



STATE OF CALIFORNIA  
OFFICE OF THE ATTORNEY GENERAL  
BILL LOCKYER  
ATTORNEY GENERAL

November 28, 2000

John I. Sansome, County Counsel  
County of San Diego  
Office of County Counsel  
County Administration Center  
1600 Pacific Highway, Room 355  
San Diego, California 92101-6005

Re: Tribal-State Class III Gaming Compact & San Diego County Indian Gaming Proposals

Dear Mr. Sansome:

Thank you for your correspondence of November 14, 2000, discussing various environmental concerns raised by the Indian gaming projects now under development in San Diego County. You have raised issues of significant concern to all citizens of California, Indian and non-Indian alike. I would like to take this opportunity to address your major points, and to describe the process by which these issues must ultimately be resolved. I have had an opportunity to orally present my view of these issues to the Rincon Tribe.

**By Executing the Compact, the Tribes Promised, as Sovereigns,  
to Implement the Policies and Purposes of NEPA and CEQA  
through their Environmental Protection Ordinances.**

As you know, in Compact section 10.8.1 signatory tribes have promised, consistent with their governmental interests, to make a good faith effort to incorporate the policies and purposes of both the National Environmental Policy Act (NEPA) and the California Environmental Quality Act (CEQA) in their tribal environmental protection ordinances. Although the Compact does not imply that tribes' environmental protection processes must be identical to those followed under either statute, because both NEPA and CEQA are primarily procedural statutes, the environmental procedures employed by tribes are crucial. It is the position of my office that the Compact's reference to NEPA and CEQA means, at a minimum, that tribes have agreed, through procedural mechanisms established in their environmental protection ordinances, to take reasonable steps to identify the significant off-reservation environmental impacts of their projects, consider feasible mitigation measures and project alternatives, and provide meaningful

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opportunities for public comment at critical points during their environmental review process. In addition to these procedural aspects, the core policies and purposes of CEQA include a substantive mandate to implement feasible mitigation measures and project alternatives that have been identified during the review process. Because the direct application of NEPA and CEQA to tribal projects, absent express congressional authorization or tribal consent, would be inconsistent with tribes' unique status and sovereign interests, the Compact does not provide for direct application of NEPA or CEQA to Indian lands. (See, e.g., *California v. Cabazon Band of Mission Indians* (1987) 480 U.S. 202.) The promises made by the tribes in the Compact, including the promise to make a good faith effort to meet the policies and purposes of NEPA and CEQA, were an exercise of tribal sovereignty, and an expression of tribal governmental interests in negotiating a class III gaming compact without compromising the right to self-government.

Your discussion of the current encroachment permit issue that has arisen between the County and the Rincon San Luiseno Band of Mission Indians (the Rincon Band) underscores the Compact's purpose to ensure tribal environmental reviews that are consistent with the policies and purposes of NEPA and CEQA. Otherwise, as you suggest, meaningful cooperation between tribes and local governments to mitigate environmental impacts, as is contemplated by section 10.8.2 of the Compact, will be impossible. However, it should also be noted that the comments issued by my Office on the Rincon Band's environmental evaluation did not specifically address the issuance of encroachment permits or the County's authority to issue them. I do not view the comment letter as determinative of whether the County of San Diego may properly issue an encroachment permit, or whether the County has satisfied its obligations under CEQA. These determinations are, as an original proposition, within the jurisdiction and discretion of the appropriate County authorities.

**Any Compact Enforcement Proceedings on Behalf of the State  
Must be Originated by Governor Davis**

The comment letters prepared by San Diego County's Chief Administrative Officer, Walter Ekard, and your correspondence to me, raise significant questions concerning whether the environmental protection provisions of the Compact have been breached and, if so, whether I will take steps to enforce the Compact under my own constitutional authority. While I appreciate your desire for prompt action to address your concerns, I, as Attorney General, do not have independent authority under Article V, section 13 of the California Constitution, or Government Code sections 12511 and 12600 through 12612, to enforce the Compact. For the reasons outlined below, the determination of whether the Compact has been breached, and whether enforcement action is appropriate, are questions that lie within the province of the Governor's Office.



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The purpose of the comments issued by my Office relating to the Rincon Band's Environmental Evaluation and the San Pasqual Band of Mission Indians' Environmental Assessment was to express a concern that those documents did not reflect environmental reviews that appeared fully consistent with the policies and purposes of NEPA and CEQA. Whether the tribes have in fact made a good faith effort to conduct an environmental review that is consistent with those policies and purposes under the Compact is another question.

The California Constitution invests the Governor with authority to represent the State in compact negotiations with Indian tribes conducted under the Indian Gaming Regulatory Act (IGRA). (Cal. Const., art. IV, § 19; 25 U.S.C. § 2710, subd. (d).) Furthermore, the California Constitution also vests in the Governor "[t]he supreme executive power of this State" (Cal. Const., art. V, § 1), which the California Supreme Court has ruled includes the ultimate authority to determine the public interest. (See *Deukmejian v. Brown* (1981) 29 Cal.3d 150, 158.) Under these constitutional principles, it is for the Governor, not the Office of the Attorney General, to authoritatively identify and define the State's interest in its relationship with the tribes — a relationship that is in many respects similar to relations between national governments, consistent with the intent of the drafters of IGRA. For these reasons, any determination that a tribe has breached a promise contained in the Compact must be made in the first instance by the Governor.

**Resolution of Issues Concerning  
 Gaming Device Licensing Authority Under the Compact  
 May Affect the 12-month Deadline for Operation of Licensed Gaming Devices**

Your letter makes reference to the Compact's provision that failure to have authorized gaming devices in operation within a year from the issuance of licenses will result in cancellation of the tribe's licenses. I understand that the convergence of the one-year license cancellation period established by Compact section 4.3.2.2, and the Gaming Device allocation draw conducted on May 15, 2000, is a major factor driving the scope and timing of the environmental review processes that are of particular concern to San Diego County, and that relaxation of this constraint would clearly be of great benefit to many concerned parties. However, as you are aware, this provision of the Compact was voluntarily agreed to by both the Governor and the signatory tribes, and participation in an allocation draw by a number of tribes was a voluntary, sovereign act over which the State exercised no control. Because I have no direct role under federal or state law to negotiate or renegotiate Compact language, a remedy for this problem may ultimately be available only through further negotiations between the tribes and the Governor.

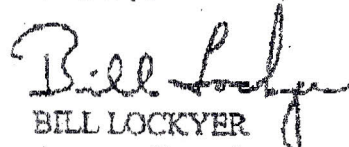
Consistent with the presentation of my views above, I am forwarding a copy of this correspondence, and your own, to the Governor, for his reference and information. I am also providing a copy to the Rincon and San Pasqual Tribes for their information.

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Thank you again for your thoughtful presentation of these issues, and for your attention now.

Sincerely,

  
BILL LOCKYER  
Attorney General

cc: Honorable Gray Davis (w/Enclosure)  
Governor of the State of California  
  
John Currier, Tribal Chairman (w/Enclosure)  
Rincon San Luiseno Band of Mission Indians  
  
Alan Lawson, Chairperson (w/Enclosure)  
San Pasqual Band of Mission Indians