

FEDERATED INDIANS OF GRATON RANCHERIA

Response to September 13, 2005, Memorandum Re: Information Gathering and Research on
State and Federal Issues Related to Indian Casinos

September 23, 2005

1. *What rights does FIGR have to establish a casino resort under federal law?*

The Federated Indians of Graton Rancheria (“FIGR” or the “Tribe”) has a right under federal law to establish a gaming facility and to engage in certain forms of gaming on its tribal lands.¹ This right is derived from the Tribe’s status as a federally recognized independent sovereign entity with inherent powers of self-government. An Indian tribe’s right to conduct gaming on its tribal lands is subject to federal laws and regulations and, in California and several other states, state criminal prohibitions.²

The Tribe’s right to game is regulated through the federal statute known as the Indian Gaming Regulatory Act (“IGRA”).³ IGRA divides Indian gaming into three classes and provides the most oversight for Class III gaming, which includes slot machines and banking card games.⁴ Under IGRA, the Tribe may establish a Class III gaming facility on its reservation as long as (i) the games offered are permissible in California, (ii) the Tribe has a compact with the State which has been approved by the Secretary of the Interior (or, alternatively, if the State has refused to negotiate a compact in good faith, the Department of Interior has issued gaming procedures for the Tribe), and (iii) the Tribe’s management contract has been approved by the National Indian Gaming Commission (“NIGC”).⁵ Passage of Proposition 1A in 2000 satisfied the first requirement by amending the California Constitution to allow slot machines and banking card games on eligible tribal lands in California.⁶ The Tribe must still obtain a compact from the State (or have gaming procedures issued by the Department of Interior) and have its management contract approved by the NIGC before establishing its Class III gaming facility.

In addition, the Secretary of the Interior must accept land into trust for the benefit of the Tribe as the Tribe’s reservation before the Tribe can establish its gaming facility. The Graton Rancheria Restoration Act,⁷ which restored the Tribe’s federally recognized status in 2000, requires the Secretary of the Interior, at the request of the Tribe, to accept land in trust as the Tribe’s new reservation within the Tribe’s aboriginal territory of Marin and Sonoma Counties.⁸

¹ See generally California v. Cabazon Band of Mission Indians, 480 U.S. 202, (1987).

² *Id.* at 209-210.

³ 25 U.S.C. §§ 2701-2721. Congress enacted IGRA in 1988 in response to the Supreme Court’s ruling a year earlier in the Cabazon case, California v. Cabazon Band of Mission Indians, 480 U.S. at 221-222.

⁴ IGRA at 25 U.S.C. §2703. See also Artichoke Joe’s v. Norton, 353 F.3rd 712, 714-15 (9th Cir. 2003).

⁵ IGRA at 25 U.S.C. §2710(d); 25 U.S.C. §2711.

⁶ See Artichoke Joe’s v. Norton, 353 F.3rd at 742 (holding that IGRA, Proposition 1A, and the Tribal-State Compacts are consistent with IGRA).

⁷ Graton Rancheria Restoration Act, Pub. L. No. 106-568; 25 U.S.C. § 1300n *et seq.*

⁸ Graton Rancheria Reservation Act at 25 U.S.C. § 1300n-3(a).

Accordingly, the Tribe intends to request that the Secretary of the Interior take into trust certain lands located immediately west of Rohnert Park as the Tribe's reservation.

Although IGRA generally prohibits gaming on land acquired in trust for a tribe after 1988, Section 20 of IGRA includes several exceptions to this general rule. The reservation to be acquired for the Tribe will be eligible for gaming under the exception for "restored lands" of a "restored tribe".⁹

2. *What is the Governor's discretionary authority to negotiate compacts with Indian tribes? Can the Governor prevent FIGR's establishment of a casino resort based on a citizen advisory vote or any other reasons (e.g. environmental impacts)?*

Federal law compels the Governor to negotiate compacts with federally recognized tribes. Once a federally recognized Indian tribe requests a compact, the State is required under federal law to negotiate a compact with that tribe in good faith.¹⁰ If the State refuses to negotiate in good faith, the requesting tribe can sue the State in federal court.¹¹ By State statute, California has consented to such suits by waiving any sovereign immunity the State might otherwise enjoy under the Eleventh Amendment to the U.S. Constitution.¹²

Under IGRA, if a court finds that a State has failed to negotiate in good faith and the State does not agree to a compact after an additional court-ordered negotiation and mediation process, the Secretary of the Interior then must prescribe procedures which will enable the Tribe to conduct Class III gaming without a compact.¹³ On September 21, 2005, the Department of the Interior prescribed such procedures under circumstances where the State of Wyoming had failed to negotiate a compact in good faith with the Northern Arapaho Tribe. Thus, the Northern Arapaho Tribe will now be able to establish a Class III gaming facility without a compact and the State of Wyoming will lose the benefit of whatever provisions it might otherwise have desired to include in a Tribal-State Compact.

IGRA does not provide the Governor with any basis to refuse to negotiate a compact based on a citizen advisory vote or for any other reasons. Neither IGRA nor any other federal or state law requires or contemplates a local advisory vote to establish an Indian gaming facility. The issue of a local advisory vote has not arisen in other states and has arisen in California only in the recent past. The concept of a local advisory vote was referenced in the Proclamation which Governor Schwarzenegger issued on May 18, 2005 declaring his policy on certain specified tribal gaming issues (the "Proclamation"). However, the reference to a local advisory vote was in a context which is inapplicable to the Tribe.

The Proclamation stated that the Governor's policy was not to concur with any two-part determination by the Secretary of the Interior under Section 20(b)(1)(A) of IGRA (a "Two-Part

⁹ IGRA at 25 U.S.C. §2719(b)(1)(B)(iii).

¹⁰ IGRA at 25 U.S.C. §2710(d)(3)(A).

¹¹ IGRA at 25 U.S.C. §2710(d)(7)(A).

¹² Cal. Gov't Code § 98005. *See also Artichoke Joe's v. Norton*, 353 F.3rd at 716 n.7.

¹³ IGRA at 25 U.S.C. §2710(d)(7)(B)(vii).

Determination”) unless there was a local advisory vote or some other indication that the affected local community supports the project. A Two-Part Determination refers to one of the exceptions to the general rule prohibiting gaming on lands acquired in trust after 1988 under Section 20 of IGRA. In order for lands to qualify for gaming under the Two-Part Determination, the Secretary of the Interior must determine that a gaming establishment on the newly acquired land is in the best interest of the Indian tribe and not detrimental to the surrounding community, and then the Governor must concur with those two Secretarial determinations. However, the Tribe is not required to seek, and is not seeking, a Secretarial Two-Part Determination and a related Gubernatorial concurrence. This is because, as noted above, the Tribe will be able to game on its new reservation lands pursuant to the alternative exception in Section 20 of IGRA for “restored lands” of a “restored tribe”. Therefore, the statement in the Governor’s Proclamation setting forth his conditions for a Gubernatorial concurrence with a Secretarial Two-Part Determination are inapplicable to the Tribe.

Similarly, IGRA does not provide the Governor with any basis for refusing to negotiate a compact based on environmental impacts of a proposed gaming facility.¹⁴ The Governor does have the right, however, to address environmental issues in the compacting process. Each of the compacts negotiated by Governor Schwarzenegger requires the tribe to mitigate any significant off-reservation impacts under a CEQA-like process. It is almost certain that any future compact between the State and the Tribe will include such a requirement. The environmental review process required under recent compacts supplements the extensive environmental review process required for the Tribe’s gaming facility under the federal National Environmental Policy Act (“NEPA”).

3. *Does the State’s compact impact the City’s Memorandum of Understanding with FIGR?*

No. The Tribal-State Compact and the City’s Memorandum of Understanding are entirely separate agreements. The terms of the Tribal-State Compact will not alter or affect the terms of the City’s Memorandum of Understanding. However, in negotiating the Tribal-State Compact, the Tribe and the State may take into account financial, environmental and other provisions of the pre-existing Memorandum of Understanding between the City and the Tribe.

¹⁴ The State recently announced the settlement of a lawsuit filed by the tribe known as the Big Lagoon Rancheria against the Wilson Administration for refusing to negotiate in good faith a compact to establish a gaming facility on the Big Lagoon Rancheria lands. The Big Lagoon Rancheria lands are uniquely situated in a pristine and important ecological area next to Big Lagoon on the Northern California coast in Humboldt County. Big Lagoon is a State ecological preserve managed by the Department of Fish and Wildlife and is one of the few remaining naturally functioning coastal lagoons in California. The tribe’s lawsuit against the State raised a unique set of environmental concerns and boundary disputes which implicated laws other than IGRA, such as the California Coastal Zone Act. None of these issues are relevant to the lands outside Rohnert Park. Recognizing its obligation to negotiate a compact with the tribe under IGRA, the State recently settled the lawsuit by agreeing to allow the Big Lagoon to build a facility at an alternative site in Barstow.

4. *What is the legal definition under federal and state law for “reservation shopping”? Does FIGR’s proposed casino resort fall under the definition of “reservation shopping”?*

There is no legal definition for the term “reservation shopping” because the term does not appear in federal or state law. Rather, the term has been adopted and used by opponents of gaming projects to discredit those projects. District of Columbia lobbyist Jack Abramoff popularized the use of the term “reservation shopping” in his successful campaign on behalf of a Louisiana gaming tribe to stop another tribe from establishing a competing casino. The term “reservation shopping” is generally understood to refer to efforts by tribes, which have an existing reservation, that seek to acquire new trust lands for gaming outside their existing reservation or their aboriginal or historical territory.

Obviously, the Tribe is not engaged in “reservation shopping”. The Tribe does not have an existing reservation and has been landless since its former rancheria in Graton was lost in the early 1960’s as a result of the federal government’s unlawful implementation of its tribal termination policy. Also, the lands which the Tribe seeks to place in trust as its new reservation near Rohnert Park are clearly within the Tribe’s aboriginal territory of Marin and southern Sonoma Counties as recognized by historians and confirmed by Congress.¹⁵ Moreover, the proposed site is less than 10 miles from the Tribe’s former Graton Rancheria lands and within two miles of the old Coast Miwok Indian village of Kotati (i.e. Cotati).

5. *Does the State have a legal definition for “urban casinos”? If so, what are the standards that apply to this definition?*

The term “urban casino” does not appear in federal or state law. The term is derived from a statement contained in the Proclamation Governor Schwarzenegger issued on May 18, 2005. In the Proclamation, the Governor stated that he “shall oppose proposals for the federal acquisition of lands within any urbanized area where the lands sought to be acquired in trust are to be used to conduct or facilitate gaming activities.”¹⁶ The Proclamation further states that, the term “urbanized area” has the same meaning ascribed to that term in California Public Resources Code section 21071, subdivision (a).¹⁷ The term “urbanized area” includes cities with more than 100,000 residents. A list of cities meeting this definition is attached to the Proclamation. Since the City has a population of well under the 100,000 residents, the City of Rohnert Park is not included on the list.

¹⁵ Since the early 1990’s, the Tribe has had a firm tribal policy of opposing any effort by other tribes to establish trust land within the Tribe’s aboriginal territory of Marin and southern Sonoma Counties, and has found it necessary to implement the policy on several occasions.

¹⁶ Proclamation, Par. 1.

¹⁷ Proclamation, Par. 6