

# Overview Federal Review Process Pending Indian Casino Projects



Contra Costa County is currently home to one Class II Indian casino. Two other out-of-area tribes have pending "restored" land applications for casinos. Together, the three casinos could result in thousands and thousands of slot machines (plus gaming tables) in over 700,000 sq. ft. of casinos plus hotels, convention and entertainment facilities. (The most recent tribal-state compacts have allowed 5,000 – 7500 slot machines per casino. In addition, the compacts allow the tribes to have two casinos each.) The County has opposed the two new projects, and the Governor has also stated his opposition.

The three Indian Gaming Casino projects are located within a 4-mile radius of one another in West Contra Costa County, a densely populated, low-income minority area with high unemployment rates, high crime rates and considerable traffic congestion. As currently proposed, the casino projects do not adequately address or mitigate their negative off-reservation impacts on the local economy, quality of life, demands for County services or local government revenues.

The federal government controls the review process on new casino development and is the decision maker as well. The process is complex and characterized by a lack of transparency, structure and local government notification. The elements of the process include:

- Indian Lands Determination,
- Fee-to-Trust Application,
- Compliance with the National Environmental Policy Act ("NEPA"), including preparation of an Environmental Impact Statement for the fee-to-trust application and the casino project.

These processes take place under the umbrella of the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 et seq., which established the statutory structure for Indian Gaming in the United States. IGRA generally prohibits gaming on Indian Lands acquired in trust after October 17, 1988 (the date IGRA was enacted), and requires that tribes seeking to game on

land acquired after that date undergo a two-part determination which includes approval by the Secretary of the Interior and concurrence of the Governor under Section 2719(b)(1)(A), unless one of the exceptions under Section 2719(b)(1)(B) applies. At issue is whether or not the third exception under this section applies to the Scotts Valley and Guidiville casino project proposals: "lands taken into trust as part of the restoration of lands for a tribe that has been restored to federal recognition."

The two-part determination process provides important protections for local communities and other tribes. It requires the Secretary of the Interior to consult with officials of the state government, local governments and nearby tribes. Approval requires that the Secretary find that the acquisition is in the best interest of the tribe and its members and that it is not detrimental to the surrounding community. Conversely, under the exception provisions, community impact is not a consideration.

The two-part determination process also requires concurrence with the Secretary's determination by the Governor of the involved State. This too is an important protection, since the Governor can weigh the benefits to the tribe against the impacts on the local community and other tribes and provide for appropriate mitigation of off-reservation impacts through the State-Tribal Compact. In California, the Governor has insisted on a compact provision that requires tribes to negotiate a judicially enforceable agreement with the County affected by the casino project which fully mitigates the direct and indirect off-reservation impacts of the casino. However the Governor has steadfastly opposed all efforts to locate casinos in urban areas and has argued that the People of California authorized casino gambling on Indian lands only in the tribes' historical areas, not in urban areas located far from their homelands.

Additionally, Tribes can operate Class II gaming facilities on restored trust land without any compact. Technological advances have blurred the distinction between Class II and Class III devices, such that they trigger similar impacts. Yet, there is no mechanism to ensure mitigation of off-reservation impacts of Class II gaming. In Contra Costa County, Casino San Pablo is currently operating over 1,000 Class II bingo-based slot machines, plus gaming tables, with no mitigations to the State or County.

These differences in rights, responsibilities, and authorities mean that the status of the land is a very critical issue.

Both the Scotts Valley Band and Guidiville Band are requesting that their project lands be taken into trust as “restored lands” and thus not be subject to the two-part determination process.

**Indian Lands Determination.** A tribe that seeks to have its “after-acquired” lands be placed in trust (title is held by the United States “in trust” for the benefit of the tribe) so that the land will be deemed “Indian lands” under IGRA and eligible for gaming is generally said to be seeking an “Indian lands” determination. Lands can be deemed newly-acquired lands or restored lands. The determination is made by the Solicitor’s Office in the Department of Interior.

IGRA does not specify any administrative process for making Indian Lands Determinations, so it is entirely within the discretion of the Solicitor’s Office and the Department of Interior *when* that determination will be made in the overall review process for a casino project. Some argue that the Determination is nothing more than an opinion that cannot be challenged under the Administrative Procedures Act (APA); some courts have held, however, that the Determination can be challenged.

There is greater clarity on the standards that must be used to determine if a land acquisition qualifies as restored land. IGRA requires that “restored lands” are only those to which the tribe has both a significant historical and modern connection. There is also considerable case law that provides guidance. Additionally, the Department of the Interior recently adopted implementing regulations on evaluation of fee-to-trust applications. Subsection (c) §292.11 and §292.12 of those regulations apply to the restored land applications of the Scotts Valley Band and Guidiville Band:

§ 292.11 What are “restored lands”?

For newly acquired lands to qualify as “restored lands” for purposes of § 292.7, the tribe acquiring the lands must meet the requirements of paragraph (a), (b), or (c) of this section....

(c) If the tribe was restored by a Federal court determination in which the United States is a party or by a court-approved settlement agreement entered into by the United States, it must meet the requirements of § 292.12.

§ 292.12 How does a tribe establish connections to newly acquired lands for the purposes of the “restored lands” exception? To establish a connection to the newly acquired lands for purposes of § 292.11, the tribe must meet the criteria in this section.

(a) The newly acquired lands must be located within the State or States where the tribe is now located, as evidenced by the tribe’s governmental presence and tribal population, and the tribe must demonstrate one or more of the following modern connections to the land:

- (1) The land is within reasonable commuting distance of the tribe's existing reservation;
  - (2) If the tribe has no reservation, the land is near where a significant number of tribal members reside;
  - (3) The land is within a 25-mile radius of the tribe's headquarters or other tribal governmental facilities that have existed at that location for at least 2 years at the time of the application for land-into-trust; or
  - (4) Other factors demonstrate the tribe's current connection to the land.
- (b) The tribe must demonstrate a significant historical connection to the land.
- (c) The tribe must demonstrate a temporal connection between the date of the acquisition of the land and the date of the tribe's restoration. To demonstrate this connection, the tribe must be able to show that either:
- (1) The land is included in the tribe's first request for newly acquired lands since the tribe was restored to Federal recognition; or
  - (2) The tribe submitted an application to take the land into trust within 25 years after the tribe was restored to Federal recognition and the tribe is not gaming on other lands.

*Scotts Valley Band's Indian Lands Determination Request.* The Scotts Valley Band's request is currently pending a decision in the Solicitor's Office of the Department of Interior. It is the County's understanding that the Solicitor's Office has received all the materials from the Band and from the County that will be considered in making the Determination.

The Band submitted a considerable volume of material in its attempt to demonstrate a historic and modern connection to the North Richmond casino site. However, as demonstrated in the County's opposition reports, the Band is from Lake County, over 100 miles north, and has no connection to the property.

*Guidiville Band's Indian Lands Determination Request.* The Guidiville Band's request is also pending a decision from the Solicitor's Office. The County currently has an outstanding Freedom of Information Act (FOIA) request for materials as well as an appeal on redacted information. We are currently reviewing materials that the Band's attorneys recently sent us in response to the County's FOIA request and appeal. While we are unsure of the Solicitor's Office schedule for rendering an opinion, we have urged them not to act on the Determination prior to resolution of the County's FOIA request and appeal.

As it did for the Scotts Valley Band's Indian Lands Determination Request, the County submitted extensive responses to the Guidiville Band's Request. The Guidivilles are from Mendocino County, and have no connection to Point Molate, site of their proposed casino.

**Fee-to-Trust Application.** Theoretically, the federal government should not take lands into trust for gaming purposes unless it has first determined that the lands are Indian lands under IGRA. In practice, however, the different divisions of the Interior Department all act at the same time, which forces counties to respond to everything at once.

The Bureau of Indian Affairs (BIA) is the responsible agency on fee-to-trust applications. The BIA makes its recommendations to the Assistant Secretary-Indian Affairs, who acts on behalf of the Secretary of Interior, the decision-making authority. Since fee-to-trust decisions on gaming projects are “major federal actions” under NEPA, the BIA determines whether or not to require an Environmental Impact Statement (EIS). Although discretionary, it appears that the BIA now requires an EIS whenever the tribe seeks to place the land into trust for gaming purposes.

Land is taken into trust through the “Record of Decision” (ROD). The ROD is the final agency action under NEPA that will be incorporated into the fee-to-trust decision. For example, the ROD identifies which of the casino project alternatives can be developed and associated mitigation measures, if any.

Following issuance of the final EIS (FEIS) and adoption of the Record of Decision by the Assistant Secretary-Indian Affairs, the decision is final (40CFR Sec. 1505.2). Any challenge to the decision must be filed in federal court within six years, but as practical matter, the ROD and the fee-to-trust decision must be challenged at the same time. If the Department of Interior takes the land into trust after the final EIS is issued, departmental regulations provide that an objecting party has only 30 days to file a legal challenge. (61 Fed. Reg. 18082-18083.)

*Scotts Valley Band's Fee-to-Trust Application.* As far as the County is aware, the Scotts Valley application is complete and awaiting a decision. As with the Indian Lands Determination, the County filed extensive comments in opposition.

*Guidiville Band's Fee-to-Trust Application.* The Guidivilles have filed their application and the County has filed its comments. No action can be taken on it until the environmental review process is completed.

**Environmental Impact Statement**. The BIA is the lead agency for the EIS, which covers both the fee-to-trust action (ie removing the land from the jurisdiction of local and state governments and other public agencies and placing it under the jurisdiction of the tribe) and the casino project (including alternatives). The environmental review process includes:

- Scoping Report – the Scoping Report describes the casino project, project alternatives, development standards and issues that will be examined in the EIS. A public hearing is conducted, and comments received by the BIA, which is the lead agency for the EIS. Comments may or may not result in changes to the scope of the EIS.
- Administrative Draft EIS – the ADEIS is then prepared and sent to “cooperating agencies” for review and comment (this document is confidential and not available to public). The review period is usually 30 days.
- Draft EIS – the DEIS is then published and distributed for public review and comment. The review period was 45 days for the Scotts Valley casino project, although we have been told by the BIA that there will be a longer comment period on the Guidiville casino project DEIS. The BIA responds to each of the comments, and comments may or may not result in changes to the Final EIS.
- Final EIS – the FEIS is also published and distributed for public review and comment, with a review period of 30 days. No responses are made to comments on the FEIS. The FEIS is adopted as part of the ROD, which determines which, if any, casino project alternative may be developed and associated mitigation measures.

*Scotts Valley Band’s Environmental Impact Statement.* The process is complete and a Final EIS published. The County submitted extensive comments at each step of the process. Unfortunately, most of the County’s concerns were not addressed, resulting in development standards and mitigation measures that do not adequately protect against the negative off-reservation impacts of the casino project, including but not limited to traffic congestion, increased demand for county services due to crime, problem and pathological gambling and smoking, loss of property tax revenues, and disruption to the County Redevelopment Agency’s neighborhood revitalization efforts.

*Guidiville Band's Environmental Impact Statement.* To date, the BIA has issued the Scoping Report and Administrative Draft EIS (the document is actually an EIR/EIS since, pursuant to Court order, the City of Richmond is also conducting environmental review of the project under the California Environmental Quality Act). The County filed comments on both the Scoping Report and Administrative Draft EIR/EIS. No action can be taken until the environmental review process is completed.

**Conclusion.** The County has spent considerable time and resources to participate in the review process on the Scotts Valley and Guidiville Bands' proposed casino projects. It has been a frustrating experience because of the lack of notification; need to submit FOIA requests for materials; short time frames for review of environmental documents; and concurrent processing of Indian Lands Determination Request, Fee-to-Trust application and environmental review. From a public policy perspective, the entire process needs re-examination and reform. However the County's responses are thorough and precedent-setting. To our knowledge, no other jurisdiction has so thoroughly documented and analyzed the issues and facts underlying a tribe's attempt to relocate from its historical base to an urban community solely to capture a gaming market.

A decision should be forthcoming fairly soon on the Scotts Valley Band's casino project. Hopefully, the County's analysis will prevail and the Office of the Solicitor will find that the North Richmond property does not qualify as restored lands under IGRA. We have kept in touch with the Governor's office and, if legal action is necessary, will work closely with them as well.