

FIRST AMENDMENT TO INTERGOVERNMENTAL MITIGATION AGREEMENT

This First Amendment to the Intergovernmental Mitigation Agreement dated October 23, 2012 (“Amendment”), dated as of _____, 2019 (“Effective Date”), is by and between the County of Sonoma (the “County”), a political subdivision of the State of California, and the Federated Indians of Graton Rancheria (the “Tribe”), a federally recognized Indian tribe (collectively, the “Parties”).

RECITALS

WHEREAS, in accordance with the Memorandum of Understanding between the County and the Tribe, effective November 1, 2004, as amended, and the Compact, the Tribe and the County entered into an Intergovernmental Mitigation Agreement dated October 23, 2012 (the “Agreement”) to mitigate the off-Reservation impacts of the Tribe’s hotel and casino (the “Project”); and

WHEREAS, the Tribe paid the County \$3.27 million in one-time payments as required by Section 2(a) of the Agreement (“One-Time Payment”); and

WHEREAS, Section 5(e) of the Agreement requires that the County reimburse the Tribe for the One-Time Payment; and

WHEREAS, Section 3(f) and 5(a) of the Agreement require that the Graton Mitigation Fund be used to pay \$700,000 per annum to the County in lieu of the County Transient Occupancy Tax, following the opening of a hotel at the Gaming Facility and based on 200 hotel rooms, such payment to increase in an amount proportional to any increased number of additional future hotel rooms (the “TOT In Lieu Payment”); and

WHEREAS, on March 26, 2013, the Tribe and the City of Rohnert Park entered into a First Amended and Restated Memorandum of Understanding (the “2013 City MOU”), which significantly amended the Tribe’s 2003 Memorandum of Understanding with the City to mitigate the Project impacts within the City and make investments in and contributions to the City community; and

WHEREAS, on March 29, 2013, the County notified the Tribe of its objection to the 2013 City MOU, which the County alleged significantly defunded and undermined the purposes of the Agreement, and requested that the Tribe meet and confer with the County to resolve the dispute (the “Dispute”); and

WHEREAS, on December 22, 2017, the County restated the Dispute by letter to the Tribe and proposed several measures to resolve the Dispute; and

WHEREAS, the Tribe does not agree with the County’s objection and allegations regarding the 2013 City MOU; and

WHEREAS, the Tribe, County, City, and representatives of the Governor's Office engaged in a series of negotiations to resolve the Dispute; and

WHEREAS, the State Gaming Agency has administered payments from the Graton Mitigation Fund with the understanding that such payments are not precedent setting with respect to the Dispute, and is awaiting the outcome of the Parties' attempts to successfully negotiate a resolution to the Dispute; and

WHEREAS, on November 1, 2016, the Tribe issued a Notice of Preparation for the Graton Rancheria Hotel Expansion Project (the "Hotel Expansion Project"), pursuant to Section 11.8.2 of the Compact; and

WHEREAS, the Tribe completed a Draft Tribal Environmental Impact Report (the "Draft TEIR") for the Hotel Expansion Project, and submitted the Draft TEIR to the County on or about March 3, 2017, as required by Sections 11.8.1 and 11.8.3 of the Compact; and

WHEREAS, on May 24, 2017, the County submitted to the Tribe its comments to the Draft TEIR; and

WHEREAS, on September 8, 2017, the Tribe's legal counsel met with County staff to discuss the County's comments to the Draft TEIR, as required by Section 11.8.7(a) of the Compact, and resolution of the Dispute; and

WHEREAS, on January 25, 2018, the Tribe submitted the Final Tribal Environmental Impact Report (the "Final TEIR") to the County; and

WHEREAS, Section 11.8.7(a) of the Compact requires that, before the commencement of a project as that term is defined in the Compact, the Tribe shall enter into an enforceable written agreement with the County with respect to, among other things, the timely mitigation of any Significant Effects of the Project on the Environment; and

WHEREAS, the Tribe intends to make changes to the Hotel Expansion Project which will result in it consisting of an additional approximately 225 rooms rather than the 200 additional rooms originally planned; and

WHEREAS, the Tribe and the County had reached an understanding regarding an intergovernmental agreement as required under Section 11.8.7 of the Compact with regard to the Hotel Expansion Project, which understanding is affected by the Tribe's change in plans for the Hotel Expansion Project; and

WHEREAS, the Tribe and the County entered into a Memorandum of Agreement effective July 22, 2008 ("2008 Agreement") that established certain provisions and procedures applicable to future acquisitions of trust land; and

WHEREAS, the Tribe notified the County of its intent to submit an application to the United States to have certain lands contiguous to the Tribe's reservation taken into trust for the benefit of the Tribe ("Fee to Trust Application"); and

WHEREAS, the Tribe intends to work with Bureau of Indian Affairs of the U.S. Department of the Interior to complete an evaluation of the environmental impacts of the Fee to Trust Application ("Environmental Assessment") pursuant to the National Environmental Policy Act ("NEPA");

WHEREAS, the Parties intend that this Amendment will settle, compromise, and fully discharge the Dispute; and

WHEREAS, the County does not have legal authority to deliberate on, approve, deny, or otherwise exercise judgment regarding the Hotel Expansion Project on the Reservation; and

WHEREAS, the County is not deliberating on, approving, supporting, denying, or otherwise exercising judgment regarding the Hotel Expansion Project by entering into this Amendment; and

WHEREAS, the County and Tribe are committed to continuing their efforts to establish a respectful, long-term government-to-government relationship by meeting and conferring in good faith on issues of concern regarding the Hotel Expansion Project, Fee to Trust Application, and this Amendment.

NOW, THEREFORE, the Parties hereby agree as follows:

1. Definitions

The terms not defined elsewhere in the Agreement or this Amendment shall have the following meanings:

"Hotel Expansion Project" means the development, construction, and operation on the Reservation of all or any part of the project described in Section 2 of the Final TEIR as it is to be supplemented as further described in this Agreement, which includes, but is not limited to, the construction of approximately 225 additional hotel rooms, an outdoor swimming pool and lounge area, new meeting rooms, and the expansion of the banquet area, mezzanine transfer space, back of house space, and circulation space.

2. Significant Effect Mitigation

(a) Enforceable Provisions of Final TEIR

The Parties agree to make enforceable the Mitigation Measures identified in the Final TEIR for the Hotel Expansion Project, which is attached hereto as Exhibit A and incorporated herein by reference, and as it will be supplemented by the Supplemental Final TEIR as defined

below. The County has a particular interest, without limitation, in the following Mitigation Measures: 3.2-1 (Design Elements), 3.2-2 (Lighting Restrictions), 3.6-1 (GHG Reduction Measures), 3.8-2 (Water-Saving Fixtures), 3.8-3 (Well Monitoring), 3.13-1 (Construction Traffic Management Plan).

(b) Reclaimed Water Alternative

The Tribe will examine and implement the more feasible of the two options identified in Mitigation Measure 3.8-4.

(c) Mitigation Monitoring and Reporting

In accordance with Section 6(g) of the Agreement, the Tribe will prepare and provide to the County mitigation monitoring reports for all mitigation measures in the Final TEIR, as supplemented by the Supplemental Final TEIR.

3. Resolution of Dispute

(a) One-Time Payment Forgiveness

- (i) Forgiveness of Portion of One-Time Payment. The Tribe agrees to forgive \$1 million of the One-Time Payment due to be reimbursed to the Tribe under Section 5(e) of the Agreement, following approval of the Fee to Trust Application and upon the recordation of the final title opinion and county recordation of the warranty deed(s) of trust for said lands in trust by the United States for the benefit of the Tribe.

If at the time the One-Time Payment is due there has not been a final decision by the federal government on the Fee to Trust Application, then the obligation of the County to pay \$1 million of the One-Time Payment shall be suspended, and the County shall owe no interest on said \$1 million, until a final decision is issued.

- (ii) Remaining Reimbursement. The Parties agree to further discuss the obligation of the County to repay the remaining \$2.27 million of the One-Time Payment due to be reimbursed to the Tribe under Section 5(e) of the Agreement (the “Remaining Reimbursement”). In this Amendment the Tribe makes no promises or representations regarding forgiveness of any or all of the Remaining Reimbursement. The Tribe may, in its sole discretion, agree to forgive some or all of the Remaining Reimbursement, and if it agrees to forgive any further portion(s), it may do so in increments. So long as there are ongoing discussions to forgive the One-Time Payment, or any portion thereof, no interest will accrue on the unpaid portion of the Remaining Reimbursement.

(b) Transient Occupancy Tax In Lieu

(i) Past TOT In Lieu Payments. The Tribe agrees to guarantee the TOT In Lieu Payment, as provided in this Section. To effect this guarantee for the quarters ending December 31, 2016, March 31, 2017, June 30, 2017, September 30, 2017, December 31, 2017, March 31, 2018, June 30, 2018, September 30, 2018 and December 31, 2018, the Tribe shall pay the County \$770,015.33 no later than thirty (30) days after the Effective Date of this Amendment.

(ii) Future TOT In Lieu Payments. Commencing with the quarter ending March 31, 2020, if the Graton Mitigation Fund is insufficient to fully fund the TOT In Lieu Payment, assuming proportional distribution of Graton Mitigation Fund dollars into each payment category required under Section 5.1.4(iv) of the 2013 City MOU, the Tribe shall pay the County the difference between the amount required to fully fund the TOT In Lieu Payment, including the CPI adjustment required under Section 5(c) of the Agreement, and the amount actually paid from the Graton Mitigation Fund for that quarter, assuming proportional distribution of Graton Mitigation Fund dollars into each payment category required under Section 5.1.4(iv) of the 2013 City MOU. The County shall calculate the amount owed on a quarterly basis and the Tribe shall remit that amount within thirty (30) days of the County's written request.

(iii) Impact of Hotel Expansion Project. The Parties acknowledge and agree that the amount guaranteed under this Section will increase upon the opening of new hotel rooms contemplated by the Hotel Expansion Project in an amount proportional to the increased number of rooms, as required under Section 3(f) of the Agreement. Notwithstanding any provision of the Agreement, the guarantee provided under this Section is not subject to any reimbursement by the County.

(c) Charitable Contribution Under 2013 City MOU

Until the termination of the Agreement or until a court determines this Section is a violation of Section 4.2.2 of the 2013 City MOU, the Tribe agrees to designate the County as the recipient of 50% (fifty percent) of each recurring cash contribution required under Section 4.2.2 of the 2013 City MOU, which shall be adjusted by CPI as provided in Section 5.5 of the 2013 City MOU. The first designation under this Section shall be made as of the first distribution of Graton Mitigation Funds to the City after the Effective Date of this Agreement. The Tribe will make all reasonable efforts, including, if necessary, the meet and confer obligations of Section 11.2 of the 2013 City MOU, to ensure that the payments required by this subsection 3(c) are made. For the purposes of this provision, "reasonable efforts" shall not require the Tribe to initiate or engage in any arbitration or litigation. The County acknowledges that the City is not a signatory to this Amendment. If the City refuses to make the contributions to the County, the County may, at its own cost, pursue any action against the City, in pursuit of its own interest, provided that the County holds the Tribe harmless in any such action.

(d) No Further Amendments to 2013 City MOU

The Tribe agrees that it will not further amend the 2013 City MOU in any way that will have a financial impact on the County, the Agreement, this Amendment, or any other agreements with the County that may arise out of negotiations concerning the Project and the Hotel Expansion Project, without prior consultation with and written approval from the County.

(e) Release of County Claims Relating to 2013 City MOU

The County shall, and hereby does, fully, finally and irrevocably waive, release, and relinquish any and all claims of right or causes of action that it may now or hereafter have against the Tribe arising from or related to the Dispute. The County expressly acknowledges and agrees that all rights under Section 1542 of the California Civil Code are expressly waived. That section provides:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY.

4. Hotel Expansion Project

(a) Original TEIR.

The County and the Tribe acknowledge that in 2017 the Tribe published a Draft TEIR (“the Original Draft TEIR”) for the Hotel Expansion Project, which was envisioned at that time to consist of 200 additional rooms, and that the County had an opportunity to submit, and did submit, comments during the public comment period to the Original Draft TEIR. The Tribe took the County’s comments into account and subsequently published a Final TEIR (the “Original Final TEIR”). The County acknowledges that the Original Final TEIR adequately addressed all of the County’s concerns regarding potentially significant impacts of the 200-room Hotel Expansion Project on the off-reservation environment, and that the 200-room Hotel Expansion Project was expected not to have impacts on the County’s costs for law enforcement, fire protection, emergency medical services or any other public services to be provided by the County to the Tribe for the purposes of the Gaming Operation, including the Gaming Facility, nor to generate any need for expansion of programs designed to address gambling addiction or to have any effects on public safety.

(b) Supplemental TEIR.

The Tribe has now modified its plans and intends to proceed with an approximately 225-room Hotel Expansion Project. In furtherance thereof, the Tribe intends to issue a Notice of Preparation, a Supplemental Draft TEIR, and a Supplemental Final TEIR (collectively,

the “Supplemental TEIR Process”) to cover any differences in impacts on the off-reservation environment between the 200-room version and the 225-room version of the Hotel Expansion Project. The County agrees that its comments during the public comment periods of the Supplemental TEIR Process shall be limited to the delta between significant impacts on the off-reservation environment of the 200-room and 225-room versions of the Hotel Expansion Project, and that any demands from the County with regard to an Inter-Governmental Agreement under Section 11.8.7 of the Compact concerning the Hotel Expansion Project shall be limited to the delta between mitigation of impacts on the off-reservation environment of the 200-room version and the 225-room version, and on the delta between the two versions in the County’s expected costs as a result of the Hotel Expansion Project for: law enforcement, fire protection, emergency medical services, any other public services to be provided by the County to the Tribe for the purposes of the Gaming Operation, including the Gaming Facility, any need for expansion of programs designed to address gambling addiction, or effects on public safety.

5. Fee to Trust Application

(a) Fee to Trust Application Filing.

The Tribe has filed the Fee to Trust Application. The County and the Tribe agree to meet and confer to discuss the potential impacts of the application on the County, in accordance with this Amendment and the 2008 Agreement.

(c) Environmental Assessment.

An Environmental Assessment is being prepared for the Fee to Trust Application. The Tribe will provide the County a draft of the Environmental Assessment prior to submission to the federal government. The County and the Tribe agree to meet and confer to discuss how the Environmental Assessment or subsequent environmental document may propose to mitigate potential impacts of the Fee to Trust Application. The Tribe agrees to give meaningful consideration to the County’s comments in considering amendments to the Fee Trust Application and associated Environmental Assessment or subsequent environmental document.

(d) Additional Comments.

Notwithstanding the meet and confer process above, the County reserves the right to submit comments to the federal government on the Fee to Trust Application and NEPA compliance.

(e) Application of 2008 Agreement.

The Tribe and the County acknowledge that the 2008 Agreement includes provisions that apply to future Tribal commercial development projects, as defined therein, including but not limited to environmental review and negotiation of an intergovernmental mitigation agreement.

(f) Intergovernmental Agreement.

Irrespective of whether an intergovernmental mitigation agreement is required under the 2008 Agreement, the County and the Tribe agree to commence diligent and good faith negotiations and use their respective best efforts, including meeting and conferring, to execute an intergovernmental mitigation agreement for the Fee to Trust Application.

6. Effective Date

This Amendment shall not become effective unless and until the following events have occurred:

(a) this Amendment has been approved by the Board of Supervisors of the County, approved as to form by County Counsel and executed and delivered by the County; and

(b) this Amendment has been approved by the Tribal Council and the General Council of the Tribe, approved as to form by legal counsel to the Tribe, and executed and delivered by the Tribe.

7. Dispute Resolution

In order to foster good government-to-government relationships and to resolve any disputes in a productive manner, the Parties agree that any disputes arising pursuant to this Amendment shall be subject to the dispute resolution provisions set forth in the Parties' Intergovernmental Mitigation Agreement dated October 23, 2012.

8. Waiver of Sovereign Immunity

Section 13 of the Agreement is hereby removed and replaced with the following language: Pursuant to General Council Resolution No. ___, and subject to the provisions of this Section, the Tribe expressly and irrevocably waives sovereign immunity (and any defenses based thereon) in favor of the County, but not as to any other person or entity, as to any dispute which specifically arises under the Agreement and this Amendment and not as to any other action, matters or disputes. The Tribe does not waive its sovereign immunity with respect to (i) actions by third parties, or (ii) disputes between the Tribe and the County which do not specifically arise under the Agreement or this Amendment. The Tribe further agrees that exhaustion of administrative remedies, including before any tribal court, shall not be required prior to proceeding to court action under Section 12 of the Agreement.

9. Review by the Department of the Interior

The Tribe shall submit this Amendment to the United States Department of the Interior for either: (a) approval pursuant to 25 U.S.C. § 81; or (b) a written response that this Amendment does not require approval under 25 U.S.C. § 81. The Tribe shall undertake reasonable efforts, in consultation with the County, to secure approval or written response. The County, at its sole discretion, has the right to withdraw its support for the Amendment if it is not submitted to the Department of the Interior pursuant to this section within ten (10) days following the Effective Date. If the Department of Interior determines that portions of this Amendment violate 25 U.S.C. § 81 or are otherwise invalid, the severability provisions set forth in Section 11 of the Agreement shall govern.

10. Effect of Amendment

Except to the extent the Agreement is specifically amended or supplemented hereby, the Agreement, together with exhibits is, and shall continue to be, in full force and effect as originally executed, and nothing contained herein shall, or shall be construed to modify, invalidate or otherwise affect any provision of the Agreement or any right of the County or the Tribe arising thereunder. The Agreement terms are further fully integrated into this Amendment.

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IN WITNESS WHEREOF, the Parties have executed this Amendment as of the date set forth above.

Date: _____, 2019

SONOMA COUNTY, CALIFORNIA

By: _____
David Rabbitt
Chairperson of the Board of Supervisors

Date: _____, 2019

APPROVED AS TO FORM BY COUNTY
COUNSEL

By: _____
Bruce Goldstein
County Counsel

Date: _____, 2019

FEDERATED INDIANS OF GRATON
RANCHERIA

By: _____
Greg Sarris
Chairperson

Date: _____, 2019

APPROVED AS TO FORM BY LEGAL
COUNSEL FOR THE TRIBE

By: _____
James E. Cohen
Maier Pfeffer Kim Geary & Cohen LLP
Attorneys for Federated Indians of
Graton Rancheria