

CALIFORNIA COASTAL COMMISSION

45 FREMONT, SUITE 2000
SAN FRANCISCO, CA 94105-2219
VOICE (415) 904-5200
FAX (415) 904-5400
TDD (415) 597-5885



July 31, 2015

Sally Jewell
Secretary of the Interior
Department of the Interior
1849 C Street, N.W.
Washington DC 20240

United States Secretary of the Interior
c/o Ms. Venus McGhee Prince
Deputy Solicitor for Indian Affairs
Office of the Solicitor
U.S. Department of the Interior
1849 C Street, N.W.
Washington DC 20240

Kevin K. Washburn
Assistant Secretary-Indian Affairs
U.S. Department of the Interior
Indian Affairs
MS-3642-MIB
1849 C Street, N.W.
Washington, DC 20240

Re: Request for Consistency Determination from Secretary of the Interior for the Class III Gaming Compact for the Big Lagoon Rancheria submitted by the Court-Appointed Mediator

Dear Secretary Jewell, Deputy Solicitor Prince, and Assistant Secretary Washburn:

This letter is to request that the Secretary of Interior submit a consistency determination, pursuant to the federal Coastal Zone Management Act (CZMA), 16 USC § 1451 *et seq.*, for the action you will take to prescribe Class III gaming procedures that are consistent with a proposed tribal gaming compact that has been presented to you. We are therefore requesting that you refrain from taking any action to prescribe procedures consistent with that compact until the federal consistency procedures have been satisfied. The reason we are making this request is

because we believe the Secretary's decision to prescribe procedures consistent with the compact falls within the scope of the consistency requirements of the CZMA. 16 USC § 1456(c). Under subdivision (c)(1), any federal agency carrying out an activity that may affect the coastal resources of a state must provide an analysis of how the activity is consistent to the maximum extent practicable with that state's coastal zone management program (CZMP) for the state's review before proceeding.

As background, on May 4, 2011, the U.S. District Court for the Northern District of California appointed the Honorable Eugene F. Lynch (Ret.) as a Mediator, pursuant to 25 U.S.C. § 2710(d)(7)(B)(iv), in a dispute between Big Lagoon Rancheria (the Tribe) and the State of California over negotiations for a tribal gaming compact that would allow the Tribe to conduct Class III gaming on a parcel of land taken into trust for the Tribe by the Bureau of Indian Affairs (BIA) in 1994. On September 27, 2011, the mediator notified the District Court that it had selected the compact proposed by the Tribe. Multiple appeals were resolved by the Ninth Circuit Court of Appeal's En Banc decision, which states as follows:

All that remains is for the mediator to notify the Secretary of the Interior of his selection, and, once the Secretary of the Interior prescribes procedures to govern gaming that are consistent with that selection, Big Lagoon Rancheria will be authorized to build the casino and engage in the gaming that it seeks.

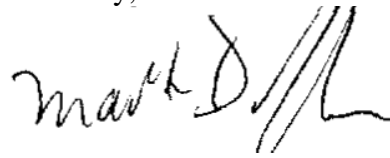
Big Lagoon Rancheria v. State of California, --- F.3d ---, 2015 WL 3499884 (9th Cir. 2015), as amended on denial of rehearing *en banc* (July 8, 2015).

The basis of the Commission's position as to the effects of this activity on the California coastal zone will be essentially the same as the basis cited in our attached May 11, 2000, letter asserting that the proposal that was the subject of an application by the Tribe to the National Indian Gaming Commission (NIGC) would have coastal zone effects (see Attachment 1). That letter was never acted upon, as the application to NIGC was withdrawn soon after our letter was sent, which led us to withdraw our request to OCM (then, OCRM) at that time. The coastal zone issues described in that letter remain applicable today.

We would also point out for your consideration the fact that in a separate but related matter - our agency's appeal to the Interior Board of Indian Appeals, of a BIA action to take a five-acre parcel of land, located near (i.e., within one-half mile of) the site for the proposed casino, into Trust for the Tribe - the DOI Assistant Secretary for Indian Affairs remanded the matter back to the BIA (Pacific Region), for the purpose of determining whether, under the U.S. Supreme Court's *Carcieri v. Salazar* decision, the BIA is legally able to take land into Trust for the Tribe (see Attachment 2). We have not received any notification that this determination has been finalized, and we would suggest that you may want to consider completion of that review and determination prior to taking any final action to prescribe procedures consistent with the mediator's proposed compact.

If you have any questions, please feel free to call me at (415) 904-5289.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark D. Delaplane". The signature is written in a cursive, slightly slanted style.

MARK DELAPLAINE
Manager, Energy, Ocean Resources,
and Federal Consistency Division

Attachments

- 1) CCC letter to NIGC, May 11, 2000
- 2) Assistant Secretary for Indian Affairs Memo, January 27, 2010

cc: North Coast District (Bob Merrill)
Big Lagoon Rancheria (Virgil Moorehead, Chairman)
Bureau of Indian Affairs, Pacific Region (Amy Dutschke)
Office for Coastal Management (David Kaiser, Kerry Kehoe)
California Attorney General's Office (Peter Kaufman, Sara Drake, Timothy Muscat)
Counsel for Big Lagoon Rancheria (Baker & McKenzie, LLP (Bruce Jackson, Peter Engstrom))
U.S. Attorney General's Office (Samuel Hirsch, Jennifer Turner, Rebecca Ross)

LIFORNIA COASTAL COMMISSION

REMONT STREET, SUITE 2000
FRANCISCO, CA 94105-2219
CE AND TDD (416) 904-5200

**Attachment 1**

May 11, 2000

Dr. James Baker
Administrator
National Oceanic & Atmospheric Administration
U.S. Department of Commerce
14th and Constitution Avenue, N.W.
Washington, D.C. 20230

Barry W. Brandon
Chief of Staff
1441 L Street, N.W., Suite 9100
Washington, D.C. 20005

Virgil Moorehead
Tribal Chairperson
Big Lagoon Rancheria
708 Ninth Street
Arcata, CA 95521

RE: Application by the Big Lagoon Rancheria to the National Indian Gaming Commission for approval of an Indian Gaming facility at the Big Lagoon Rancheria, Humboldt County.

Dear Addressees:

By this letter, the California Coastal Commission is formally notifying the National Oceanic and Atmospheric Administration (NOAA), the National Indian Gaming Commission (NIGC), and the Big Lagoon Rancheria (Rancheria) of the Coastal Commission's intention to review the proposed development of a casino at the Big Lagoon Rancheria, Humboldt County. This activity requires an approval by the NIGC and, as such, is subject to the federal consistency provisions of Section 307(c)(3)(A) of the federal Coastal Zone Management Act (CZMA).¹ The proposed project can reasonably be expected to adversely affect coastal access, recreation, water quality, and habitat resources of the California coastal zone. Additionally, the project's land use is significantly different than the nearby land uses and would have cumulative effects on coastal resources. Therefore, the Rancheria must prepare and submit a consistency certification pursuant to the CZMA and its implementing regulations². Since this is an "unlisted activity," the regulations require NOAA's approval of the state's request to

¹ 16 USC § 1456(c)(3)(A)

² 15 CFR Part 930 Subpart D

review the activity.³ The CZMA and its implementing regulations prevent the NIGC from issuing its approval until the Commission concurs with a consistency certification, NOAA denies the Coastal Commission permission to review the activity, or the time period for Coastal Commission review has expired.⁴

Background

In 1989, the Big Lagoon Rancheria acquired the property on which it currently proposes to build a casino. The acquisition was made using funds granted to the Rancheria by the U.S. Department of Housing and Urban Development (HUD) for the purpose of expanding the Rancheria's housing resources. Prior to approving the grant request, HUD contacted the Coastal Commission regarding HUD's responsibilities pursuant to the CZMA. The Coastal Commission staff informed HUD that the housing and land acquisition grant may raise coastal issues and, at a minimum, HUD should submit a negative determination to the Coastal Commission. HUD did not submit a consistency determination or a negative determination to the Commission and the activity was not reviewed pursuant to the requirements of the CZMA. Several years after the Rancheria acquired the land and built several housing units, the Bureau of Indian Affairs (BIA) placed this property into trust. The BIA relied on HUD's environmental assessment to support its actions and did not coordinate with the Coastal Commission pursuant to the requirements of the federal CZMA.

In 1995, the Rancheria received NIGC approval for its class III tribal gaming ordinances.⁵ At that time, the Rancheria began construction of the casino. After Commission staff learned of these construction activities, it initiated discussions with representatives of the Rancheria regarding the applicability to such activities of the consistency review requirements of the CZMA. However, before such discussions reached a conclusion the issue became moot because the Rancheria stopped construction on the casino (see copy of news article enclosed).

On May 1, 2000, the Coastal Commission received a copy of a draft environmental assessment that described construction of a new gaming facility at the site of the previous project. The environmental assessment states that the *"site is relatively level, having previously been graded and filled for a previous gaming development project."*⁶ The environmental assessment states that it is being prepared to fulfill the requirements of the National Environmental Policy Act triggered by NIGC approval of a management contract for the facility. This required approval is a "permit or license" as defined by the regulations implementing the CZMA.⁷ Since this permit is not listed in the certified California Coastal Management Program, the Commission must request permission from NOAA before it can proceed with federal consistency review. As described below,

³ 15 CFR § 930.54

⁴ 15 CFR § 930.54

⁵ Federal Register, Vol.60, No. 44, March 7, 1995, p. 12575.

⁶ Environmental Assessment, p. 8.

⁷ 15 CFR § 930.51

the Commission staff believes that the proposed casino will affect land and water uses and natural resources of the coastal zone.

Recreational Resources

The proposed project is located adjacent to a county park, Big Lagoon County Park, which includes a campground located near the site of the proposed casino. Additionally, the proposed casino site is located near Dry Lagoon State Beach. That State Park includes the sand spit located north and west of the Rancheria (see enclosed map). This entire area is relatively undeveloped and people enjoy its semi-wilderness character. The proposed project would affect this character. The gaming facility would be a two-story 47,150 square-foot building with ancillary uses including restrooms, restaurant, bar, administrative offices, security and surveillance offices, storage, and wastewater treatment plant. In addition, the facility would provide parking for 400 cars. The Rancheria proposes to operate the casino 24 hours per day seven days per week. The influx of people drawn by the proposed casino would alter the character of the existing recreational uses. Additionally, the increase in traffic would interfere with people utilizing the coastal recreational resources. Finally, the location of the proposed casino is relatively close to the County campground and the all-night activities of the casino would interfere with use of the campground by increasing light and noise during the night. Since these recreational resources are located in the coastal zone, the project affects coastal uses and resources.

Visual Resources

The proposed project would be visible from Dry Lagoon State Beach, Big Lagoon County Park, and Big Lagoon. This large two-story structure would significantly alter the views from these areas and this two-story 47,000 square-foot development would significantly alter the visual resources of the coastal zone. The large parking lot, ancillary development, and night lighting would also adversely affect these visual resources. Enclosed with this letter are several photographs taken from the State Beach and County Park, which were taken after the Rancheria constructed the foundation. Although the foundation is barely visible, the Commission staff believes that the actual casino would be large enough to adversely affect the visual resources of these areas. Additionally, the Lagoon is used for recreational boating purposes. The County Park includes a boat ramp, which provides the public with easy access to the water. The Casino would be visible from the water of Big Lagoon and significantly affect its visual character. The Commission staff believes that the project's visual impacts would have a significant effect on coastal uses and resources.

Water Quality

The environmental assessment identifies two potential water quality impacts from the proposed project, including non-point source pollution and wastewater discharges. The proposed project is located relatively close to Big Lagoon and would significantly increase the amount of impervious surfaces and the number of automobiles to the area. These changes would result in a significant increase in non-point source water pollution.

There are many different best management practices (BMPs) that can be utilized by the Rancheria to minimize this impact. However, if the BMPs are inadequate, the water quality of the lagoon would be degraded.

The second water quality issue is the treatment and discharge of wastewater. In its environmental assessment, the Rancheria proposes to construct a tertiary wastewater treatment plant to process sewage generated by the facility. However, the document does not indicate whether there would be any regulatory oversight of the treatment facility by the U.S. Environmental Protection Agency or the California Regional Water Quality Control Board. Without such oversight, there is no way to assure that the treatment plant would actually reach tertiary standards. If the plant results in discharges that are less than tertiary, it would degrade the water quality of the lagoon. Additionally, the environmental assessment does not identify the location of the discharges from the treatment plant. If the Rancheria discharges the treated sewage into the lagoon or at upland sites that drain to the lagoon, the project would significantly degrade water quality resources. Finally, if the treatment plant has an accident, it would result in the discharge of partially treated or untreated sewage into the lagoon. Because a sand bar forms at the mouth of the lagoon for most of the year, it has limited water circulation and any discharges into the lagoon would significantly degrade its water quality, and thus affect coastal zone resources.

Habitat

The area provides habitat for several federally listed threatened and endangered species. These species include bald eagle, snowy plover, brown pelican, steelhead trout, and cutthroat salmon. Also the peregrine falcon, which was recently removed from the federal endangered species list but is still on the state endangered species list, is found in the area. These species would be adversely affected by the increase in human activities caused by the proposed casino. Specifically, increased human activities, nighttime lights, and increased trash and other debris would adversely affect bird and mammal species. Additionally, the fish species in Big Lagoon would be adversely affected by a decrease in water quality from the proposed casino. This problem would be significant because a sand bar forms at the mouth of the lagoon for most of the year. At these times, there is little water circulation in the lagoon. Since these sensitive species are resources of the coastal zone, the project would affect coastal zone resources.

Land Use

The proposed project is located in an area that is predominantly open space, parkland, and vacation cabins. The proposed casino is out of character with these land uses. Additionally, the scale of the proposed structure is out of character with other development in the area, which consists mostly of small houses. Finally, the casino may generate the need for other related development in the area. These related developments might include hotels, motels, restaurants, and gas stations. Along with the previously proposed casino, the Rancheria proposed the acquisition of adjacent land and the construction of other visitor serving uses including hotels, restaurants, and

a golf course (the enclosed article fully describes some of the potential development on adjacent parcels). Cumulatively, these developments would change the undeveloped and rural character of the area to a more urban developed character and would have cumulative impacts on water quality, public access to the shoreline, coastal recreational activities, and habitat resources.

Conclusion

In conclusion, the Commission staff believes that the proposed casino on the Big Lagoon Rancheria will adversely affect land and water uses and natural resources of the coastal zone. The Commission staff believes that these impacts are potentially significant and that the project requires federal consistency review pursuant to the CZMA. By this letter, we request, pursuant to Section 930.54 of the federal consistency regulations, permission from NOAA to review this project. Also, by this letter, we are informing the applicant of its right within 15 days from the applicant's receipt of this letter to comment to NOAA on the state's request to review this activity

Please feel free to call James Raives of our federal consistency staff at (415) 904-5292 if you have any questions or concerns.

Sincerely,

PETER M. DOUGLAS
Executive Director

cc: Jeff Benoit, Director, OCRM, w/ enclosures
David Kaiser, OCRM, w/ enclosures
Peter Kaufman, Deputy Attorney General, w/ enclosures
Governor's Washington, D.C. Office
California Department of Water Resources
Greg Bergfeld, Regional Director, National Indian Gaming Commission
Bob Merrill
Steve Scholl

Enclosures




United States Department of the Interior


OFFICE OF THE SECRETARY
Washington, DC 20240

JAN 27 2010

Memorandum

To: Dale Risling
Acting Regional Director, Pacific Region

Through: Jerry Gidner 
Director, Bureau of Indian Affairs

From: Larry Echo Hawk 
Assistant Secretary – Indian Affairs

Subject: Big Lagoon Rancheria Land Acquisition Decision and Appeal to the Interior Board of Indian Appeals

The California Coastal Commission (CCC) has entered an appeal with the Interior Board of Indian Appeals (IBIA) of your decision, dated October 2, 2009, to acquire approximately 5 acres in trust for the Big Lagoon Rancheria for non-gaming purposes. The CCC refers to the United States Supreme Court ruling in *Carcieri v. Salazar* alleging that Big Lagoon was not under Federal jurisdiction in 1934, and the Secretary, therefore, lacks authority to take the land in trust.

Your decision does not address the ruling in *Carcieri v. Salazar*, nor does it determine whether Big Lagoon was under Federal jurisdiction in 1934. Because of the CCC's *Carcieri*-related allegations, I am directing you to request a remand from the IBIA for the purpose of applying the holding of *Carcieri v. Salazar* to your decision and to determine whether Big Lagoon was under Federal jurisdiction in 1934. The Solicitor's Office, Division of Indian Affairs, will provide legal assistance to your office in making this determination. When you have completed your analysis, please issue a new decision that addresses the applicable provisions of Part 151 and includes a determination whether Big Lagoon was under Federal jurisdiction in 1934.

cc: Regional Solicitor, Pacific Regional Solicitor's Office
Associate Solicitor, Division of Indian Affairs