Stand Up For California!

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September 30, 2008

Chairman Phillip Hogen
National Indian Gaming Commission
1441 L. Street, NW
Washington Dc 20005
Faxed 202-632-7066

RE: Comment as an Interested Party on after-acquired lands provision of the Indian Gaming Regulatory "Act 25 USC Section 2719 – Department of the Interiors new regulations (73 FR 29354) Deadline September 30, 2008.

Dear Chairman Hogen:

Thank you for this opportunity to make comment as an 'Interested Party' on the proposed after-acquired land provision of the Indian Gaming Regulatory Act (IGRA). After-acquired lands are a serious issue in California which presents a significant fiscal and environmental impact to local governments and communities of citizens. Moreover, restored lands determinations affect the states police powers over the management of the growth and location of tribal gaming.

The request for comment appears necessary in light of the expiration of the Memorandum of Understanding (MOU) between the Bureau of Indian Affairs (BIA or Department) and the National Indian Gaming Commission (NIGC or Commission) to work in cooperation. Further the recent exchange of correspondence between the Solicitor David Bernhardt of the Department of the Interior and Acting General Counsel Penny Coleman of the NIGC has raised a few red-flags in the minds of many as to: (1) who has what authority, (2) who or what triggers a land determination and (3) do the Department's new regulations apply to the NIGC?

> **Is there any reason to doubt the NIGC's current view that the NIGC, when making its own decisions pursuant to 25 USC section 2719, should follow the substance of the Department's after-acquired lands regulations?**

Certainly the substance of the Department's new rules provides guidance to the NIGC in making after-acquired land determinations. It is undisputable that NIGC has statutory authority to make final agency decisions when (1) presented with a tribal gaming management contract (2) a tribal gaming ordinance or (3) defined enforcement actions. Unquestionably, the determination of legal land status for gaming is interwoven into these actions. However, IGRA while providing the Commission with statutory authority to make final agency actions in the regulation of gaming did not provide NIGC with

authority for a final agency action on the determination of Indian lands. Nor did it provide a transparent process in which affected or interested parties can participate in the development of an Indian lands opinion.

In most circumstances, states, local governments and other affected parties have "no idea" that a land opinion has been requested, is being prepared or whether it will carry the weight of a final agency action. More likely, the final agency action has simply wrapped an in-house attorney opinion in and around it. There is no process, window of review or deadline for comment included in IGRA in the determination for eligible lands for gaming.

IGRA's only remedy, when there is a disagreement with an NIGC determination authorized by statute as a final agency action, is to appeal to the appropriate Federal district court pursuant to chapter 7 of title 5. (Sec. 2714- Judicial review) This is immediately an adversarial process which provides no opportunity to arrive at a mutually beneficial determination of an appropriate siting of a casino with affected parties such as states, host local governments or surrounding communities of citizens.

In California the NIGC has exercised authority in determining if a tribe meets the criteria of a "restored tribe" or "restored lands" at the same time. These are two separate questions that unduly affect states police powers, local government and the surrounding community of taxpayers. Just because NIGC implements IGRA and regulates gaming it does not necessarily have the authority to opine on the nature of an acquisition. A lands opinion which determines whether the acquisition legally fits into the definition of after acquired land and thus is subject to a two-part determination or an exception. NIGC has helped create a problem, as evidenced by the fact that there have only been three gubernatorial concurrences in the last 20 years and more than 35 instances of tribes acquiring land through exceptions in IGRA.

While there may not be reason to doubt the NIGC's current view of following the Department's after-acquired lands regulations, there is reason to doubt all future views of following the Department's after-acquired lands regulations. The Commission is made up of "political appointees". While Commissioners may be men and women of integrity, politics and personal agendas have had an influence on the regulation of gaming and determination of eligible lands in California. Thus there is the inevitable potential to change the NIGC's current view with each newly appointed Commissioner.

> **Should the NIGC write a bulletin to inform tribes and the public how it interprets and implements 25 USC Section 2719, especially in light of the Department's regulations?**

Since NIGC must opine on eligible lands for gaming prior to approving or denying a gaming ordinance, a management contract, or a determination for eligible lands for gaming for an enforcement action, a **bulletin** detailing 'how NIGC intends to interpret and implement 25 USC Section 2719 to inform the public and tribes of NIGC guidelines would be helpful. Additionally, make clear when the lands determination *is* wrapped into

a final agency action, and when it *is* an in house attorney opinion. Arguably, such a **bulletin** could be interpreted by some as an underground regulation. Nevertheless, the guiding principle of a bulletin would at the very least, make clear there is a decision-making process based upon objective criteria.

California over the last several years has witnessed Tribes acquiring land under the pretense of housing, a church, a medical center, a sports and recreation field, a fire station and community center, open space never to be developed or lands for future generations. It appears that in some instances Tribes have intentionally circumvented the scrutiny of the Office of Indian Gaming Management in order to avoid controversy and delay in placing land into trust. Land into trust applications for these types of activities fail to address the intense impacts and accelerated growth created by casinos. This process for casino developments or ancillary developments to enhance existing casinos has been dubbed, "*bait and switch*".

Once land is in trust tribes have sought after a more **favorable forum** for the determination of lands eligible for gaming. The focus of the NIGC on the development of tribal gaming has provided this favored forum. The NIGC's responsibilities are two-fold and convey the conflicting obligations of (1) assisting tribes with the establishment and operation of a gaming facility while at the same time (2) providing limited regulatory oversight. Decisions by the NIGC have been made without an open or transparent process.

Thus, the NIGC finds itself embroiled in difficult, protracted and adversarial litigation. The States of Iowa, Nebraska, and County Governments in California and elsewhere are challenging the integrity of the decision-making process of the NIGC. The very integrity of the NIGC decision making process is currently being questioned by the Department.

Should the NIGC issue its own regulations to govern its decisions under 25 USC section 2719? If so, should they be identical in substance to the Department's regulations?

USC 25 Section 2719 details the many exceptions for establishing casinos on after acquired lands. In most instances, tribes that meet these exceptions are landless and must submit an application for a fee to trust transfer of after acquired lands. The NIGC has no decision-making role in the Department's process (CFR 151.10 and CFR 151.11) for establishing after-acquired lands in trust. This raises numerous complex questions over the authority of NIGC to make a decision if Indian lands qualify as restored or initial reservation.

Where in IGRA is the NIGC vested with statutory authority to re-classify lands previously taken into trust for other purposes, authorize gaming by circumventing the Office of Indian Gaming Management in the establishment of a casino on after acquired lands? IGRA does not authorize the NIGC to *second-guess* all after acquired lands transferred into trust by the Secretary? Section 2719 (c) states:

> "Nothing in this section shall affect or diminish the authority and responsibility of the Secretary to take land into trust."

Call it common sense, or linear thinking, in the circumstances of determining if after acquired lands meet an exception for gaming under IGRA it is logical that the Secretary of the Interior is in the best position and has the greatest expertise since it is the Secretary who has initiated the original action, not the NIGC. Just because NIGC implements IGRA and regulates gaming, it should not be able to circumvent the two-part determination, thus, re-classifying lands to meet an exception. The NIGC can only offer an in house attorney opinion on Indian lands.

- This implies a necessary collaboration with the Department, states, host local governments and affected communities of citizens on any Indian land determination.

If the NIGC undertakes a rulemaking under 25 USC section 2719, are there any subjects or issues that were not covered by the Department's regulations that should be covered in NIGC regulations?

The Department's new regulations approach after-acquired lands for gaming as part of a transparent process of a land acquisition under the authority the Indian Reorganization Act (IRA). However, the final determination of lands eligible for gaming is made as an administrative decision at the very end of a fee-to-trust process. Inasmuch as, the overall process of the environmental and fiscal impacts of the transfer of land is an open process, the administrative decision lacks transparency with regards to the determination of a restored tribe and restored lands or an initial reservation.

To Chairman Hogen's credit, in 2006, letters were sent to the State of California asking for assistance in making land determinations for three Tribes with extremely controversial applications: (1) The Ione Band of Miwok, (2) the Federated Band Indians of the Graton Rancheria and (3) the Greenville Rancheria of Maidu Indians. This was the first time the State of California was alerted and invited to be involved in a land determination process.

Stand Up For California! respectfully requests that the NIGC continues to alert states, and gives significant consideration to adding host local governments, nearby Indian Tribes and the affected communities of citizens to the mailing of pending determinations asking for assistance in making land determinations.

Should the NIGC promulgate procedural regulations that would govern the process of developing Indian lands opinions and determinations at the NIGC?

This is a very good question which raises additional complicated jurisdictional questions that must be given considerable thought and legal review. Regulations are created and used by executive agencies to "clarify" the intent and scope of federal statutes, which an agency is charged with administrating or enforcing. Properly speaking, regulations are

not law, but rules and regulations have the full force and effect of the law. An implementing regulation on the process of developing Indian lands opinions must be crafted carefully to ensure that it does not expand upon the limited powers for this activity vested in the Commission by IGRA.

It is inexcusable that the NIGC continues to make decisions regarding the applicability of a section 20 exception without a formal process or standard. Moreover, the dispute between the NIGC and the Department of the Interior highlights the political vacuum that exists where there has been and continues to be ambiguity and confusion. The record, litigation and recent Congressional hearings make clear that the exceptions are swallowing the rule, as numerous tribes are now seeking to avoid the two-part test and to establish casinos over the objection of states and communities. Local communities nationwide are upset and mistrustful regarding how these exceptions are being applied, which is typically by cutting communities out of the process.

Conclusion:

IGRA, as a law is not tribal property; it is intended to create a balance between tribal rights to conduct gaming and rights of the state and the community not to have gaming established over their strong objections. Creating new or re-classifying Indian lands for the sole purpose of the establishment of a casino was not the intent or spirit in which IGRA was written, debated or enacted.

- Recognition between the NIGC and the Department over each others authority.
- Recognition over the broad public policy issues necessary to develop a formal process setting standards to ensure fair, objective land determinations.
- Provide access to the process through notification to states and affected parties when a land determination is eminent.
- A careful promulgation of implementing regulations of the specific statutes that authorize the final agency actions of the NIGC.

Once again, thank you for the opportunity to make a comment on an issue vital to all citizens of California.

Sincerely,

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