would subvert the notions of cooperative federalism that lie at the heart of IGRA. (See *Artichoke Joe's v. Norton* (9th Cir. 2003) 353 F.3d 712,715 ["IGRA is an example of 'cooperative federalism' in that it seeks to balance the competing sovereign interests of the federal government, state governments, and Indian tribes, by giving each a role in the regulatory scheme."].)

This proposed land acquisition, if approved, may also undermine the constitutionality of California's Indian gaming regime. As you may be aware, the State successfully defended a challenge to the constitutionality of Proposition 1A, which 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 p. 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.

California's exception of operations on tribal lands from its long-standing prohibition on class III gaming passes constitutional muster. Before Proposition 1A was ratified, California absolutely banned casino-style gaming. See *Hotel Employees, supra*, 88 Cal.Rptr.2d 56, 981 P.2d at 996 (tracing the history of California's gambling prohibitions back to 1849). Thus, its regulation of gambling does not involve the State's attaching a "vice" label to an activity without a corresponding prohibition. [Citation.] California has expressed its legislative judgment that "[u]nregulated gambling enterprises are inimical to the public health, safety, welfare, and good order." California Business and Professions Code section 19801, subdivision (c)(1). By limiting class III gaming to tribal lands, Proposition 1A, and the compacts negotiated pursuant to it, foster California's "legitimate sovereign interest in regulating the growth of Class III gaming activities in California." Tribal-State Compact, pmbl. F.

conduct class III gaming on Indian lands, to the extent that the State has not



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Further, limiting class III gaming operations to those run by tribes is reasonably designed to defend against the criminal infiltration of gaming operations. By restricting large-scale gambling enterprises to carefully limited locations, California furthers its purpose of ensuring that such gaming activities are free from criminal and other undesirable elements." *Id.*

Thus, a rational basis exists for California's decision to restrict class III gaming operations to those conducted by Indian tribes on their own lands. California could, of course, pursue these interests even more effectively by banning class III gaming altogether. However, as discussed above, rational-basis review does not require states to choose an all-or-nothing approach. It requires only that the means chosen are reasonable.

(*Artichoke Joe's, supra*, 353 F.3d at p. 740.)

Governor Schwarzenegger and California's Indian tribes have made great strides towards establishing a long-term, stable relationship on gaming matters. Granting the Guidiville application would be contrary to the State's public policy and the California electorate's good faith.

Both the United States, as Trustor of the Property, and the Tribe Must Waive Sovereign Immunity with Regard to State Oversight of Hazardous Waste Cleanup and Monitoring

Point Molate is a former Naval Fuel Depot that ceased operations in 1995. Past releases from operations at the Fuel Depot have resulted in predominantly petroleum-impacted soils and groundwater beneath the site, with some seepage of that petroleum into the San Francisco Bay. A portion of the site is subject to land use restrictions and covenants that, among other things allow for continued monitoring of the site by the San Francisco Regional Water Quality Control Board. In addition, the State, through the Regional Board, has issued a Site Cleanup Requirements Order for the remaining unremediated 40 acres of the site still owned by the Navy and the State is responsible for oversight of the cleanup process. Remaining areas of concern include underground storage tanks, waste disposal areas, sandblast grit disposal areas, treatment pond areas, and fuel/chemical storage areas.

To ensure that remediation is completed the DEIS/R must require a waiver of sovereignty immunity from the United States, as trustor, and the Tribe in favor of the State as to any State action necessary to enforce remediation efforts at the site, until the State determines that remediation activities for the specified restricted areas have been completed or that restrictions are otherwise no longer necessary to protect human health and the environment. Such a waiver must also allow for continued monitoring as determined necessary by the State. Since some of

allow for continued monitoring of the site by the San Francisco Regional Water Quality Control Board.



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Mr. Dale Morris, Regional Director
Honorable Gayle McLaughlin, Mayor
October 12, 2009
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the monitoring efforts are anticipated to continue in perpetuity, it is essential that the State have full authority to regulate and enforce its efforts to protect both groundwater and the immediately adjacent San Francisco Bay.

Conclusion

The Governor's Office urges the Bureau of Indian Affairs and the Secretary of the Interior to exercise its discretion to reject the Guildville trust application, and all other similar acquisitions. Land acquisitions that would allow Indian gaming in urban areas are contrary to the intent of the voters of the State and the State's policy. In addition, the DEIS/R does not provide assurances that the State will be able to enforce its Site Cleanup Requirements Order and continue to conduct long term monitoring of the site.

These comments do not constitute the entirety of the State's comments on the DEIS/R. Other State agencies with specific technical expertise may provide additional comments in separate letters. Thank you for this opportunity to comment on the DEIS/R. We look forward to your response to our comments.

Sincerely,


ANDREA LYNN HOCH
Legal Affairs Secretary

Enclosures

cc: The Honorable Ken Salazar, Secretary, U.S. Department of the Interior



APPENDIX D: LETTER FROM US SENATORS



United States Senate

WASHINGTON, DC 20510

September 15, 2009

The Honorable Ken Salazar
Secretary of the Interior
U.S. Department of the Interior
1849 C Street NW
Washington, D.C. 20240

Dear Secretary Salazar:

We understand that many tribes have petitioned you to take land into trust for many purposes, including for purposes of Indian gaming. As you know, we strongly oppose taking off-reservation lands into trust for gaming purposes. We do not believe this was envisioned when we passed the Indian Gaming Regulatory Act (IGRA).

While Indian gaming is permitted on Indian lands and in accordance with state and federal laws, we have serious concerns about the recent practice of tribes and municipalities seeking advantageous gaming opportunities on lands that are not traditionally tribal lands. This is an abuse of the land into trust process and violates the spirit of the IGRA.

As you begin to evaluate the Department's policies on Indian gaming, we hope you will support certain aspects of the Department's January 3, 2008 guidance on taking off-reservation land into trust for gaming purposes. Without diminishing previously established requirements that an application must follow, the Department's guidelines require greater scrutiny with respect to the distance between the identified parcel and the tribe's reservation. In addition, the 2008 guidelines placed a "greater weight" on state and local concerns and potential jurisdictional and tax concerns should land be taken into trust. We support this additional consideration to maintain comprehensive and coordinated governmental and regulatory patterns and control. Lastly, the guidelines also provide for a comprehensive analysis of whether the proposed gaming facility is compatible with the current zoning and land use requirements of the state and local governments in the area surrounding the proposed gaming facility. Incompatible uses might consist of land zoned or used for, among other things, schools and residential developments.

Frequently, off-reservation gaming opportunities are sought without thorough consultation with local governments, other Indian tribes, or area residents and without discussing the impacts of a casino on the environment, air quality, noise levels, community planning, and quality of life. Where a state and its tribes have a long history of Indian gaming and have carefully negotiated initial and subsequent gaming compacts, a new gaming enterprise, particularly one outside the petitioning tribe's ancestral or historical lands, can be more disruptive to existing land use plans and revenue-sharing agreements. These impacts should be



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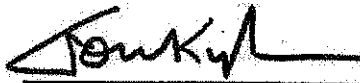
Pt. Molate Casino DEIR comments 56

considered as part of any determination to take land into trust, and especially in the rare occurrence when trust lands are sought outside a tribe's reservation boundaries.

We support increased scrutiny of the practice of taking off-reservation land into trust for gaming purposes, as advocated by the Department's guidance document, and ask that you consider this view as you and Assistant Secretary of Indian Affairs Larry Echo Hawk develop your policies for Indian gaming and consider applications for land into trust for gaming purposes. To the extent that you believe that current regulations and guidelines are insufficient to adequately address this troubling trend of off-reservation gaming, please advise us as to your solution and whether legislation is necessary to affect policies supporting these principles.

We look forward to hearing from you.

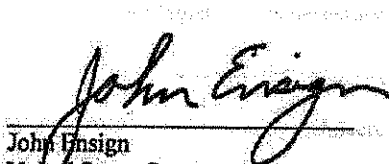
Sincerely,



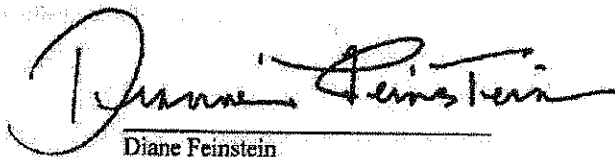
Jon Kyl
United States Senator



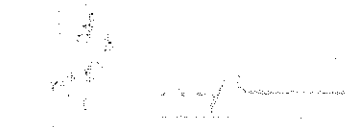
Harry Reid
United States Senator



John Insign
United States Senator



Diane Feinstein
United States Senator



Barbara Boxer
United States Senator



Barbara Boxer
United States Senator



CONSIDER WITH D.2



Elinor Blake
<eblake@igc.org>
11/10/2009 11:34 AM

To eshar@cob.cccounty.us
cc
bcc
Subject Item for Board Agenda Item D.2

Thank you for giving this to the Board - I intended to come and give comments in person but at the last minute, cannot make it. My comments are both pasted in below, and attached for your convenience.

Elinor Blake

November 10, 2009

Re: Item D.2 on the Board's agenda today

Dear Supervisor Bonilla and Members of the Board:

As a resident of unincorporated Richmond, I am dismayed to see the Intergovernmental Agreement with the Guidiville Band of Pomo Indians that you have before you today concerning Pt. Molate. As recently as April, Supervisor Bonilla wrote to the Department of the Interior on the Board's behalf arguing that "the Band does not meet the standard for a Restored Indian Lands Determination." The Agreement's language reverses that position, although the legal argument has not changed.

I well appreciate the Board's interest and the County's considerable need for funds, especially in this difficult economic time. I also recognize the Board's and Counsel's efforts to address in the Agreement the numerous burdens on County residents and services caused by the proposed development, including increased traffic and noise, harm to the environment in several respects, and public health and safety.

Nevertheless, it is a bad bargain. To point to just one issue as an example, creating County positions to help people with a gambling problem rather than preventing the gambling center from being established in the first place seems only cynical. In 2005 the County commissioned a study of the public health impacts of the San Pablo Casino which includes an overview of research on gambling behavior and problem gambling up to that time. The picture is not a pretty one. Since then, the State's Office of Problem and Pathological Gambling has issued further reports, noting in one that "The lifetime prevalence of problem and pathological gambling is particularly high among African Americans and among individuals who are disabled or unemployed." [Emphasis in the original. See http://www.adp.ca.gov/OPG/pdf/CA_Problem_Gambling_Prevalence_Survey-Final_Report.pdf].

The Board is aware that yet a third casino may be located in the same area, known as the Sugar Bowl Casino. These casinos straddle one of the lowest-income areas of the state with a high level of unemployment and underemployment, and with a significant African American population. The proposed development project holds out a promise of jobs with one hand, while the other hand is hidden behind its back holding out damage.

In any case, I do not understand why the Board would declare its acceptance of the final EIR before that document is released, relinquishing the option of going to court if deemed warranted. Many critical comments have been filed and it is not known what the response to them will be. At the least, a vote on this Agreement should be postponed until that document has been issued.

Thank you for the opportunity to comment briefly on this important item.

Sincerely,

Elinor Blake
Richmond, CA



Comments, Agenda item D.2

2006 California Problem Gambling Prevalence Survey

August 2006

Appendices

Submitted to:

California Department of Alcohol and Drug Programs
Office of Problem and Pathological Gambling

Submitted by:

Rachel A. Volberg
Kari L. Nysse-Carris

APPENDIX A: Detailed Data Tables

Table A-1: Past Year Gambling Participation by Gender

	Male (3520) %	Female (3601) %	Sig.
Lottery	47.1	40.3	<.001
Casino	29.9	26.2	<.001
Private	17.1	8.7	<.001
Track/OTB	6.6	3.2	<.001
Other	6.9	2.7	<.001
Bingo	1.4	2.8	<.001
Cardroom	4.0	1.2	<.001
Internet	1.8	0.5	<.001
Past Year Gambling	62.9	52.4	<.001
	(3721)	(1276)	
Started gambling before 21	55.7	35.8	<.001

Table A-2: Past Year Gambling Participation by Age

	18-29 (1649) %	30-39 (1463) %	40-49 (1467) %	50-64 (1480) %	65+ (1028) %	Sig.
Lottery	34.8	46.0	52.6	48.4	34.8	<.001
Casino	24.7	30.6	29.6	31.8	22.3	<.001
Private	23.7	16.3	8.9	7.0	4.9	<.001
Track/OTB	4.7	5.7	5.0	4.5	4.7	.533
Other	5.6	6.6	5.1	3.9	2.1	<.001
Bingo	1.5	1.8	2.9	2.8	1.6	.012
Cardroom	4.2	3.8	1.8	1.5	1.1	<.001
Internet	1.7	1.6	1.2	0.7	0.1	.001
Past Year Gambling	54.7	59.3	62.6	61.4	47.3	<.001
	(1070)	(1084)	(1169)	(1159)	(719)	
Started gambling before 21	75.7	51.7	39.2	33.7	26.9	<.001

Table A-3: Past Year Gambling Participation by Ethnicity

	Non-Hispanic White (3466) %	Non-Hispanic Black (434) %	Hispanic (2164) %	Asian (914) %	Other* (116) %	Sig.
Lottery	44.8	52.1	42.8	36.4	49.6	<.001
Casino	32.4	34.6	22.8	20.4	30.5	<.001
Private	14.6	14.5	11.1	9.2	16.1	<.001
Track/OTB	6.5	4.1	3.5	2.2	5.9	<.001
Other	4.4	7.6	5.4	3.5	6.8	.006
Bingo	2.2	2.5	2.1	1.8	2.5	.886
Cardroom	2.7	3.9	2.5	2.0	2.5	.334
Internet	1.6	1.4	0.5	0.9	2.5	.002
Past Year Gambling	60.8	67.1	53.5	49.7	64.4	<.001
	(2777)	(317)	(1403)	(628)	(85)	
Started gambling before 21	46.4	50.5	51.3	31.1	51.8	<.001

* Includes Native American, Middle Eastern, other and multiracial groups.

Table A-4: Past Year Gambling Participation by Nativity

	US Born (4682) %	Non-US Born (2059) %	Sig.
Lottery	46.3	37.9	<.001
Casino	33.3	16.8	<.001
Private	16.4	4.7	<.001
Track/OTB	6.4	1.4	<.001
Other	5.7	3.1	<.001
Bingo	2.3	1.2	.001
Cardroom	3.1	1.3	<.001
Internet	1.5	0.4	<.001
Past Year Gambling	62.6	47.1	<.001
	(3721)	(1276)	
Started gambling before 21	50.0	36.3	<.001

Table A-5: Demographics of Gamblers in California

		Non-Gamblers (1201) %	Infrequent Gamblers (1829)	Past Year Gamblers (2519) %	Monthly Gamblers (878) %	Weekly Gamblers (694) %	Sig.
Gender	Male	38.9	46.0	48.6	61.2	64.8	<.001
	Female	61.1	54.0	51.4	38.8	35.2	
Age	18 - 29	34.1	18.7	22.6	23.5	18.6	<.001
	30 - 39	20.3	19.6	22.7	19.2	18.3	
	40 - 49	14.2	20.8	22.8	22.1	22.3	
	50 - 64	16.1	21.0	21.0	23.7	24.9	
	65+	15.4	19.8	10.9	11.5	15.9	
Ethnicity	Non-Hispanic White	29.4	55.6	52.0	53.5	47.2	<.001
	African American	5.6	4.2	6.5	5.9	11.1	
	Hispanic	45.2	25.6	28.3	26.9	30.3	
	Asian	18.3	13.2	11.5	11.5	9.2	
	Other	1.4	1.4	1.7	2.1	2.2	
Marital Status	Married	51.0	57.5	58.9	53.7	55.1	<.001
	Widowed	6.1	8.4	3.9	4.4	5.9	
	Divorced	6.0	9.3	9.1	10.6	11.4	
	Separated	3.8	2.4	1.9	3.1	1.3	
	Never Married	33.1	22.3	26.3	28.3	26.2	
Education	Elementary / Some HS	30.9	12.6	9.8	9.6	13.8	<.001
	HS Grad	26.3	22.9	24.4	25.9	31.0	
	Some College	19.2	21.8	28.1	28.9	28.1	
	BA Degree	9.6	19.8	19.1	20.4	17.6	
	Graduate Study	14.0	22.9	18.6	15.1	9.3	
Employment	Employed	52.7	59.6	69.3	71.7	63.3	<.001
	Unemployed	5.9	4.6	4.0	3.1	5.4	
	Retired	13.6	17.5	11.9	12.0	17.5	
	Disabled	4.6	3.9	4.2	5.1	6.4	
	Keeping House	12.3	8.6	6.0	4.0	3.1	
	Student	6.7	2.4	2.5	3.1	1.2	
	Other	4.1	3.5	2.2	1.1	3.0	
Income	Up to \$25,000	32.5	17.6	13.6	16.0	19.7	<.001
	\$25,001 - \$35,000	15.6	12.0	10.2	10.1	9.7	
	\$35,001 - \$50,000	18.0	15.4	15.9	15.3	13.8	
	\$50,001 - \$75,000	18.3	23.7	22.9	23.9	22.5	
	\$75,001 - \$125,000	12.1	23.1	26.3	22.6	25.0	
	Over \$125,000	3.5	8.2	11.1	12.1	9.4	