Northern California Counties Tribal Matters Consortium

November 27, 2006

George Skibine, Director
Office of Indian Gaming Management
Office of Deputy Assistant Secretary
Policy and Economic Development
1849 "C" Street, NW
Mail Stop 3657-MIB
Washington, D.C. 20240

RE: Comments on Proposed Rules Regarding Gaming on Trust Lands Acquired After October 17, 1988 (25 CFR 292; 71 Fed. Reg. 58769 (Oct. 5, 2006)

Dear Mr. Skibine:

The Northern California Counties Tribal Matters Consortium ("Consortium"), a collaboration between Napa, Solano and Sonoma counties, provides the following comments to the Proposed Rule on Gaming on Trust Land Acquired After October 17, 1988 (71 Fed. Reg. 58769-58776 (October 5, 2006)). The Consortium welcomes the proposed rules as an initial effort to bring some consistency to the gaming trust acquisition process which has operated without such administrative direction since the Indian Gaming Reform Act's (IGRA's) enactment in 1988.

The Consortium is a new and growing organization founded by northern San Francisco Bay Area county governments, based upon the understanding that large-scale gaming projects have significant local and regional impacts. The Consortium recognizes that, to successfully address the projects and related off-reservation impacts, there must be a collaborative effort involving, at a minimum, county government and affected tribes. The Consortium's Policies reflect, consistent with the spirit of the proposed rules, that deference should be paid to tribal governments that have significant demonstrated ties to an area and that have worked with other governments to address development concerns.

In Northern California, a growing number of tribal entities are attempting to acquire land, seek trust status, and advance development proposals for casinos and other uses in locations based solely upon market appeal. Some tribes are attempting to develop land without regard to current reservation location or the existence of historic or other significant ties to a chosen location. The Consortium was formed, in part, to address these challenges. With respect to the issues raised in the proposed rules, the following Consortium Policies apply:

* The Consortium is opposed to any federal fee-to-trust request, for gaming purposes, on behalf of a tribe that lacks significant, long-term and documented ties to an area in the county where the trust land acquisition or development is proposed.

* The Consortium is committed to working with tribes that have such ties on a government-to-government basis to consider development proposals within the Consortium policy framework.

* The Consortium members are prepared to work with tribes to insure that county-tribal agreements will fully mitigate environmental impacts of proposed projects and that there will be guarantees of substantial compliance with county ordinances, zoning and environmental policies through an enforceable memorandum of understanding or similar agreement.

Consistent with these policies the Consortium respectfully offers the comments that follow.

I. CONSULTATION

The Consortium's overriding concern is that the incremental steps the proposed rules take to require consultation with local government on critical gaming-related trust decisions are wholly inadequate. To date, state and local governments have generally been left out of the consultative process regarding critical federal Indian gaming decisions. This failure to include the jurisdictions that are most affected by tribal development as a partner in the process has served to undermine IGRA's goals of promoting tribal economic development by creating vigorous opposition to gaming proposals and, has in part, led to legislation to restrict "reservation shopping" (S. 2078 - McCain) and (H.R. 4893-Pombo). Both measures included provisions that supported consultation with local governments. H.R. 4893 went as far as to require a restored or landless tribe, as a condition for gaming, to enter into a memorandum of understanding with the county government to address gaming impacts.

As your July 27, 2005 testimony at the Department of Interior Oversight Hearing before the Senate Committee on Indian Affairs revealed, particularly in California, restored land determinations are the principal mechanism tribes have and are using to apply to take land into trust for gaming purposes. Since your appearance before the Committee, the number of pending trust land determinations under the section 20 exceptions have more than tripled. Decisions of whether land qualified for restored status were being made both by the NIGC and BIA, essentially in secret. Counties were left in the dark without notification that such an application was under consideration much less a real opportunity for input. It is imperative that whatever rules are adopted that they apply to both the NIGC and BIA, and that a clear process is set out with a meaningful opportunity for notice, comment and consultation is included as part of these critical decisions.

One way to extend consultation to the restored lands and other IGRA exceptions determination is to incorporate consultation provisions similar to section 292.19 (with the suggested revisions) into subpart B of the rules. Such consultation with local governments not only makes practical sense but is compelled by Executive Order 13352 (August 26, 2004) in which the Department of the Interior is ordered to promote cooperative actions by including local participation in federal decision making and to promote collaboration among Federal, state, local and tribal governments. The proposed rules represent an important opportunity to create real consultation between all affected parties regarding gaming on "after-acquired" land and ultimately are likely to lead to more successful projects. As drafted, however, the rules are inadequate to effect real change or meaningful consultation. What is needed to fully implement IGRA's intent and Executive Order 13352 is a shift of paradigm within the agency that truly views state and local governments as essential partners in the administrative process.

Despite some references to "consultation" in the proposed rules, meaningful inclusion has not occurred. For example, the proposed rules were subject to a set of hearings across the country to obtain input from tribes. Local governments were neither notified of the hearings nor invited to share their views. Similarly, as discussed below in comments to section 292.19, although the proposed rules purport to offer a "consultation" process, as part of the two-part determination for after-acquired land, in reality, as currently drafted, local government is relegated to a role of, at best, commenter. With respect to determinations regarding restored lands and other IGRA exceptions, local government are not even afforded notice much less a consultation role. As stated, incorporation of revised section 292.19 set of consultation procedures would help cure the current deficiencies.

The proposed approach also is inconsistent with the growing appreciation that for gaming proposals to be successful and accepted, the communities that are

forced to address and live with the impacts must be included as part of the process and have the opportunity to enter into judicially enforceable agreements with tribal governments. This has been recognized both in recent California compacts as well as the referenced proposed federal legislation. The proposed rules therefore should be redrafted, following a concerted effort to obtain input from local and state government, to reflect an integrated meaningful role for these government entities.

II. PROCEDURAL REQUIREMENTS

Regulatory Planning and Review

The lack of appreciation for the local impact of tribal gaming facilities is also reflected in the BIA's determination that the proposed rules are: 1) not "a significant regulatory action"; 2) do not trigger an Unfunded Mandates Act statement; and 3) are not entitled to a Federalism Assessment. The basis for an OMB bypass for the Regulatory Planning and Review is the determination that the rule will not have "an annual economic effect of $100 million or adversely affect . . . the environment or other units of government." The stated rationale for this is that the number of requests to conduct gaming under the two part test are small and only "two applications for year qualify and have been approved to operate a gaming establishment on trust land under the general exceptions . .." As discussed below, the Regulatory Planning Review bypass, Unfunded Mandates Reform Act rejection and Federalism Assessment waiver are not supported by the realities of the impacts of tribal gaming and of these proposed rules on local government.

Adverse Affect on the Environment

The justification for the bypass essentially ignores the reality of the gross regional and local impacts of large gaming facilities in rural and other areas that lack the infrastructure to support such projects. The Consortium experience, as well as review of environmental documents for currently proposed casinos, indicates that these facilities have significant environmental impacts often in the area of traffic, water, air pollution and wastewater. For example, it is estimated that a current proposed facility in Sonoma County, to be operated by a newly restored tribe, will generate almost 20,000 car trips per day creating gridlock on the central interstate Highway 101, as well as creating congestion on arterial County roads. The increased traffic essentially equates to the need for a new freeway lane. Special events at another Sonoma County casino in the rural Alexander Valley periodically turn a two lane state Highway into a parking lot creating congestion and safety hazards that cause local residents to spend hours to go a few miles to their homes.

In addition, a May 2006 report prepared for the California Attorney General, Gambling in the Golden State 1998 Forward by the California Research Bureau, documents the socio-economic impacts of large gaming facilities. The report cites

research which estimates that while there is 'a modest correlation between Indian casinos and [higher] county employment rates [there are also] . . . somewhat higher crime and higher rates of personal bankruptcy.' [p.3.] Aggravated assaults and violent crime were correlated with greater casino presence, as were increased expenditures (an additional $15.33 per capita) for law enforcement. [*Id.*] For Sonoma County alone this would equate to over $7 million dollars.

The Attorney General's Report also found that problem and pathological gamblers account for 10% of casino gambling patrons and the adults living within 50 miles of a casino had double the probability of problem or pathological gaming addiction. [p.4.] The report estimated that the annual cost of problem and pathological gambling in California was nearly one billion dollars. These costs were derived from increased crime, unpaid debts and bankruptcy, mental illness, substance abuse, unemployment and public assistance related to these gamblers. [p.5.]

Adverse Affect on Local Government

In addition to the local environmental impacts identified above, each application for trust land, if approved, substantially and directly affects the relationship between the Federal and State government and implicitly imposes costs on localities. This is caused by the removal of property from the regulatory and political jurisdiction of the state. This has a significant affect on local government revenues due to the inability to collect taxes on trust land. These tax revenues otherwise would have been used to support public services which are placed in even greater demand by the federal action to allow transfer of land from the state for gaming purposes.

The federal action also has important and sometimes far-reaching land use implications. As a general rule, these projects, particularly in unincorporated and/or rural areas, are not only incompatible with local land use planning but tend to have growth inducing impacts. This exacerbates the problem of a lack of a sufficient infrastructure in the locations where Indian casinos are often sited. The action taking these lands out of local land use jurisdiction therefore has secondary affects on the entire community.

Frequency of Applications

The further rationalization for bypass of the OMB review also minimizes the impact of the rulemaking by looking at historical averages rather than the current crush of gaming applications. According to the BIA, just prior to publication of the proposed rules there were 65 off-reservation gaming applications pending with almost 20 of those proposals located in California. As the BIA stated in its July 27, 2005 testimony before the Senate Committee on Indian Affairs, the restored lands

applications, regulated by the proposed rule, is now the most prevalent exception used to obtain post-1988 gaming lands.

Federalism Assessment and Unfunded Mandates

The Department is required to do a Federalism Assessment (pursuant to Executive Order 13132) and an Unfunded Mandates Reform Act analysis (under 2 U.S.C. 1531 et seq.), in part, to insure that the proposed regulations do not impose substantial costs on local governments. The Department has determined that such assessments are not required in this case because the rules do not impose costs on localities. The information provided above demonstrates that this conclusion is flawed and that full assessments should be required.

Due to the above, the decisions not to seek regulatory and planning review from the OMB to conduct a Federalism Assessment or to prepare an Unfunded Mandate statement should be reconsidered.

III. CONSORTIUM COMMENTS ON SUBSTANTIVE PROVISIONS

Subpart A - Comments on General Provisions

Section 292.2 (Definitions) – The definition of a number of terms in this section are inadequate to support the full consultative function that are required if these rules are to be effectively implemented. The Consortium offers the following comments on the terms listed below:

"Appropriate State and Local Officials" – The term is too vague with respect to 'local officials' and the proposed definition will result in unnecessary confusion and disparate application. The rules support the notion that local governments should be a meaningful partner in providing input on trust gaming decision and that contact with tribes should occur on a government-to-government basis. Consistent with this position, the term should be defined to include "all principal elected officials of municipal and county (or parish) governments, including but not limited to all mayors, Sheriffs, and Board of Supervisor chairs in all jurisdictions whose boundaries are located within a minimum of 25 miles of the proposed gaming establishment." As these trust decisions often have environmental and socio-economic impacts that extend far beyond 25 miles from a casino, the distance should be set as a minimum with an explicit requirement that any local government or tribe, beyond the 25 mile boundary, that is likely to be significantly affected must be sent notice.

"Contiguous" – Webster's Third New International Dictionary defines contiguous in terms such as touching along boundaries, adjoining with nothing

intervening, touching or connected throughout. The definition should not be altered to include parcels that are divided by waters, public roads, or rights of way. The definition should either more closely follow the dictionary definition by dropping the second sentence or should be deleted altogether.

"Reservation" - The Consortium has particularly serious concerns over the over broad nature of this definition. For example, the phrase "which has been acknowledged by the United States" is confusing and will result in unnecessary contests over its meaning. It is not clear who could acknowledge land as tribal on behalf of the United States or how such property status would be properly acknowledged. The definition further omits any requirement for Congressional or judicial determination. The rule also appears to allow for land to be considered "reservation" by treaty, whether or not the treaty was ratified by Congress, or by judicial determination, whether or not the State was a party to the litigation. As drafted, the term goes far beyond the definition for Indian Lands contained under IGRA and arguably exceeds the Secretary's authority in expanding the scope of the provision through the proposed definition. The Consortium recommends that the definition be deleted from the final rule.

"Surrounding Community" – Consistent with the principles and definition discussed above, this term should mean all governments - municipal, county and tribal, whose jurisdictional boundaries are within a minimum of 25 miles from the proposed gaming establishment.

"Gaming" – The rules should include a definition of this word that, as in many of the California compacts, recognizes the full casino facility must be considered in any regulatory scheme. As such, the regulations and gaming definition should apply to all ancillary structures and activities that directly support the gambling function, including but not limited to parking, hotels, entertainment venues, dedicated roads, and retail establishments. This is necessary to insure that massive gambling related complexes are not built on newly-acquired land that evades the section 20 review process.

Subpart B – Comments on Exceptions to Prohibition on Gaming on After-Acquired Trust Lands

Section 292.6 (Initial Reservation Exception) – A recent key concern of Congress, as well as local governments, is that tribes without a significant tie to an area not be allowed to site a casino simply based on its proximity to lucrative gaming markets. The issue of "reservation shopping" has become a rallying cry for those opposed to casino gaming and the failure of the proposed rules to adequately address the issue ultimately will be counter-productive to tribal economic

development. This is particularly a concern under section 292.6 subdivisions (b) and (c).

Under subdivision (b), a tribe can establish a location simply by moving its government headquarters within 25 miles of its desired gaming location without regard to where tribal members live. At a minimum, the language should be changed to require a trust acquisition be in both proximity to tribal members and tribal headquarters. The Consortium therefore recommends striking the word "or" in the subdivision and substituting "and."

Of greater concern is the vague and ambiguous language in subdivision (c) that requires land be located within an area of "significant and historical connections." In California, and elsewhere, some tribes have taken great liberty in determining significant connections far from traditional lands. A fundamental policy of the Consortium is that tribes with significant ties to an area should be accorded deference with respect to government-to-government discussions regarding their development plans. The proposed language is too ill-defined to serve either the interests of tribes or local governments.

The Consortium offers the following substitute language for subdivision (c) that more accurately expresses the intent of the Act and related case law:

> The land is located within an area where the tribe has significant ties as demonstrated by clear evidence that, at the time of settlement by non-Indians, the tribe maintained exclusive use and occupancy of the area. Elements that may be used to establish the tribe's relationship to the specific area include, but are not limited to: 1) loss of land through ratified treaty or specific congressional act; or 2) explicit recognition of exclusive use of land through prior administrative action or congressional act.

A reasonable addition to the proposed rules would be a section providing a clear position that lands far removed from a tribe's historic territory shall not be taken into trust for gaming purposes. Further, the proposed rules should make clear what the current criteria is that is being used for these determinations, what process will be used to make a decision, and clarify that the BIA rather than the NIGC, or any other entity, controls the determination process.

Sections 292.11 and 292.12 (Restored Lands) – The proposed rules must be changed to include a notification and consultation process for local governments similar to that contained in section 292.19 (as revised by these comments). The current and proposed "process" whereby local governments are neither notified,

consulted nor provided a mechanism to comment on restored lands decisions, guarantee that the cycle of frustration, community concern and opposition that has marked many recent Indian gaming proposals, and led to congressional attempts to change the current system, will continue. Ultimately, the BIA's proposed regulatory approach may serve to wholly undermine Indian gaming as a continuing vehicle for economic development. As discussed above, restored lands trust applications, are the most prevalent approach to new gaming in California. Local governments cannot continue to be ignored at the federal level and prevented from providing meaningful and timely input. All exceptions to the general bar to using land acquired after 1988 for gaming must explicitly require meaningful local consultation prior to the rendering of an administrative decision.[1]

The proposed rules also should be redrafted to conform more closely to the applicable law. Included in such a change would be the addition of a section 292.11 subdivision (d) to require that the land be the first trust acquisition following restoration. In addition, sections 292.11 subd. (b) and 292.12 subd. (b) should be amended to define "significant historical connection" consistent with the "significant ties" language offered above for section 292.6 subd. (c) and to otherwise specifically include a specific geographical nexus to the proposed trust acquisition.

As drafted, Section 292.12 subd. (c) undermines the temporal connection requirement currently required by the courts. To make the section meaningful, at a minimum, the conjunction between (1) and (2) should be changed from "or" to "and" to require that the land both be a first acquisition and be within 25 years of restoration.

The ambiguity and broad approach under the draft rule invites not only "reservation shopping" but its newest permutation of tribal "leap frogging." This term describes when a tribe attempts to open a casino closer to an urban center than a tribal competitor. By way of example, this is now occurring in Sonoma County where a further northern Mendocino County tribe, the Hopland Band of Pomo Indians, which already operates a casino, has applied to take land into trust in Sonoma County to put it closer to San Francisco and nearer to another tribal casino that is currently undercutting Hopland's gaming profits. These efforts are an affront both to county governments that have worked with local tribes on a government-to-

[1] Similarly, the Part 151 fee-to-trust acquisition regulations, when revised, must better reflect the integral role that local government occupies related to tribal development on previously regulated land. As here, the rules must establish standards for tribal needs and clear criteria for balancing acquisition benefits against local impacts. As is suggested here, the Part 151 rules should require a true interactive consultative process involving local and state government, the affected tribe, and the BIA.

government basis to address gaming and other tribal development issues and to locally based tribes.

Subpart C – Comments on Secretarial Determination and Governor's Concurrence

Section 292.13 et seq. (Gaming Activities on Lands that Do Not Qualify Under the IGRA Exceptions) – The underlying flaw in the proposed rules concerning the "two-part test" is that no clear criteria are provided for the Secretary to exercise discretion in making a determination regarding whether a proposed gaming acquisition is in the tribe's best interest and would not be detrimental to the surrounding community. It remains unclear what factors will be considered and how they will be weighed. While the proposed rules require a list of documents and information, section 292.21 provides no guidance to the Secretary (or public) other than the "information will be considered." This, in essence, creates a non-rule where no objective criteria or standards apply to the decision.

In addition, the process should be clarified. At a minimum the process should include tribes filing a preliminary application for review. The application should not be deemed complete until the NEPA review is concluded. Consultation between tribes and local governments should be encouraged throughout the process, but completion of formal consultation with the local government and the BIA and formal consideration of the application should not precede the NEPA assessment.

This Subpart should also contain some additional provisions. For example, as recommended below, whenever a parcel acquired after 1988 is being or converted to a gaming purpose, the IGRA section 20 process explicitly should prohibit gaming until these rules are applied. Further, consistent with the Consortium Policies and significant ties language of the proposed rules, it should be made clear that lands far removed from a tribe's existing reservation will be disfavored for trust status for gaming purposes. Finally, the information to be provided to the BIA should include specific information as to the scope of the gaming establishment (and related facilities). (This information is required to be provided to local officials under section 292.20, subd. (a)(2), but does not appear to be otherwise collected.)

Section 292.17 (Tribal Benefits) – This section similarly suffers from a lack of standards for making a determination of adequate tribal benefits. It does not require any gaming alternatives discussion or analysis whether the scope of the proposed project is consistent with the tribe's economic needs. In addition, the rules should provide direction of how fulfillment and definition of a tribe's economic needs should be balanced against the detrimental off-reservation

environmental impacts of a facility. As above, no standards are provided to conduct a cost-benefit analysis. The Secretary, therefore, is without guidance in evaluating the trust acquisition for the proposed gaming establishment. The standards requested in these comments are of such critical importance that they must be circulated and available for public discussion before the final rule is published.

Sections 292.18- 292.20 (Consultation Process) – A primary Consortium concern again relates to the consultation process. It is not clear whether under section 292.18 a tribe will have solicited feedback from local governments regarding detrimental impacts to the surrounding community or will be making that determination themselves. In such a consultation it would be important to specifically list, as part of section 292.18 subd. (b), the critical issues of traffic, water and wastewater. The rules should incorporate the best practices approach of requiring a consultation between tribes and local officials on the section 292.18 issues with the intent of jointly analyzing the "detrimental impacts" and the feasibility of the type of inter-governmental agreements contemplated in section 292.18 subd. (f).

Further, the 60-day comment period under 292.19 (a) is inadequate and does not recognize the type of exchange that characterizes a real "consultation". At a minimum, a 90-day consultation period should be afforded with an opportunity for 30-day extensions. Similarly, it does not appear that local governments will have the opportunity to review the information submitted pursuant to section 292.17-292.18 as part of the consultation. The rules should make provision for providing that information to consulting governments with the exception of limited proprietary data. The need to analyze this critical data again supports a longer consultation period.

Section 292.21 (Evaluation of Gaming Request) – From a process perspective the rules must demonstrate that the BIA has taken independent responsibility for evaluating the accuracy of the information submitted by tribes and local governments. As discussed above, the rules must establish the criteria under which the application will be decided and the various factors weighed. The rules also should identify the process by which decisions under either Subparts B or C can be reviewed. Under this section the Secretary also should be required to consider information received from any entity or organization (not just those that received official notice). (See section 292.21 subd. (b).) In addition, after reaching a decision, the Secretary should provide information not only to the tribe but to state and local government entities that participated in the consultation. (See section 292.21 subd. (b).)

Prohibition on Trust Land Use Changes to Allow Gaming

Finally, a section should be added under the rules to address the issue of Indian gaming on lands that evaded the traditional gaming trust review process. For example, as of April 2006 there were over 100 trust applications sent to the Sate of California as required by the Administrative Procedures Act notification process. While the majority of these applications were non-gaming, there is nothing in the proposed rules that prohibit a tribe from using the newly acquired lands for gaming. As you are aware, a recent review by the Inspector General of the Department of the Interior found at least 10 instances where tribes had converted trust land from non-gaming to gaming purposes without approval of the BIA and NIGC or notification to local governments.

To limit the possibility of these stealth gaming efforts, sometimes called "bait and switch," the rules could contain a provision that prohibits approval of gaming on any land taken into trust after 1988 unless gaming was the stated use in the trust application at the time the land was acquired by the Secretary. This requirement helps to ensure that any gaming proposal meets applicable legal standards and that environmental and other reviews did or will properly analyze the off-reservation impacts.

The Consortium appreciates the work of the BIA and its staff in preparing these much needed proposed rules. We hope to work with the agency in an open consultative process to improve the draft so that the rules better meet the needs of both local and tribal governments. Thank you for your consideration of these comments.

Very truly yours,

Brad Wagenknecht,
Napa County Supervisor and Chairman
of the Northern California Counties
Tribal Matters Consortium

Cc: Senator Dianne Feinstein
Senator Barbara Boxer
Senator John McCain
Majority Speaker Elect Nancy Pelosi
Congressman Mike Thompson
Congresswoman Lynn Woolsey
Congressman George Miller

Congresswoman Ellen Tauscher
Governor Arnold Schwarzenegger
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