



September 30, 2008

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Honorable Philip N. Hogen  
Chairman  
National Indian Gaming Commission  
1441 L Street, NW, 9<sup>th</sup> Floor  
Washington, DC 20005

Dear Chairman Hogen:

The California State Association of Counties (CSAC) submits this letter on behalf of all 58 California Counties which share concerns regarding the impacts of federal "Indian Lands Determinations" on local governments. These comments follow your request to Indian tribes and other "interested parties" to respond to four questions posed by the National Indian Gaming Commission (NIGC) with respect to Indian Lands Determinations made under the after-acquired lands provisions pursuant to the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. Section 2719.

## INTRODUCTION

At the outset, CSAC reaffirms its absolute respect for the authority granted to federally recognized tribes. CSAC also reaffirms its support for the right of Indian tribes to self-governance and its recognition of the need for tribes to preserve their tribal heritage and to pursue economic self-reliance. CSAC further recognizes the injustices tribes have faced and the unique history of many California tribes in facing termination of their sovereign status and loss of tribal lands.

However, it is now apparent that the delicate balance between federal, state and tribal rights that was struck to further tribal economic development in IGRA's enactment has become upset. Tribal gaming has grown from a \$100 million venture when IGRA was enacted, to over a \$26 billion enterprise today, and tribes and their development partners are now looking far from traditional tribal lands to open casinos in the most lucrative markets. In addition, existing laws fail to address the off-reservation impacts of tribal land development, particularly in those instances when local land use and health and safety regulations are not observed by tribes in their commercial endeavors. Unfortunately, the role of County government, and the impact on CSAC members, on federal gaming decisions, particularly critical Indian Land Determinations, is often overlooked. Particularly in California, with its history of termination and restoration of tribes, the Indian Lands Determination is often the lynchpin of a gaming proposal coming to fruition. The impacts of these decisions on local government are therefore important to consider as regulations are developed and implemented in this area.

### A. The Role of County Government

Every Californian, including tribal members, depends upon county government for a broad range of critical services, from public safety and transportation, to waste management and disaster relief. Counties are the largest political subdivision of the state having corporate authority and are vested by the Legislature with the powers necessary to provide for the

health and welfare of the people within their borders. Counties are responsible for a countywide justice system, social welfare, health and other services totaling nearly 700 programs, including the following:

- |                             |                                     |                   |
|-----------------------------|-------------------------------------|-------------------|
| * sheriff                   | * elections & voter services        | * jails           |
| * public health             | * roads & bridges                   | * flood control   |
| * fire protection           | * welfare                           | * indigent health |
| * family support            | * child & adult protective services |                   |
| * substance abuse treatment | * probation                         |                   |

Most of these services are provided to residents both outside and inside city limits. Unlike the exercise of land use control, such programs as public health, welfare, and jail services are provided (and often mandated) regardless of whether a recipient resides within a city or in the unincorporated area of the county. These vital public services are delivered to California residents through their 58 counties. It is no exaggeration to say that county government is essential to the quality of life for over 35 million Californians. No other form of local government so directly impacts the daily lives of all citizens. In addition, because county government has very little authority to independently raise taxes and increase revenues, the ability to adequately mitigate the off-reservation impact of large-scale reservation gaming endeavors is critical.

#### B. Impacts on County Government

There is not yet a definitive study on the impacts of gaming on local communities. However, in those counties that are faced with large gaming projects, it is clear that the impacts on traffic, water/wastewater, the criminal justice system and social services are significant. For non-Indian casinos it is estimated that for every dollar a community collects from gambling-related taxes, it must spend three dollars to cover new expenses, including police, infrastructure, social welfare, and counseling services.<sup>1</sup> As local communities cannot tax Indian operations, or the related hotel and other services that would ordinarily be a source of local government income, the negative impact of such facilities can even be greater.

As often the key political entity and service provider in the area, with a larger geographic perspective and land use responsibility, county involvement is critical to insure that the needs of the community are met and that any legitimate tribal gaming proposal is ultimately successful and accepted. Further, local government is therefore not only an interested party to the outcome of the Indian Lands Determination but often has a unique understanding and/or resources related to tribal history in the area that could help inform the Indian Lands Determinations. Local government notice and involvement in the process is necessary both to help insure that all relevant information is before the decision maker and that, for projects that meet the Indian lands criteria, to maximize the potential for the project's long-term success.

#### C. CSAC Policy Bearing on Indian Lands Determinations

<sup>1</sup> *Cabazon, The Indian Gaming Regulatory Act, and the Socioeconomic Consequences of American Indian Governmental Gaming - A Ten Year Review* by Jonathon Taylor and Joseph Kalt of the Harvard Project on American Indian Economic Development (2005) at p. 9 (citing Sen. Frank Padavan, *Rolling the Dice: Why Casino Gambling is a Bad Bet for New York State* at ii (1994)). In 2003 CSAC took a "snapshot" of local impacts by examining information provided by eight of the then twenty-six counties (the only counties that had conducted an analysis of local government fiscal impacts) where Indian gaming facilities operated. The total fiscal impact to those eight counties was approximately \$200 million, including roughly \$182 million in one-time costs and \$17 million in annual costs. If these figures were extrapolated to the rest of the state, the local government fiscal costs could well exceed \$600 million in one-time and on-going costs for road improvements, health services, law enforcement, emergency services, infrastructure modifications, and social services.

CSAC policies that relate to the posed questions are attached at Exhibit A. In sum, CSAC supports Indian Land Determination procedures that 1) promote transparency in the determination process; 2) include notice and a meaningful opportunity to have the relevant comments of affected counties considered; 3) preserve the ability of counties to meet their governmental responsibilities, including the provision of health safety and welfare services; 4) restrict placing lands into trust outside of a tribe's legitimate historic land base; and 5) support the uniform application of regulations by the single agency best equipped to make the authorized determination.

## **RESPONSE TO NIGC QUESTIONS**

### **A. Inadequate NIGC Outreach**

As a preliminary matter, CSAC is extremely disappointed that despite repeated outreach efforts on these issues, the NIGC failed to seek responses to the posed questions from affected local county governments or their representatives. As mentioned above, in California, Indian Lands Determinations are often the key driver in gaming proposals. The lack of solicitation of comments from county governments on this issue reflect the continuation of what appears as a secretive decision making process that takes place without notice to or input from affected county governments. While consultation by NIGC with Indian tribes on these important policy issues is obviously critical, it is no less important to involve the other governmental entities that are most affected by the Indian Lands Determinations. The important role of local government consultation is recognized, and mandated, in various Executive Orders (see e.g., Exec. Order 13,132 (principles of federalism require consultation with local governments and deference to local concerns); Exec. Order 52,989 (conservation efforts require agencies to consult with local government to accommodate local interests) and should be an integral part of the process here as well.

### **B. Need for Single Agency Determinations to Promote Uniformity**

As exemplified in recent correspondence between the NIGC General Counsel and the Interior Department Solicitor in the Indian lands opinion involving the Poarch Band of Creek Indians, it is clear that the legal debate continues over which agency has legal responsibility to make Indian Land Determinations. The discord on this critical issue, 20 years after IGRA's enactment, does not inspire confidence by those most affected by these decisions and ultimately undermines the already faulty process. The fact that there is not a clear single government agency responsible for making these decisions compounds the problems of "reservation shopping" with the prospect of Indian Lands opinion shopping, and makes it that much more difficult for interested parties to participate in a process that is already less than transparent. If the parties themselves cannot clearly delegate authority to a single agency, the Department of Justice should be requested to issue a decision to resolve the matter.

CSAC has not taken a formal position as to which single appropriate agency should maintain the authority over Indian Land Determinations. However, it does appear that, on its face, the BIA has the subject matter expertise regarding tribal history and more extensive staff capability to take on these often fact intensive inquiries and appears better suited for carrying out a public process that involves local government participation. It also is compelling that the BIA, as the agency authorized to make fee to trust determinations, should be deciding questions regarding the characterization of Indian lands. At a minimum, BIA staff should be jointly involved in any NIGC Indian lands opinion.

C. CSAC Responses to NIGC Questions

With these underlying principles in mind, CSAC addresses below the questions posed by the NIGC's August 11 information request.

- 1) Is there any reason to doubt our current view that the NIGC, when making its own decisions pursuant to 25 U.S.C. §2719, should follow the substance of the Department's after-acquired land regulations?

*As noted above, CSAC does not take a position on the question of which agency has the appropriate legal authority to make dispositive Indian Lands Determinations. Whatever the outcome of the dispute, and CSAC reserves the right to submit input at a later date on the issue in the appropriate forum, the key consideration on this questions is that there is uniform application of a single set of rules and procedures. CSAC has previously commented on the Department's regulations and while not in agreement with all of the provisions, supports a single standard governing Indian Lands Determinations. As noted above, CSAC also strongly supports a process, currently missing, that explicitly provides for notice to, and an opportunity of input from, local government on these decisions to help inform the agency on the application of the utilized standards.*

- 2) Should the NIGC write a bulletin to inform tribes and the public how it interprets and implements 25 U.S.C. §2719, especially in light of the Department's regulations?

*CSAC supports the use of a bulletin in conjunction with a searchable website that provides the public information on recent decisions as well as all prior decisions interpreting and implementing 25 U.S.C. §2719 by both the NIGC and BIA.*

- 3) Should the NIGC issue its own regulations to govern its decisions under 25 U.S.C. §2719? If so, should they be identical in substance to the Department's regulations?

*Regulations should be uniform and jointly issued.*

- 4) If the NIGC undertakes a rulemaking under 25 U.S.C. § 2719, are there any subjects or issues that were not covered by the Department's regulations that should be covered in NIGC regulations? Should the NIGC promulgate procedural regulations that would govern the process for developing Indian lands opinions and determinations at the NIGC?

*As stated above, any rulemaking should be done jointly with BIA. CSAC strongly supports the development of procedural regulations which provide for meaningful involvement by interested parties and the public. In particular, regulations should address an area omitted in the BIA's section 20 regulations published on May 20, 2008, related to how information relevant to Indian Land Determinations will be gathered and evaluated. Specifically, regulations should provide for a meaningful opportunity for local government and the public to have notice and to comment on Indian land determination requests. For example, the current process whereby the NIGC relies on procedures, such as gaming ordinance approval, to make Indian Land Determinations gives the appearance of a back door decision making process (often done under unreasonable time constraints), without affording any notice to other affected parties. A transparent process whereby parties have notice and a meaningful opportunity to provide comments based upon clear*

*and uniformly applied standards should be the cornerstone of the Indian Lands Determination procedure.*

*Substantively, by example, one area for further development is the need for greater detail to define the term "significant historical connection" in 25 C.F.R. §294.2. This important criterion for an Indian Lands Determination for restored lands is ambiguous and never received the benefit of public comment. Similarly, a working specific definition of what constitutes "subsistence use in the vicinity of the land" needs further development in the context of restored lands requests as it currently appears to lack any real limitations. The regulations should define this term in accordance with current precedent that requires continuous and significant use of the area for subsistence use.*

Thank you for your consideration of CSAC's comments. We hope to be included as part of a future dialogue of how these critical issues should be resolved. Please do not hesitate to contact me to discuss these or related issues.

Sincerely,



Mike McGowan  
Supervisor, Yolo County, California  
Chair, California State Association of California Indian Gaming Working Group

Attachment

cc: The Honorable Dianne Feinstein, United States Senate  
The Honorable Barbara Boxer, United States Senate  
California Members of the United States House of Representatives  
The Honorable Arnold Schwarzenegger, Governor, State of California  
David L. Bernhardt, Department of the Interior  
George Skibine, Department of the Interior  
Penny Colman, Esq., National Indian Gaming Commission