



TRIBAL GAMING AND COMMUNITY PLANNING IN CALIFORNIA

A Primer for
Policymakers,
the Public
and the Press

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CALIFORNIA PLANNING ROUNDTABLE

TRIBAL GAMING AND COMMUNITY

Dear Reader:

The California Planning Roundtable (CPR) has published this report to describe the legal and policy framework for tribal gaming's role in California community planning. Tribal casinos and their associated commercial development have had, and will continue to have, major effects on communities and community planning. CPR believed there was a need for a comprehensive primer explaining the legal and policy context—federal, state, and local—for tribal gaming's role in community planning.

This report is intended for a general readership, including policymakers, the public, and the press. The report should be particularly useful for communities in which new or expanded tribal gaming facilities are proposed.

Proposed tribal gaming compacts and facilities are often highly controversial. This report attempts to step back from the controversy and offer neutral, objective information about the legal and policy framework for tribal gaming's role in community planning. The report also provides a number of examples showing how this framework works in practice.

The report was prepared by a CPR Task Force composed of Tom Jacobson, Steve Preston, Marvin Roos, and Al Herson. CPR is solely responsible for the final contents of the report. CPR greatly appreciates peer reviews of early drafts that were provided by: Cathy Christian, Attorney, Nielsen, Merksamer, Parrinello, Mueller & Naylor, LLP; Tom Davis, Chief Planning and Development Officer, Agua Caliente Band of Cahuilla Indians; and Paul Shigley, Editor, California Planning and Development Report.

If you find this report valuable, I encourage you to learn more about other CPR activities. CPR is an organization of experienced planning professionals who are members of the American Planning Association (APA). CPR provides a forum for prominent planners to exercise creativity and leadership in promoting understanding of California's critical public policy issues, and recommending action.

CPR periodically chooses timely and significant California planning issues for study (such as tribal gaming), and publishes the results in widely distributed papers or articles. CPR also organizes and presents panels for California Chapter APA annual conferences, and provides policy input to the Chapter's legislative review program.

Please visit <http://www.cprroundtable.org/index.html> for more information about CPR and its activities. Our web site also contains an electronic version of this report.

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PLANNING IN CALIFORNIA

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SECTION 1: TRIBAL GAMING AND COMMUNITY PLANNING: AN OVERVIEW

Tribal gaming is just one form of an ever-widening range of economic development activities available to California tribal governments. It is in many ways, however, the most controversial, particularly when tribal gaming facilities offer “casino” gambling, such as slot machines and blackjack. The implications of establishing and operating tribal casinos have become important components in land use and environmental planning for growing numbers of California communities.

This primer, a project of the California Planning Roundtable, attempts to outline the framework within which tribal gaming in California operates, paying particular attention to its role in community planning. A basic, simplified version of that framework is provided here, along with references to those portions of the primer that offer more in-depth discussion.

- Under federal law, tribes are deemed domestic dependent nations and, as such, exercise a limited sovereignty that is subject to Congressional authority. (See Section 2)
- Tribal gaming in the United States operates pursuant to federal legislation adopted in 1988 – the Indian Gaming Regulatory Act (IGRA). (See Section 2)
- Under the IGRA, casino gambling (slot machines, blackjack, etc.) requires state authorization. In California, this was accomplished by Proposition 1A, a constitutional amendment adopted by the voters in 2000. (See Section 2)
- Casino gambling also requires an agreement or “compact” between a tribe and state, which establishes the terms under which tribal casinos will operate. More recent compacts establish a process for the tribe and affected local governments to agree on mitigation for impacts on neighboring communities. (See Sections 2,5,7)
- While subject to federal law, tribal casinos are largely exempt from city and county land use regulations and state environmental regulations. (See Sections 2,5)
- Tribes undertake planning for tribal lands through various mechanisms; they increasingly address the environmental and other impacts of tribal gaming facilities on surrounding communities. (See Sections 5,6,7)
- Several federal environmental laws may apply to tribal casinos (e.g., the National Environmental Policy Act (NEPA) and the Federal Endangered Species, Clean Water, and Clean Air Acts), offering opportunities for on and off-site environmental protection. (See Section 4)
- Under the tribal/state compacts needed for casino gambling, tribal casinos require environmental impact assessments similar to, though less demanding than, those prepared under the California Environmental Quality Act (CEQA). (See Sections 5, 7)
- Tribes are required to address off-site impacts of tribal casinos under those tribal/state compacts entered into after 2003. (See Sections 5, 6,7)
- Funding for addressing impacts on neighboring communities may come from agreements with local governments. (See Sections 6,7)

SECTION 2: KEY LAWS AND LEGAL PRINCIPLES GOVERNING THE LOCATION, DESIGN, AND OPERATION OF TRIBAL GAMING IN CALIFORNIA

Tribal Sovereignty and Authority for Community Planning

Much of the discussion of tribal gaming and community planning begins with the term “sovereignty.” The concept of sovereignty as it applies to tribal gaming, casino siting and design, environmental regulation, etc., is critical to an understanding of these issues. And it is often misunderstood.

Tribal sovereignty has been characterized in a number of ways, including “limited sovereignty” and “semi-sovereignty.” Perhaps the most accurate description is “dependent sovereignty.” This reflects that, under federal law, Indian tribes are neither states nor foreign nations but “domestic dependent nations.” *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831); *United States v. Wheeler*, 435 U.S. 313, 323 (1978). As such, while tribes retain attributes of sovereignty over both their members and their territory, this sovereignty is not absolute; it is subject to Congressional authority.

States may apply state law to activities within tribal territories only with permission from Congress to do so.

This relationship between the tribes, federal government, and the states is illustrated in the following quotation from a leading U.S. Supreme Court case. In this case from the 1980s, the State of California sought to apply state law to the operation of bingo games on the reservations of the Cabazon and Morongo Bands of Mission Indians. In rejecting that claim,¹ the Court said:

“... tribal sovereignty is dependent on, and subordinate to, only the Federal government, not the States.” California v. Cabazon Band of Mission Indians, 480 U.S. 202, 207 (1987)

The principles of tribal sovereignty apply to authority over land use regulation. Most land use regulation in California is under the authority of cities and counties, granted by express provisions of state law (e.g. the

planning and zoning laws and Subdivision Map Act), or the broad delegation of “police power” to cities and counties.² However, city and county (and state) regulation of tribal land use has “long been preempted by extensive Federal policy and legislation,”³ making tribes exempt from such authority.

Instead, planning for tribal lands, including tribal casinos, is undertaken by the tribe itself pursuant to tribal and/or federal law. The remainder of this Section describes the legal structure for tribal gaming, including land use planning and regulation for tribal casinos. Section 6 describes the tribal land use planning process.

Federal Law Governing Tribal Gaming: Indian Gaming Regulatory Act (IGRA)


BACKGROUND AND INTENT

The siting and operation of tribal casinos illustrates the relationship between the tribes and federal and state governments. In 1988, Congress passed the IGRA⁴ in response to contention by the states over increased tribal gaming, mainly high stakes bingo. In the landmark 1987 case *California v. Cabazon Band of Mission Indians*,⁵ the U.S. Supreme Court rejected the state’s claim of authority over tribal gaming. The Court found neither of these justifications for applying state law present: 1) federal statute did not expressly grant authority to California to regulate tribal gaming activities; 2) the state interests at stake were not sufficient to justify asserting state authority in light of traditional principles of Indian sovereignty and the Congressional goals of Indian self-government, tribal self-sufficiency, and economic development.⁶

In the aftermath of that decision, Congress passed the IGRA in order to, among other things, establish a statutory basis and regulatory structure for the operation of tribal gaming. The IGRA illustrates the principles of domestic dependent sovereignty, under which tribes are subject to acts of Congress.

“... tribal sovereignty is dependent on, and subordinate to, only the Federal government, not the States.”

CALIFORNIA V. CABAZON BAND OF MISSION INDIANS, 480 U.S. 202, 207 (1987)



The federal government could have prohibited commercial tribal gaming (“... and surely the Federal Government has the authority to forbid Indian gambling enterprises ...,” *Cabazon* at 221). Instead, Congress established a framework for tribal gaming and its regulation.

The IGRA has been characterized as “the most significant economic and social change to affect American Indian tribes since the founding of the Nation.”⁷ Passing the IGRA reflected a more general shift in federal policy toward encouraging greater tribal self-sufficiency and turning away from the policy established in the 1950s of effectively “terminating” many tribal governments.⁸ Among the legislative findings accompanying enactment of the IGRA was the statement that a principal goal of federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government.⁹

The stated purposes of the IGRA¹⁰ are to:

- Provide the statutory basis for the operation of gaming tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments.
- Provide a statutory basis for the regulation of gaming by a tribe adequate to shield it from organized crime and other corrupting influences, to assure that the tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly both by operator and players.
- Declare that the establishment of independent federal regulatory authority for gaming on Indian lands, the establishment of federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission (NIGC) are necessary to meet Congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

The impacts of the IGRA have been dramatic. Currently, 57 tribes in California operate casinos.¹¹

THE INDIAN GAMING REGULATORY ACT'S REGULATORY FRAMEWORK FOR TRIBAL GAMING

The IGRA is based on three classes of gambling, each with its own degree of involvement by non-tribal governments:¹²

- Class I gaming includes social games offering minimal prizes and traditional Indian ceremonial games. Under the IGRA, Class I gaming is within the exclusive jurisdiction of the tribes and is not subject to non-tribal oversight or other provisions of the IGRA.
- Class II gaming includes bingo and certain types of “non-banked” card games, in which players play against each other and not against a “house.” These card games are limited to those explicitly authorized by the laws of the state in which the gaming will take place and those not explicitly prohibited by the state if played in conformity with any state regulations regarding hours of operation or limitations on wagers or pot sizes. Blackjack and other “banking” card games are expressly excluded from Class II gaming. The IGRA establishes oversight of Class II gaming by the NIGC.¹³
- Class III gaming is all other gambling, which has been largely focused on “Las Vegas-style” gambling, such as slot machines, roulette, blackjack, etc. Not surprisingly, the IGRA establishes the most complex regulatory approach for this type of gaming.

Some commentators have suggested that Congress, in enacting the IGRA, assumed that most gaming taking place under the IGRA would be high stakes bingo.¹⁴ In fact, most of the attention has been on Class III gaming – “casino gambling” such as slot machines and blackjack. Several fundamental restrictions apply to Class III gaming. Among the most critical are:¹⁵

- The type of Class III gaming offered by a tribe must be permitted in the state where the tribe is located. (See California's Proposition 1A on page 4)
- Class III gaming requires a compact between the tribe and state, approved by the Secretary of the Interior, and a gaming ordinance adopted by the tribe and approved by the NIGC. (See Sections 2, 7)

California's Proposition 1A

As noted previously, the IGRA limits Class III gaming within a state to types of gambling otherwise permitted in that state. This does not mean that Class III gaming in a given state is necessarily limited to those types of gaming in which non-tribal entities can engage. For example, in 2000, California voters, via a statewide ballot measure — Proposition 1A, authorized tribal casinos to operate slot machines and blackjack (forms of Class III gambling), despite the fact that no non-tribal entities can engage in these types of gaming.¹⁶

Tribal/State Compacts

The IGRA also limits Class III gaming to casinos for which a “compact” has been entered into between the tribe and the state. California law authorizes the Governor to negotiate these compacts, which require ratification by the Legislature.¹⁷

In 1999, in anticipation of and contingent on Prop 1A passing on the March 2000 statewide ballot, 57 tribes entered into compacts with the State of California. Three additional compacts were entered into in 2000 and 2003. Taken together, these compacts represent the bulk of those entered into in California to date.

In 2004, nine additional compacts were entered into in substantially different form from the earlier compacts. Some of these were renegotiated versions of 1999 compacts; others were new compacts. (See Section 7) Additional compacts were signed in 2006 and 2007.

Under the IGRA,¹⁸ compacts may address:

- Application of the tribe's or state's criminal and civil laws related to gaming.
- Allocation of criminal and civil jurisdiction between the state and the tribe as needed for the enforcement of such laws.
- The state's assessment of its costs of regulating gaming activity.
- Taxation by the tribe in amounts comparable to amounts assessed by the state for comparable activities.
- Remedies for breach of contract.
- Standards for operation of gaming activities and maintenance of the gaming facility.
- Any other subjects directly related to the operation of gaming activities.

The IGRA addresses tribal concerns that states might simply not agree to compacts allowing Class III gaming, effectively undermining key provisions of the law. The IGRA mandates that, upon request of a tribe having jurisdiction over Indian lands (See Section 3), where the tribe proposes to conduct Class III gaming, the state must negotiate with the tribe in good faith. If no agreement is reached within 180 days from the date the tribe requested the state enter negotiations, the tribe may bring a lawsuit in federal court. If the court finds the state has failed to negotiate in good faith to conclude a compact, the court must order the state and tribe to agree to a compact within 60 days. Should they fail to do so, the IGRA provides for a form of mediation intended to result in a compact. If this mediation is not successful, the IGRA provides for the Secretary of the Interior to establish procedures under which the tribe may conduct Class III gaming.¹⁹

The Secretary of the Interior has restricted authority to disapprove a tribal/state compact, limited to whether the compact violates any provision of the IGRA, any other provision of federal law that does not relate to jurisdiction over gaming on Indian lands, or the trust obligations of the federal government to Indians.

Tribal Recognition

The starting point for siting a tribal casino is recognition of the tribe by the federal government.²⁰ The IGRA defines “Indian tribe,”²¹ a term fundamental to application of the IGRA, as any Indian tribe, band, nation, or other organized group or community of Indians that, according to the Secretary of the Department of the Interior:

- Is eligible for the programs and services provided by the federal government to Indians because of their status as Indians; and
- Possesses powers of self-government.

This standard has raised some complex legal issues, as some tribes were never recognized by the federal government, but are now seeking such recognition. Furthermore, some tribes were “terminated,” especially in the 1950s, and have had to seek to overturn their termination.

Tribal Lands

The IGRA defines “Indian lands,”²² another term fundamental to its application, as:

- All lands within the limits of any Indian reservation; and
- Any land titles which are either held in trust by the federal government for the benefit of any Indian tribe or individual; or
- Held by any Indian tribe or individual subject to restriction by the federal government against disposal of the property and over which an Indian tribe exercises governmental power.

Land Held in Trust

As indicated above, critical provisions of the IGRA apply only to “Indian lands.” One of the ways in which land can qualify for this designation is to be held in trust by the federal government on behalf of a tribe.

The Secretary of the Interior is authorized to acquire land in trust on behalf of a tribe through either a process begun by a petition to the

Secretary, or by an act of Congress. The former are discretionary decisions of the Secretary, subject to criteria specified in federal regulations.²³ The Secretary acts in a ministerial capacity (that is, in a manner not involving exercise of discretion or subjective judgment) in implementing Congressional acts.

Note that, as described in the following subsection, while trust status is in some cases critical to the IGRA applying and tribal gaming being an option, it is by itself not a guarantee of being able to engage in tribal gaming.

In addition, there is an ongoing legal question regarding the status of some “rancheria” land in California. Rancherias are federal lands that were acquired for use by homeless Indians in the first part of the 1900’s. Some, but not all, of these rancheria lands were subsequently placed in trust by the federal government. The National Indian Gaming Commission, which exercises some authority over Class III gaming, has determined that any land within the former boundaries of a rancheria, even if the rancheria was terminated and the land was never placed in trust, is a “reservation” under the IGRA and thus, eligible for gaming. This determination has been challenged by several local governments. However, to date the courts have not decided this issue.²⁴

A Fundamental Limitation on Casino Siting: The IGRA’s October 17, 1988 Rule

Generally, the IGRA prohibits Class II and Class III gaming on lands acquired by the Secretary of the Interior in trust for the benefit of an Indian tribe after October 17, 1988 (the date the IGRA was enacted).²⁵ Most existing tribal casinos met the “10/17/88 rule.”

However, the IGRA²⁶ permits exceptions to this rule, allowing gaming on lands brought into trust after October 17, 1988 where:

- The lands are located within or contiguous to a reservation’s October 17, 1988 boundaries;
- The tribe had no reservation on October 17, 1988 and the lands are within the tribe’s last recognized reservation; or

CASE STUDY: IONE BAND OF MIWOK INDIANS CASINO/HOTEL AMADOR COUNTY, CA

This project illustrates one of the IGRA's exceptions to the general rule prohibiting Class II and III gaming on land brought into trust after October 17, 1988. Here, the Department of the Interior applied the provision for lands taken into trust as part of a restoration of land for a tribe restored to federal recognition.

PROPOSED PROJECT :

In September 2006, the Department of Interior ruled that a proposed casino/hotel site in Plymouth, Amador County could be acquired in trust by the federal government as part of "the restoration of lands for an Indian tribe that is restored to federal recognition."

KEY PLAYERS :

The Department of the Interior found that the land being acquired was in an area that was historically significant to the Band, within a few miles of several historic tribal burial sites. It also found that many of the Band's members live in the surrounding area, and that only twelve years had passed between restoration of the tribe in 1994 and the proposed acquisition. However, Amador County opposed the casino/hotel, in part because the County was already affected by two other tribal gaming facilities.

OUTCOME :

In March, 2007, Amador County filed a lawsuit seeking to enjoin acquisition of the casino/hotel site in trust, challenging the federal acceptance of the lone Band of Miwok Indians as a federally recognized tribe. The case was still pending at the time this report was published.

- The acquired lands are taken into trust as part of the settlement of a land claim; the initial reservation of an Indian tribe acknowledged by the Secretary of the Interior under the federal acknowledgment process; or the restoration of lands for an Indian tribe that is restored to federal recognition. (See lone Band of Miwok Indians Case Study above)

Furthermore, the IGRA²⁷ also has an exception to its prohibition on Class II and III gaming on land brought into trust after October 17, 1988 if:

- The Secretary of the Interior determines that gaming on such land is in the best interest of the tribe and would not be detrimental to the surrounding community; and
- The governor of the state in which the gaming is proposed concurs in the Secretary's determination.



Historically, most of California's tribes were relegated to reservations and rancherias that were distant from the state's population centers. As a result, most pre-10/17/88 reservations and trust lands are in rural areas and away from major highways.

One can understand, however, the commercial motivations for siting gaming facilities closer to larger markets and transportation arteries. For this reason, there has been an increased interest in siting tribal gaming facilities in these locations (sometimes referred to by detractors as "reservation shopping"), utilizing the statutory exceptions to the 10/17/88 rule.

California's Position on "Section 20 Concurrence"

As described above, a key exception to the IGRA's limitation on siting tribal casinos on land brought into trust after October 17, 1988 requires concurrence by the governor of the state in which the gaming is proposed (referred to as "Section 20 concurrence," as it is found in Section 20 of the IGRA). In response to the demand for more urban sites in California for tribal gaming facilities, Governor Schwarzenegger issued a proclamation²⁸ in May 2005 stating, among other things:

- He will oppose proposals for federal acquisition of lands within any "urbanized area" (defined under California Environmental Quality Act) which are intended to conduct or facilitate gaming.
- He will consider requests for the required gubernatorial Section 20 concurrence only in cases where, among other things:
 - The land is not within an urbanized area;
 - The local jurisdiction supports the project (e.g., as shown by an advisory vote);
 - The project serves a public policy apart from increased economic benefit to the state, community or tribe.

Furthermore, the Governor directed that a number of state agencies review proposals for urban casinos (e.g., Department of Parks and Recreation, Department of Water Resources, Department of Fish and Game,

the Native American Heritage Commission, Caltrans, the California Highway Patrol, the Air Resources Board, the Department of Conservation, and the appropriate Regional Water Quality Control Board).

Environmental Review of Casino Siting Decisions

Environmental review under the National Environmental Policy Act (NEPA) is required in order for the Department of Interior to approve a tribe's request to acquire land into trust on behalf of the tribe. As noted above, this action may be a prerequisite for casino development. NEPA review is also required when NIGC approves a tribal casino gaming management contract for Class III gaming. (See Section 4)

However, if a tribal casino is proposed for existing trust lands and the tribe is not seeking federal approval of a management contract with a commercial operator, NEPA review is not required for casino siting or development. The tribe must still comply with its own environmental review process and the process agreed upon within the tribal/state gaming compact.



SECTION 4: APPLICABILITY OF FEDERAL ENVIRONMENTAL LAWS TO TRIBAL CASINOS

Under the principles of “dependent sovereignty” described in Section 2, the federal government has the authority to apply federal laws to tribal governments. Under this authority, tribes are subject to certain federal laws that address environmental protection, with the potential for affecting the siting, design, and operation of tribal gaming facilities. The most important federal environmental laws affecting tribal casino development are:

- Environmental, public health, and safety provisions of the Indian Gaming Regulatory Act²⁹
- The National Environmental Policy Act³⁰
- The National Historic Preservation Act³¹
- The Clean Water Act³² and the Safe Drinking Water Act³³
- The Clean Air Act³⁴
- The Endangered Species Act³⁵

The following discussion lays out the basic requirements of these environmental laws, the ways in which tribes comply with these requirements, and possible effects on where and how tribal casinos will function. For tribal casino projects, some of these laws, e.g., NEPA, apply to federal agencies only if the Secretary of the Interior must approve land being taken into trust, or if the National Indian Gaming Commission must approve a management contract. Other federal laws, e.g., the Clean Water Act, the Clean Air Act, and Endangered Species Act, apply directly to tribes and may be enforced by federal regulatory agencies.

It should be noted that some tribes have adopted environmental regulations and practices that go well beyond the minimum legal requirements established by federal law and tribal/state gaming compacts. (See Section 6)

Indian Gaming Regulatory Act Environmental Requirements

For Class II and Class III gaming, the IGRA requires gaming tribes to enact a gaming ordinance that, among other things, provides assurance that the construction and operation of gaming facilities adequately protects the

environment, and public health and safety. The NIGC regulations that implement this requirement require tribes to set and enforce standards for at least the following topics: emergency preparedness, food and water, construction and maintenance, hazardous materials, and sanitation.³⁶ The NIGC retains oversight authority to assure these requirements are implemented.

Some tribes have gaming ordinances that include the IGRA environmental, health, and safety requirements; other tribes have separate environmental ordinances focused just on environmental regulation. (See Section 6)

An example of the former, integrated approach is the Susanville Rancheria tribal gaming ordinance.³⁷ This ordinance describes tribal environmental review procedures for casino development, but also adopts the federal standards for food safety, occupational health and safety, and drinking water quality, as well as a version of the Uniform Building Code.

National Environmental Policy Act (NEPA)

NEPA requires federal agencies taking major federal actions, which significantly affect the quality of the environment, to prepare an Environmental Impact Statement (EIS). If the federal action does not have a significant environmental effect, or the significant environmental effect can be mitigated, the federal agency prepares a shorter Environmental Assessment (EA) and Finding of No Significant Impact (FONSI).

Core components of an EIS are an identification of significant impacts, mitigation measures for those impacts, and an evaluation of alternatives to the proposed project. The public review provides an opportunity for interested parties to submit comments on the draft and final EIS.

Two types of federal actions are subject to NEPA compliance: 1) taking land into trust on behalf of a tribe; and 2) approval of tribal gaming management contracts with commercial operators. Thus, if a tribal casino is proposed for existing trust lands and the tribe does not seek approval of a management contract with



a commercial operator, NEPA review is not required for casino development.

Taking Land Into Trust. Siting or expanding a tribal casino may depend on the Secretary of the Interior first approving a tribe's request to take land into trust on behalf of the tribe. Such federal action is subject to NEPA, with the Bureau of Indian Affairs (BIA) serving as the "lead agency" (the federal agency with primary responsibility for the proposed action and for assessing its anticipated environmental effects). The NIGC, a federal agency created by the IGRA, typically serves as a "cooperating agency" under NEPA. A "cooperating agency" may be any Federal agency other than the lead agency with jurisdiction over the proposal or special expertise with respect to its environmental impacts. (See Section 3)

Tribal Gaming Management Contracts. Under the IGRA, in order for a tribe to operate a Class III casino using a commercial operator, the NIGC must approve a management contract. This federal action is subject to NEPA, with NIGC serving as lead agency.

Recent examples include NEPA documents prepared for the Scotts Valley Casino Project with the Bureau of Indian Affairs serving as lead agency for taking land into trust,³⁸ and the Graton Rancheria Casino and Hotel Project with NIGC serving as lead agency for approval of a management contract.³⁹ (See Graton Rancheria Case Study)

NEPA documents for tribal casinos typically address the following:

- Construction impacts from construction of the casino, support buildings, parking lots, roads, hotels, shops, and recreational facilities on air quality, noise, water quality, biological resources, and cultural resources.
- Operational impacts including changes in drainage patterns, water supplies, traffic congestion, traffic-related noise and air pollution, demands for public services and utilities, land use patterns, community character, and socioeconomic conditions.
- Cumulative impacts from the development of the tribal casino when combined with impacts of developing other facilities in the project area by the tribe or other parties.

- Alternatives such as different casino sizes, alternative land uses on the project site, or a different casino location.

NEPA documents for tribal casinos offer the opportunity for interested parties to comment on proposed tribal casinos, their impacts, and their alternatives. Commenting opportunities include the EIS scoping process, the Draft EIS, and the Final EIS.

Those who wish to challenge the legal adequacy of the NEPA review process for a tribal casino may file a lawsuit. Historically, an EA/FONSI was the most common approach to NEPA compliance for tribal gaming projects. EAs/FONSIs typically are shorter, and faster to prepare, than full EISs, but more susceptible to successful legal challenges. Full EISs on tribal casino projects are therefore becoming more common, due to increased controversy and litigation.⁴⁰

National Historic Preservation Act (NHPA)

Section 106 of the NHPA requires federal agencies to consult with State Historic Preservation Officers (SHPOs) and the Advisory Council on Historic Preservation when federal actions affect certain historic or cultural resources.⁴¹ In 1992, the NHPA was amended⁴² to allow federally recognized Indian tribes to designate a Tribal Historic Preservation Officer (THPO), who may assume any or all of the functions of a SHPO on tribal land. However, a limited number of tribes can afford such a position. In California, only seven tribes have THPOs.⁴³

A tribe, as a formal participant in the national historic preservation program, may undertake functions such as identifying and maintaining inventories of culturally significant properties, nominating properties to national and tribal registers of historic places, and conducting consultations for federal agency projects on tribal lands under NHPA Section 106.

A Section 106 consultation for a tribal casino project may be required if a proposed Department of Interior action (taking land into trust), or NIGC action (approval of a management contract), could adversely affect resources that are listed or eligible for listing on national and tribal registers of historic places.

CASE STUDY: GRATON RANCHERIA CASINO/HOTEL SONOMA COUNTY, CA

This project illustrates how the NEPA process can serve as a forum to address highly controversial tribal casino planning issues.

PROPOSED PROJECT :

A Draft Environmental Impact Statement was released in 2007 for the Graton Rancheria's proposed 760,000-square-foot casino and hotel in Sonoma County. NIGC served as lead agency for the EIS because it was asked to approve a management contract between the tribe and a management company. The Draft EIS analyzed several alternatives including: selection of a different site for the casino/hotel, construction of a smaller project, and development of a business park rather than a hotel-casino.

The Draft EIS also addressed a wide range of environmental and socio-economic impacts, including the following "areas of controversy," raised by the public during the EIS scoping process:

- Air quality impacts
- Water supply, groundwater resources, and surface water resources impacts
- Traffic congestion impacts
- Biological impacts, including impacts on species listed under the Endangered Species Act
- Impacts on funding for police services
- Likelihood of increased crime and mitigation of any impacts
- Interaction of tribal police force with city and county public safety agencies

KEY PLAYERS :

Numerous agencies and interest groups participated in the scoping process. These included the City of Rohnert Park, on whose border the casino/hotel would be located, neighboring cities, Sonoma County, environmental groups, and community members. All opposed the project.

OUTCOME :

The Final EIS was being prepared at the time this report was published.

Federal Clean Water Act (CWA) and Safe Drinking Water Act (SDWA)

The CWA establishes several regulatory programs including: water quality standards; permits to protect beneficial uses of surface waters; permits for point source and non-point source discharges of water pollution; and Section 404 permits for filling wetlands and other jurisdictional "waters of the United States." The SDWA establishes drinking water standards and a regulatory program to enforce those standards.

As allowed by the CWA and SDWA, EPA has delegated authority to implement these laws

to California and many other states. However, these statutes do not authorize states to regulate water resources of Indian lands, and EPA generally retains enforcement authority on Indian lands in California.⁴⁴

EPA is authorized to delegate authority to administer CWA and SDWA programs to tribes. EPA terms this delegation to tribes "Treatment as State" (TAS).⁴⁵ In order to delegate authority to a tribe, EPA must find that the tribe has jurisdiction, authority, and capacity to run the CWA or SDWA programs.

Few California tribes have obtained TAS status to administer CWA programs. To date, the Hoopa Valley Tribe, the Big Pine Paiute Tribe,



and the Twenty-Nine Palms Band of Mission Indians have done so.⁴⁶ Courts interpreting the TAS program, have upheld tribal rights to enact water quality standards that apply to sources located on land owned by non-members.⁴⁷

For tribal casino development, CWA requirements that may be relevant include water quality standards for any point source discharges (e.g., from wastewater treatment plants), and water quality standards and permitting requirements for storm water runoff. Section 404 permit requirements are necessary if casino development requires the fill of jurisdictional wetlands or other “waters of the U.S.” SDWA requirements that may be relevant include drinking water quality standards that must be met by the casino development’s water supply.

The 1999 and 2004 compacts have special provisions related to water quality and safe drinking water standards. They require the tribe to adopt and comply with federal water quality and safe drinking water standards applicable in California. The compacts also require the tribe to allow state, county, or city inspection and testing of water quality to assess compliance with the standards. Violations of the standards are treated as violations of the compact and may justify enjoining water use or disposal at the casino. (See Section 7)

Clean Air Act (CAA)

The CAA establishes air quality standards to protect public health and welfare, and establishes a permit program for new or modified stationary sources of air pollution. Similar to the CWA and SDWA, the CAA is enforced on tribal lands by EPA.⁴⁸ As with water quality laws, EPA can delegate regulation and enforcement to tribes by giving them TAS status, but few tribes across the nation have obtained this designation.

The most relevant CAA requirement for tribal casinos is the federal air quality conformity rule. This rule requires that federal agencies ensure their actions conform to an approved State Implementation Plan (SIP) designed to achieve and maintain national ambient air

quality standards.⁴⁹ For tribal casinos, conformity requirements would apply to the Department of Interior acquisition of land into trust, or NIGC approval of management contracts. Also, special conformity rules exist for federally-funded transportation projects,⁵⁰ and these rules would also apply to sponsors of those federally-funded transportation projects serving tribal casinos.

Endangered Species Act (ESA)

The ESA protects species listed as “endangered” or “threatened,” and can result in limitations on any action that may injure the species or destroy the critical habitat of such species. The Secretaries of Interior and Commerce, responsible for implementing the ESA, have developed special policies for implementing the ESA on tribal lands.⁵¹

Section 7 of the ESA requires federal agencies to consult with the U.S. Fish and Wildlife Service to ensure that agency actions do not jeopardize listed species or destroy or adversely modify critical habitat.⁵² For tribal casinos, consultation requirements would apply to the Department of Interior’s acquisition of land into trust, or NIGC’s approval of a management contract.

Section 10 of the ESA requires non-federal agencies to obtain an “incidental take” permit based on a Habitat Conservation Plan (HCP) if their activities could result in the “take” (e.g., harm or kill, including through habitat loss) of listed species.⁵³ Tribes need to apply for incidental take permits if their casino projects would result in an incidental take and either prepare a new project-specific HCP or demonstrate compliance with an existing regional HCP. To facilitate ESA compliance for future projects, the Agua Caliente Band of Cahuilla Indians is preparing a draft Tribal Multi-Species HCP, which is believed to be the first HCP of its kind in the nation.⁵⁴

SECTION 5: APPLICABILITY OF STATE AND LOCAL ENVIRONMENTAL LAW

As a general rule, state and local environmental regulations do not apply to tribal reservation lands and land held in trust by the federal government on behalf of a tribe (See Section 2). However, tribal casinos are subject to environmental impact assessment requirements that are somewhat similar to those of the California Environmental Quality Act under both the 1999 compacts and the 2004 compacts. (See Section 7)

In addition, CEQA may apply to local governments or the state if they extend infrastructure to serve tribal casinos. It should be noted that some tribes have adopted environmental programs that go well beyond the minimum legal requirements established by state compacts, as well as federal law. (See Section 6)

CEQA Not Applicable to Tribes

CEQA⁵⁵ requires environmental review of projects undertaken by state and local governments, including private developments that require the discretionary approval of a state or local public agency. However, state laws apply on tribal lands only as provided by Congress, and CEQA is not one of those laws.

CEQA Requirements for State and Local Infrastructure Provision to Tribal Casinos

While tribes are not subject to CEQA, local and state governments extending infrastructure to

tribal casinos, or those making other discretionary decisions that support casino development with the potential for affecting the physical environment, may themselves be subject to CEQA.


Thus, if a state or local agency approves funding of a particular road project to serve a tribal casino, that decision may be subject to CEQA. The state or local agency must analyze the direct and indirect impacts of building the infrastructure. But there is uncertainty about the scope of the infrastructure agency's duty to analyze the casino project's impacts, alternatives, and mitigation measures.

For example, in *County of Amador v. City of Plymouth*, 149 Cal.App.4th 1089 (2007), the court determined a Municipal Services Agreement (MSA) between a city and a tribe seeking to build a casino development was subject to CEQA. The MSA was an enforceable agreement in which the City agreed to support the tribe's application to take lands into trust, in return for the tribe agreeing to pay for comprehensive financial mitigation for public services impacts.

Further, the City agreed to vacate a road and implement several specific public services improvements needed to serve the casino development. The decision was unclear on whether the scope of the City's CEQA document should be limited to off-reservation road and infrastructure improvements, or whether it should include impacts of the on-reservation casino development.

Note, however, that an infrastructure funding agreement associated with a tribal casino, but not related to a specific infrastructure project, is not subject to CEQA. In *Citizens to Enforce CEQA v. City of Rohnert Park*, 131 Cal.App. 4th 1594 (2005), the City entered into a Memorandum of Understanding with the Graton Rancheria regarding funding of possible public improvements related to a proposed tribal casino. The court ruled that the Memorandum of Understanding was merely a funding mechanism and, thus, not a project subject to CEQA.





Environmental Impact Assessment Requirements Under Tribal/State Gaming Compacts

Both the 1999 compacts and the 2004 compacts (See Section 7) establish CEQA-like procedures for disclosure and mitigation of off-reservation environmental impacts of tribal casino development on tribal lands. For example, the Agua Caliente Band of Cahuilla Indians has one of the most active tribal environmental review programs in the state. (See Case Study)

The 1999 compacts require an environmental impact ordinance concerning off-reservation impacts of a gaming “project” built on tribal trust land. This provision is weaker than CEQA because, unlike CEQA, there is no requirement to mitigate impacts when feasible. Also, the scope of the ordinance does not include impacts on Indian lands, only on off-reservation lands.

Under the 1999 compacts, a “project” is a significant change to an existing gaming facility, or construction of new gaming facilities. Before commencing such a project, the tribe must inform the public of the project and determine if the project will significantly impact the off-reservation environment. If so, a tribal environmental impact report must be prepared and submitted to the State Clearinghouse in the Governor’s Office of Planning and Research and to the county board of supervisors. The tribe must consult with the board and applicable city council, if the reservation is within city boundaries, and receive public comment on the report.

While the 1999 compacts do not specify the contents of a tribal environmental impact report, they do require the tribal environmental protection ordinance to make a good faith effort to incorporate the policies and purposes of NEPA and CEQA, consistent with the tribe’s governmental interests. This suggests that environmental impact reports under the 1999 compacts should include a discussion of alternatives and mitigation measures, as well as significant adverse environmental impacts, though these contents are not specifically required by the compacts.

During construction, the tribe must keep the board of supervisors and city council informed of the project’s progress and make “good faith efforts” to mitigate significant adverse environmental impacts. Enforceable agreements to mitigate off-reservation impacts are optional and require the tribe to waive sovereign immunity.

The 2004 compacts require a tribal EIR (TEIR) process similar to the environmental reviews under the 1999 compacts, but much more formalized. Under these compacts, a TEIR must disclose significant effects of new or expanded gaming facilities and related projects on the off-reservation environment, and list ways in which these significant effects may be mitigated.

A reasonable range of alternatives to reduce significant effects, except for alternatives that would cause the tribe to forego gaming authorized by compact, must be analyzed. Like the 1999 compact environmental reviews, the scope of the review does not include impacts on Indian lands, only off-reservation lands.

Before project commencement, the tribe and affected local governments are required to enter into an enforceable written agreement for timely, feasible mitigation of off-reservation impacts. This requirement to implement feasible mitigation measures is a major change from the 1999 compacts, where such agreements are optional.

The agreement must also cover non-environmental topics such as compensation for public services, gambling addiction, and public safety impacts. Because there are no guidelines on how to analyze off-reservation impacts and mitigation measures, agreements are negotiated on a case-by-case basis. The tribe or local government can enforce the requirement for an agreement via binding arbitration. The same general approach is used in all the 2004 gaming compacts, with some compact-specific variation in specific terms.

CASE STUDY: AGUA CALIENTE BAND CASINO EXPANSION RIVERSIDE COUNTY, CA

This project illustrates the role of a “tribal environmental impact statement” in mitigating a tribal casino’s off-site impacts.

PROPOSED PROJECT :

The Agua Caliente Band of Cahuilla Indian’s Tribal Environmental Policy Act (Ordinance No. 28, adopted in March 2000) requires a Tribal Environmental Impact Statement (TEIS) for major tribal actions significantly affecting environmental quality. On February 21, 2006, the tribe issued a record of decision approving a project involving 65,000 square feet of casino expansion, a 400-room hotel, 30,000 square feet of meeting space, a 60,000 square foot showroom, and 2,200 parking spaces.

The TEIS described impacts and developed mitigation measures for the following resources:

- Geology and soils
- Biological resources
- Drainage and water quality
- Transportation and circulation
- Air quality
- Cultural resources
- Public safety
- Visual quality



KEY PLAYERS :

Following project approval, the tribe implemented a wide range of mitigation measures to avoid or reduce adverse impacts of the casino expansion project. For example, the tribe entered into a funding agreement with Riverside County for funding of public safety services, wherein a portion of the tribe’s transient occupancy tax was dedicated to Riverside County for public safety services (police, fire, and emergency medical). The County coordinated with surrounding affected cities to use the funds to offset impacts to each agency’s service programs.

OUTCOME :

The casino expansion project was being implemented at the time this report was published.

SECTION 6: LAND USE PLANNING FOR TRIBAL CASINOS

Land use on tribal lands is not subject to local and state planning requirements or land use regulation. Rather, planning on Indian lands is a tribal responsibility. Prior to the emergence of tribal casinos, the type and scale of tribal development activities (e.g., housing for tribal members) typically raised little concern in surrounding communities. Tribal casinos for Class III gaming has changed this, creating much more interest in tribal planning activities. (See Section 2)

There are 108 federally recognized Indian tribes in California, and a number of other tribes are seeking federal recognition.⁵⁶ Currently, 57 tribes operate tribal casinos, with other tribes somewhere in the process of attempting to establish casinos by seeking tribal recognition, establishing a reservation or expansions to it, seeking to have land taken into trust by the federal government on their behalf, or negotiating compacts.⁵⁷

Planning and plan implementation for tribal casinos themselves, and for addressing the relationship of tribal gaming facilities to surrounding communities, is addressed below. Also discussed are agreements between tribal and local or state governments to provide infrastructure to serve tribal gaming facilities, and tribal environmental protection programs, which can exceed the minimum legal requirements of federal law and tribal/state compacts.

Site Planning for Tribal Casinos

There is a wide range of approaches to land use planning among the various tribes. For example, the Agua Caliente Band of Cahuilla Indians in California's Coachella Valley has utilized professional planning consultants for land use and zoning matters for over 40 years. Currently, the tribe has six in-house planners and a total staff of 20 in the Planning and Development Services Department, including building officials, archaeologists, and Geographic Information Systems (GIS) staff.

The tribe's acknowledged capabilities have led to an agreement with Riverside County whereby the tribe does all of the land use

planning, as well as building and engineering permitting, for a portion of the County that is surrounded by tribal lands south of the City of Palm Springs, and all trust land not covered by a "land use contract," described below.

More typically, tribes have limited professional planning capacity in house. When facing the task of planning for a new casino, these tribes have usually relied on a gaming consultant or contract engineer or planning consultant to work with the tribe to review the opportunities and constraints of available tribal land assets and make recommendations to the tribal council.

Often, there are few alternative sites on which a tribal casino can be built, given the constraints of a limited amount of tribal land and frequently remote locations. The Agua Caliente Band is an exception to this common situation. Their lands provide an interesting example of tribal land use planning in close proximity to non-tribal development. The tribes' checkerboard land ownership pattern in the Coachella Valley (alternate square miles over three townships) has resulted in a close physical and working relationship with several jurisdictions.

Starting in the late 1970's, negotiated land use contracts with three cities and Riverside County have allowed those jurisdictions to regulate allotted trust lands (owned by individual tribal members and administered in trust by the federal governments), with the final authority available to the tribe upon appeal.

However, in the case of its gaming facilities, the tribe removed those projects from the land use contracts and processed the projects with its own staff and/or consultants. Currently, the tribe is constructing an 18-story hotel addition to its Rancho Mirage casino, located in an unincorporated portion of Riverside County adjacent to the City of Rancho Mirage. The tribe processed the project, provided environmental documentation through its own staff, and contacted the staff of the City of Rancho Mirage and Riverside County, other property owners, and other stakeholders.

Addressing Relationships to Neighboring Communities

Prior to the rise of tribal gaming, most tribes did not have economic activities that had much impact on surrounding non-Indian lands, and most jurisdictions had little interface with tribal land use. Early gaming efforts involving bingo, while occasionally controversial from the standpoint of whether cities/counties or tribal governments had the authority to control land use, did not raise much concern over environmental impacts. Class III gaming often has.

Off-site impacts have become one of the main concerns expressed both before and after the construction of tribal gaming facilities. Common examples of off-site impact concerns, environmental and otherwise, are traffic, demands on water supply and sewer capacity, increased need for health and social services, flood control, increases in gambling addiction, increased crime, and increased demand for public safety services.

CASE STUDY: UNITED AUBURN INDIAN COMMUNITY CASINO PLACER COUNTY, CA

This project illustrates voluntary mitigation of off-site impacts under a 1999 compact.


PROPOSED PROJECT AND KEY PLAYERS :

The United Auburn Indian Community entered into a Memorandum of Understanding (MOU) with Placer County regarding a proposed casino. Although the MOU was negotiated before the tribe signed its 2004 compact (2004 compacts require agreements addressing off-site impacts), the United Auburn Indian Community volunteered to mitigate off-reservation impacts of the casino project. In return, the County supported the tribe's request for the Department of Interior to approve taking the casino site lands into trust. The MOU (signed in 2000, amended in 2003) included the following commitments:

- Pay Placer County the equivalent of property taxes, the county share of sales taxes, and transient occupancy taxes.
- Comply with the County general plan, community plans, zoning ordinances, design guidelines, and building standards.
- Process development applications for review by County staff using CEQA-like procedures.
- Mitigate traffic impacts by building new off-reservation roads and paying traffic mitigation fees.
- Reimburse law enforcement and fire protection costs.
- Contribute substantial funds towards the County's open space program ("Placer Legacy").

OUTCOME :

The Thunder Valley Casino was built and is operating. A major expansion, including a hotel and performing arts center, was proposed in 2007.



As a result, tribal planning efforts are increasingly focused on off-site impacts and the relationship of tribal activities to surrounding communities beyond the requirements of applicable federal environmental laws. For example, off-reservation environmental impacts and effects on public service provisions are addressed through the local government agreements required by the 2004 compacts. (See Sections 5 and 7)

Although the local government agreements required by the 2004 compacts require tribes to address off-reservation impacts, including the effects on public services, and problem gambling with more specificity than did the 1999 compacts, there are no guidelines addressing how off-site impacts are to be quantified and no standards for mitigation. Therefore such provisions are negotiated on a case-by-case basis. (See United Auburn Indian Community Case Study on previous page)

In addition, tribal governments are adopting their own environmental protection programs with potential consequences for surrounding communities. (Discussed below) Furthermore, some tribal governments have made voluntary donations for specific government activities such as libraries, fire protection, police, and drug abuse prevention programs.

Also, the Indian Gaming Special Distribution Fund, established in the 1999 compacts requires gaming tribes make payments to the state, which the state distributes to communities to address off-site casino impacts. The 2004 compacts continue this practice.

The issue of off-site impacts may take on heightened importance as the state's population moves toward the once remote locations of the tribal reservations and rancherias. As the map on the next page shows, over 80 percent of the state's land area is now within 50 miles (approximately an hour's drive) of a reservation or rancheria. Increasingly, decisions related to tribal gaming have consequences for non-tribal lands. Similarly, the movement of population closer to tribes will have consequences for tribal lands.

Infrastructure Provision to Tribal Casinos

In some instances, infrastructure extension to a new or expanded tribal casino is an important step in the casino's development. For example, a local government may agree to extend sewer or water service, or Caltrans may provide roadway improvements.

CEQA may apply to decisions by state or local governments to provide infrastructure to tribal casinos. (See Section 5)

Tribal Environmental Programs

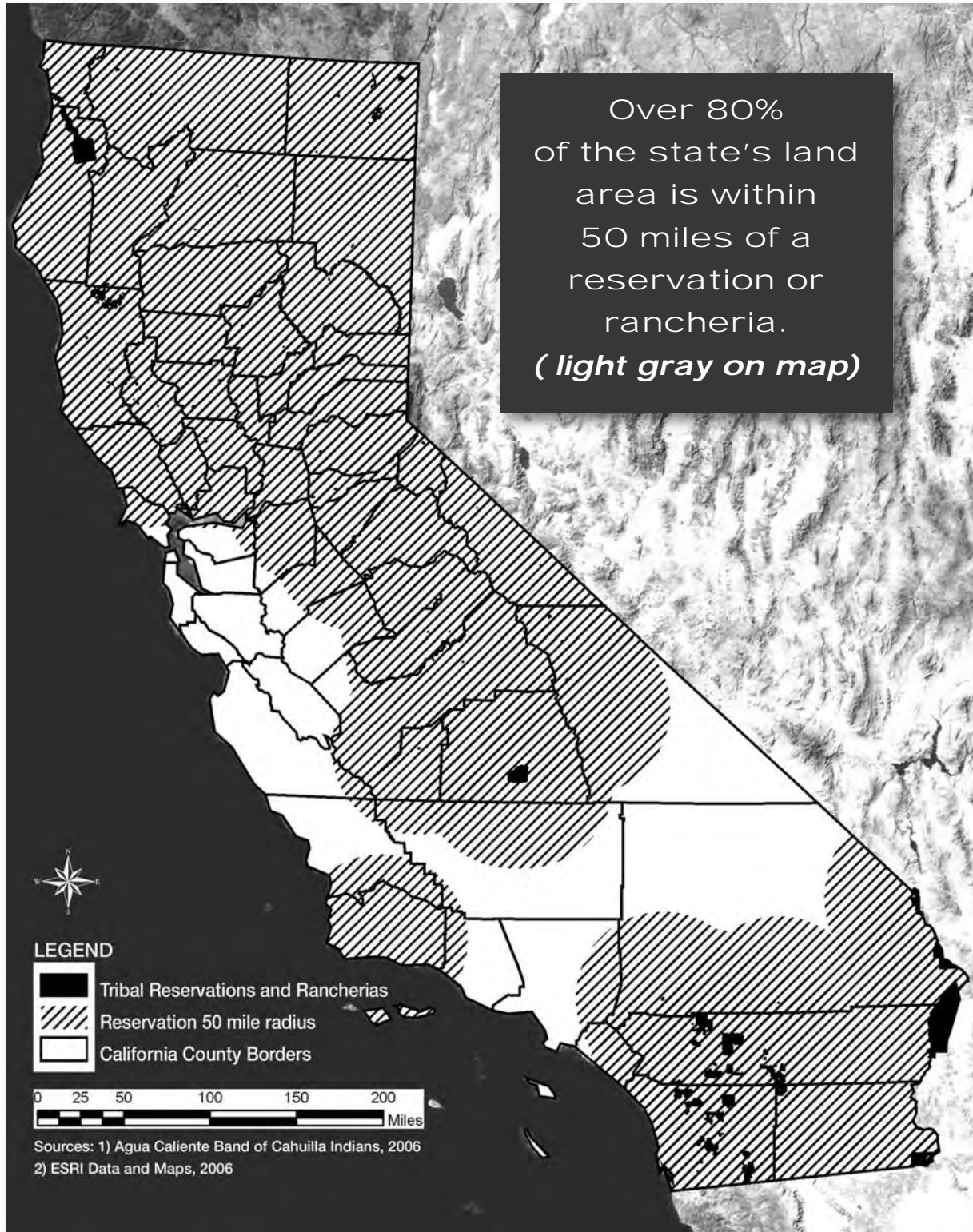
Tribal governments have the sovereign authority to regulate environmental quality and natural resources on tribal lands. Many tribes have adopted one or more environmental ordinances or policies to ensure environmental quality objectives. The types of tribal environmental programs vary greatly, depending on the size, location, resources, capacity, and cultural perspective of each tribe.

Some ordinances have been adopted to implement the environmental requirements of the IGRA, or the environmental review requirements of 1999 or the 2004 compacts. Other ordinances regulate environmental quality, e.g., water quality or solid waste ordinances, incorporating requirements of applicable federal environmental laws and applying them to tribal lands. (See Sections 4 and 5)

Furthermore, many tribes voluntarily adopt environmental ordinances that go beyond the minimum requirements of federal law and the compacts. Among the examples of this practice are the innovative tribal environmental programs adopted by the Agua Caliente Band of Cahuilla Indians, which has well-developed planning and environmental management capacity. The tribe has entered into an agreement with the City of Palm Springs to provide City review of land use

projects (including their environmental impacts) on tribal land. The tribe has also adopted a Tribal Habitat Conservation Plan. (See Agua Caliente Band Case Study on page 14)

As further examples, the Susanville Rancheria and the Torres Martinez Cahuilla Indian Tribe have both adopted water quality ordinances regulating water pollutant discharges.



SECTION 7: TRIBAL/STATE GAMING COMPACTS

Under the IGRA, Class III gaming (“casino gambling” such as slot machines and blackjack) requires a “compact” between the tribe and state. (See Section 2)

In California these compacts fall into two general groups:

- those entered into in 1999 under Governor Gray Davis in anticipation of Prop 1A passing and a smaller group of similar agreements reached in 2003; and
- compacts entered into beginning in 2004 under Governor Arnold Schwarzenegger.

This section summarizes the history and key provisions of these compacts, including recent developments. The section concludes with a case study of two tribes’ effort to establish new facilities off their reservations.

In total, the State of California has signed and ratified tribal/state gaming compacts with 66 Tribes. There are currently 58 casinos operated by 57 Tribes.

The California Gambling Control Commission (CGCC) maintains statistics concerning tribal/state gaming compacts, providing a useful summary of activity. Updated reports are available by logging onto the Commission’s website at <http://www.cgcc.ca.gov/compacts.asp>.

Pending compacts (those new or renegotiated compacts that have not yet been ratified by the Legislature) are not included in the summaries that follow.

1999 Compacts

Proposition 1A, a statewide ballot measure passed in 2000, amended the California Constitution, authorizing slot machines and blackjack in tribal casinos. This opened the door to Class III gaming in tribal casinos in California. (See Section 2 for a discussion of Prop 1A and its role in authorizing Class III gaming in California.) Anticipating the passage of Prop 1A, in 1999 the Governor negotiated compacts with 57 tribes, which were ratified by the Legislature. Most tribal casinos operate under these compacts and several signed in 2000 (together, the “1999 compacts”). Their provisions are summarized on page 20. Of these 1999 compacts, eight have been renegotiated (i.e., amended) by Governor Schwarzenegger and the tribes, and ratified in their new form by the Legislature.

2003 Compacts

Three additional tribes signed tribal/state gaming compacts in 2003:

- The La Posta Band of Diegueno Mission Indians;
- The Santa Ysabel Band of Diegueno Mission Indians; and
- The Torres-Martinez Band of Cahuilla Mission Indians.

All three tribes currently operate a casino.

A Note Concerning the Compacts

While virtually all current compacts operate in some manner under the provisions of Proposition 1A, there is wide variety among the individual agreements, when referring to the pre-2000 compacts, post-2000 compacts, or the most recent negotiations. Even within compacts negotiated during the same year, there are differences in terms between one compact and another. Each agreement is reflective of local tribal conditions. Specific compacts can be reviewed at the website of the California Gambling Control Commission: <http://www.cgcc.ca.gov/tribalinformation.asp>.

Key Provisions of the 1999 Compacts

FINANCIAL ASPECTS

The 1999 compacts address a variety of financial issues, including:

- Allowing each tribe 350 slot machines. Tribes may pay for licenses for additional machines, but generally may not operate more than 2,000 machines.
- A revenue sharing trust fund was created to which tribes make quarterly payments based on their number of licensed slot machines. Annual payments, up to \$1.1 million per tribe per year, are made to non-compact tribes and those operating fewer than 350 machines.
- An Indian Gaming Special Distribution Fund was created to which tribes began making payments in 2002 based on the number of licensed machines they were operating on September 1, 1999 (pre-compact). The Legislature can spend these funds on gambling addiction programs, grants to affected state and local agencies, reimbursement of state regulatory costs, and other uses.

ENVIRONMENTAL REVIEW

The 1999 compacts required tribes to adopt an “environmental impact ordinance” and prepare a tribal report if there is a significant impact to the off-reservation environment. (See Section 5)

LOCAL GOVERNMENT AGREEMENTS

Unlike the 2004 compacts discussed below, the 1999 compacts contain no requirements for tribes to negotiate local government agreements to address mitigating off-reservation environmental impacts or public service responsibilities. Some tribes operating under 1999 compacts have entered into local government agreements voluntarily.

LIMITS ON NUMBER OF CASINOS

Under the 1999 compacts, tribes were limited to two gaming facilities per tribe.

2004 Compacts

With the election of Governor Arnold Schwarzenegger, a new round of tribal/state compact negotiations began, creating a new and different playing field for tribal gaming in California.

Two new compacts were negotiated by the Governor and ratified by the Legislature. In addition, amendments to seven 1999 compacts were negotiated and ratified. (Another new compact was negotiated with the Lytton Rancheria, which the Legislature did not ratify.)

The terms of the agreements represent some significant changes over those found in the 1999 compacts, most notably with regard to increased revenues to the state, the potential for expanded gaming operations, required agreements to address mitigating off-site environmental impacts and effects on public services, and required compliance with certain provisions of state law.



Key Provisions of the 2004 Compacts

FINANCIAL ASPECTS

The 2004 compacts added some significant financial provisions, some of which increase revenues to the State, others of which increase, at least potentially, tribal gaming revenues. These include:

- \$97 million annual payments from the five tribes to finance a \$1 billion bond for 2004-05 transportation projects to be repaid over 18 years. The specifics of how the transportation funds will be spent were outlined in several trailer bills.
- An additional payment of \$12,000 to \$25,000 annually per slot machine exceeding the 2,000 limit in the 1999 compacts. There is no cap on the number of machines that a tribal government may operate under this provision. However, it has been suggested that its exercise will be limited as the net win per machine would need to be quite high to make the additional machines financially viable. A 2006 study by the Center for California Native Nations at the University of California, Riverside reports that eleven tribes have now reached the 2000-machine limit.⁵⁸ In return, the state promises that only tribes with a federally authorized compact may operate slot machines and certain card games within the tribe's core geographic market.
- An additional, annual payment of \$500,000 by each tribe into the "Revenue Sharing Trust Fund," described in the 1999 compacts discussion, above.⁵⁹ The 2006 UC Riverside study reports that since its creation, tribal governments with gaming have contributed more than \$148 million into the Revenue Sharing Trust fund to be shared with non-gaming tribes.⁶⁰

ENVIRONMENTAL REVIEW

The 2004 compacts establish a Tribal EIR (TEIR) process similar to the environmental review process established by the 1999 compacts. However, as described in the "Local Government Agreements" discussion in the following subsection, they add the requirement for intergovernmental agreements for off-site mitigation and public services costs. (See Section 5)

LOCAL GOVERNMENT AGREEMENTS

Under the 2004 compacts, tribes and affected local governments must reach agreement regarding the results of the tribal environmental impact report described above, relating to:

- Mitigating identified off-reservation impacts.
- Public service responsibilities, including public safety services provided by local governments.

Under the 2004 compacts, should the tribes and local governments fail to reach agreement within 55 days, the parties must submit to a form of binding arbitration.⁶¹ The 2004 compacts include a waiver of sovereignty to permit the local government to enforce the arbitration decision through the courts.⁶²

Among the impacts that might be addressed under these agreements are traffic, sewage, hazardous waste, law enforcement, fire protection, medical emergency services, public safety and gambling addiction. However, particularly in the case of public safety and gambling addiction, there is a shortage of information from which to quantify the effects of casino gambling on these areas, making it difficult to adequately identify appropriate mitigation for these impacts.

STATE LAW COMPLIANCE

Other noteworthy provisions unique to the 2004 compacts make the tribe's gaming activities subject to certain provisions of state law, including:

- Building code compliance based on state standards
- Slot machine compliance subject to state inspection and audits
- Tort law compliance in relation to patron injury

The 2004 compacts do not lift the two-casino limit established in the 1999 compacts.⁶³

In June 2004 Governor Schwarzenegger negotiated amended compacts with the following five tribes, all of which operate casinos:

- The Pala Band of Mission Indians
- The Pauma Band of Luiseno Mission Indians
- The Rumsey Indian Rancheria of Wintun Indians
- The United Auburn Indian Community, and
- The Viejas Band of Kumeyaay Indians.

In August of 2004, Governor Schwarzenegger negotiated two new and two amended compacts with the following tribes, although only one – Coyote Valley – operates a casino:

- The Buena Vista Rancheria of Me-Wuk Indians (amended)
- The Ewilaapaayp Band of Kumeyaay Indians (amended)
- The Coyote Valley Band of Pomo Indians (new), and
- The Fort Mojave Indian Tribe (new).

2006 Compacts

In 2006, Governor Schwarzenegger negotiated an amended tribal/state gaming compact with the Quechan Tribe of the Fort Yuma Indian Reservation. The tribe currently has a casino in operation.

2007 Compacts

Several additional compacts were negotiated by the Governor and tribes, and ratified by the Legislature in the 2007-08 session, despite fierce challenges by opponents. Compacts ratified in the session to date include:

- The Yurok Tribe of the Yurok Reservation
- The Morongo Band of Mission Indians (amended)
- The Sycuan Band of the Kumeyaay Nation (amended)
- The Agua Caliente Band of Cahuilla Indians (amended) and
- The Pechanga Band of Luiseno Mission Indians (amended).

Still pending are the results of a second attempt to secure ratification of compacts with the Big Lagoon Rancheria of Humboldt County and the Los Coyotes Band of Cahuilla and Cupeño Indians in San Diego County to establish a single casino in the City of Barstow. (See Case Study below).

CASE STUDY: PROPOSED CASINO IN BARSTOW SAN BERNARDINO COUNTY, CA

This project illustrates an attempt to develop a tribal casino at a location other than historic tribal lands.

PROPOSED PROJECT AND KEY PLAYERS :

Compacts would have authorized the Big Lagoon Rancheria of Humboldt County and the Los Coyotes Band of Cahuilla and Cupeno Indians in San Diego County to establish a single, unified casino project in the City of Barstow on land identified by the City.

The City had previously entered into an exclusive arrangement with the Los Coyotes Band to allow for the construction of a casino. As a condition of its compact with the State, the Los Coyotes Band agreed to share its site with the Big Lagoon Rancheria.

Big Lagoon Rancheria, in exchange for the right to locate its gaming operations in Barstow, agreed to refrain from building a casino or any other commercial development on its tribal lands along the coast of northern California. The Big Lagoon Rancheria's lands are adjacent to park land and Big Lagoon, one of the few remaining naturally functioning coastal lagoons in the state.

But the agreement stalled in June, 2006 hearings before the Assembly's Governmental Organization Committee. The proposed deal drew opposition from inland tribes and others who said it would violate federal law and break promises California tribes made to voters when they approved Indian gambling here more than six years ago.

The two out-of-town tribes said the deal was their best avenue to economic development. Press reports indicated, however, that "...lawmakers left open the possibility of changing the pacts to allow the tribes to put a casino in another part of the state."

CURRENT STATUS

SB 157, introduced on January 30, 2007 by Senator Wiggins, represents a second attempt to secure ratification of these agreements. It was pending committee hearing at the time this report was published.

EPILOG

While a number of California cities and most counties will end up working side by side with a tribe on a land use issue dealing with gaming, it is becoming apparent that interesting negotiations lie ahead in the realm of local government relationships with tribes and land use.

Prior to the recent commercial successes of tribal gaming, there were few examples of tribes that were successful in using their lands to further tribal economic development goals and objectives, particularly with activities that were felt to be "off" the reservation. Relatively remote locations of many of the state's reservations and rancherias caused few city officials to think in terms of dealing with impacts from successful tribal ventures. One major exception to this was the "checkerboard" reservations characterized by tribal ownership of alternating sections of land found mostly in southern California.

The success of tribal gaming caught many by surprise. What was possibly thought of as a means to provide some moderate economic means to California's native people has become a viable basis for many tribes to start thinking and acting far beyond gaming enterprises.

The same sovereignty that allows California's Indian tribes to operate under federal law and at a relative arm's length from state, city and county regulations for gaming activities, also affords a significant autonomy for other land uses.

Prior to the success of gaming, tribal lands were often sought out for uses that had difficulty getting entitled within cities and counties such as biosolids composting, waste-to-energy conversion plants, and the like. With the capacity generated by gaming, tribes are now able to become involved with more traditional economic uses, such as hotels, resorts, shopping centers, and open market housing on reservation and trust lands as well as on other lands acquired by tribes.

The remoteness of many reservations and rancherias is becoming a thing of the past. While not true for all tribes, many lie in the path of approaching development and will be able to participate with and, at times, compete with cities and counties in attracting desirable economic activities. Tribes will increasingly be faced with the need to have an adequate hard infrastructure (roads, water, sewer, storm drains, etc.) as well as the soft supporting social infrastructure of schools, parks, affordable housing and public safety services that cities and counties everywhere have traditionally been charged with providing.

It is very likely that the success of an expanding economic base for tribal development activities will be sustained only with cooperation between tribes and local governments. Cities that are now unconcerned about gaming due to its remoteness may well find themselves at the table with area tribes discussing power plant siting, commercial centers, housing and the myriad of land uses that go hand in hand with economic development. And, just as there are advantages to cities working together to resolve many regional issues, tribes may increasingly find that they will benefit by cooperating with other government entities. Increasingly, tribal and local governments can look to cooperation models and weigh the potential for benefits to both gaming tribes and their neighbors.

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California Research Bureau, "California Tribal-State Gambling Compacts, 1999-2006," (2007).

California Research Bureau, "Early California Laws and Policies related to California Indians" (2002).

Regarding Legislation:

California State Senate (to search legislation on this topic):
www.sen.ca.gov; www.leginfo.ca.gov

League of California Cities list-serve accessible through the League: **www.cacities.org**
Note that some functions of the site and services are available to member city governments only.

Web Sites:

California Nations Indian Gaming Association:
<http://www.cniga.com>

National Indian Gaming Association:
<http://www.indiangaming.org>

National Indian Gaming Commission:
<http://www.nigc.gov>

Tribal Alliance of Sovereign Indian Nations:
www.tasin.org

Governor's Office – Gaming Compacts:
<http://gov.ca.gov/issue/gaming-compact>

California Center for Native Nations, University of California, Riverside:
www.ccnn.ucr.edu

Institute of Governmental Studies, University of California:
www.igs.berkeley.edu/library/htIndianGaming.htm

California Gambling Control Commission:
<http://www.cgcc.ca.gov/tribalinformation.asp>

ACRONYMS

BIA	Bureau of Indian Affairs
CAA	Clean Air Act
CCAPA	California Chapter American Planning Association
CGCC	California Gambling Control Commission
CEQA	California Environmental Quality Act
CPR	California Planning Roundtable
CWA	Clean Water Act
EA	Environmental Assessment
EIR	Environmental Impact Report
EIS	Environmental Impact Statement
ESA	Endangered Species Act
FONSI	Finding of No Significant Impact
GIS	Geographic Information System
HCP	Habitat Conservation Plan
IGRA	Indian Gaming Regulatory Act
MSA	Municipal Services Agreement
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act
NIGC	National Indian Gaming Commission
SDWA	Safe Drinking Water Act
SHPO	State Historic Preservation Officer
SIP	State Implementation Plan
TAS	Treatment as State
TEIR	Tribal Environmental Impact Report
TEIS	Tribal Environmental Impact Statement
THPO	Tribal Historic Preservation Officer



- ¹ The Court did note that state laws may be applied to tribal Indians on their reservations when Congress so provides or the application is not in conflict with (i.e., not preempted by) federal law – not the case here. *Cabazon* at 207, 214-216.
- ² In California, cities and counties have a broad authority under their police power to enact regulations to promote the public's health, safety, and welfare. A fundamental limitation on that authority is that local exercise of police power may not conflict with a state or federal law. California Constitution Article XI, Section 7; *Associated Home Builders, Inc., v. City of Livermore*, 18 Cal. 3d 582, 609 (1976); *People ex rel. Deukmejian v. County of Mendocino*, 36 Cal. 3d 476, 484 (1984).
- ³ *Santa Rosa Band of Indians v. Kings County*, 532 F. 2d 655, 658 (9th Cir 1975).
- ⁴ 25 USC Sec. 2701 et seq.
- ⁵ 480 U.S. 202, 207 (1987).
- ⁶ See footnote 1 and accompanying text.
- ⁷ Eadington, William R. Editor, *Indian Gaming and the Law*, Institute for the Study of Gambling and Commercial Gaming, University of Nevada, Reno (2004), p.vi.
- ⁸ *Ibid.*, p.21.
- ⁹ 25 USC Sec. 2703 (6)-(8).
- ¹⁰ Declaration of Policy, Public Law 100-497.
- ¹¹ California Gambling Control Commission, <http://www.cgcc.ca.gov/compacts.asp>. Accessed September 4, 2007.
- ¹² 25 USC Sec. 2701(4).
- ¹³ The NIGC was created by the IGRA, within the Department of the Interior. The Chair of the three-member Commission is appointed by the President and requires Senate confirmation. Two associate members are appointed by the Secretary of the Interior. No more than two members of the Commission may be of the same political party and at least two must be members of an Indian tribe, but may not have a financial interest in or management responsibilities for any gaming activity.
- ¹⁴ Eadington, p.9.
- ¹⁵ 25 USC Sec. 2710(d).
- ¹⁶ California Constitution, Art IV, section 19(f).
- ¹⁷ California Constitution Art, IV, section 19(f); see, also, Government Code sections 12012.25-12012.5, ratifying tribal/state compacts.
- ¹⁸ 25 USC Sec. 2710(d)(3)(C).
- ¹⁹ 25 USC Sec. 2710(d)(7).
- ²⁰ A recent study identified 341 federally recognized Indian tribes in the lower 48 states; 221 tribes in 28 states operate 411 Indian gaming facilities. Western Governors Association, "The Indian Gaming Regulatory Act and 'Off-Reservation' Indian Gaming Proposals: A Primer," Attachment A.
- ²¹ 25 USC Sec. 2703(5).
- ²² 25 USC Sec. 2703(4).
- ²³ 25 CFR Part 151.
- ²⁴ Cathy Christian, Attorney, Nielsen, Merksamer, Parrinello, Mueller & Naylor, LLP, personal communication, October 25, 2006.
- ²⁵ 25 USC Sec. 2719 (a). Note that the IGRA does not affect the Secretary of the Interior's authority or responsibility to take land into trust on behalf of a tribe. Rather, the IGRA addresses the ability to engage in gaming under its regulations on Indian lands, including lands held in trust by the Secretary of the Interior.
- ²⁶ 25 USC Sec. 2719(b).
- ²⁷ 25 USC Sec. 2719(b)(1)(A).
- ²⁸ Proclamation of the Governor of the State of California, May 18, 2005.
- ²⁹ 25 USC Sec. 2710(b)(2)(E).

- ³⁰ 42 USC Sec. 4321 et seq.
- ³¹ 16 USC Sec. 470 et seq.
- ³² 33 USC Sec. 1251 et seq.
- ³³ 42 USC Sec. 300 et seq.
- ³⁴ 42 USC Sec. 7401 et seq.
- ³⁵ 16 USC Sec. 1531 et seq.
- ³⁶ 25 CFR Part 580.
- ³⁷ Ordinance Number 2001-004, amendment 1.
- ³⁸ BIA, Draft Environmental Impact Statement (DEIS) for Scotts Valley Band of Pomo Indians Fee-to-Trust and Gaming Development Project, 2006.
- ³⁹ NIGC, EIS Supplemental Scoping Report, Graton Rancheria Hotel and Casino Project, February 2006.
- ⁴⁰ Staudenmaier, H.M. "Tribal Gaming Management Contracts and NEPA Compliance," paper presented at CLE International conference on "Environmental and Natural Resources Law on the Reservation," Phoenix, AZ, September 2004.
- ⁴¹ 36 CFR Part 800 for Section 106 consultation regulations.
- ⁴² Section 101(d)(2).
- ⁴³ National Association of Tribal Historic Preservation Officers http://www.nathpo.org/THPO_/Members/state_list.htm. Accessed March 18, 2007.
- ⁴⁴ See, e.g., *Washington Department of Ecology v. U.S. EPA*, 752 F. 2d 1465 (9th Cir. 1985); 56 Fed. Reg. 64876 (1991).
- ⁴⁵ 33 U.S.C. Sec 1377(e) for CWA TAS. See, e.g., authorization for tribes.
- ⁴⁶ Environmental Protection Agency, <http://www.epa.gov/waterscience/standards/wqslibrary/tribes.html>. Accessed March 18, 2007.
- ⁴⁷ See, *City of Albuquerque v. Browner*, 97 F. 3d 415 (10th Cir.1996); *Montana v. United States*, 137 F. 3d 1135 (9th Cir. 1998).
- ⁴⁸ 42 USC Sec. 7601.
- ⁴⁹ 40 CFR 93.150 et seq.
- ⁵⁰ 40 CFR Parts 51 and 93.
- ⁵¹ Secretarial Order #3206, American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act, June 5, 1997.
- ⁵² See 50 CFR Sec. 402 et seq.
- ⁵³ See 50 CFR Parts 13 and 17.
- ⁵⁴ Tom Davis, Chief Planning and Development Officer, Agua Caliente Band of Cahuilla Indians, personal communication, May 19, 2006.
- ⁵⁵ Public Resources Code Sec. 21000 et seq.
- ⁵⁶ California Legislative Analyst's Office, Questions and Answers: California Tribal Casinos, February 2007.
- ⁵⁷ California Gambling Control Commission, www.cgcc.ca.gov/tribalinformation.asp. Accessed September 4, 2007.
- ⁵⁸ Center for California Native Nations, University of California Riverside, "An Impact Analysis of Tribal Government Gaming in California," January 2006.
- ⁵⁹ California State Association of Counties, "CSAC Fact Sheet on the New Tribal/State Gaming Compacts," June 21, 2004.
- ⁶⁰ Center for California Native Nations, University of California Riverside, "An Impact Analysis of Tribal Government Gaming in California," January 2006, Executive Summary, p.5.
- ⁶¹ California State Association of Counties, "CSAC Fact Sheet on the New Tribal/State Gaming Compacts," June 21, 2004.
- ⁶² Ibid.
- ⁶³ Ibid.



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