

Northern California Counties Tribal Matters Consortium

SUPERVISOR VALERIE BROWN
NORTHERN CALIFORNIA COUNTIES
TRIBAL MATTERS CONSORTIUM

TESTIMONY
BEFORE THE COMMITTEE ON RESOURCES
UNITED STATES HOUSE OF REPRESENTATIVES

OVERSIGHT FIELD HEARING ON H.R. (DISCUSSION DRAFT) (POMBO),
TO AMEND THE INDIAN GAMING REGULATORY ACT
TO RESTRICT OFF-RESERVATION GAMING
CALIFORNIA STATE CAPITOL BUILDING
SACRAMENTO, CALIFORNIA
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On behalf of the Northern California Counties Tribal Matters Consortium (Consortium), I would like to thank Chairman Pombo, Ranking Member Rahall, and the other distinguished members of the Committee on Resources for giving us this opportunity to testify. I especially want to thank you for making the effort to conduct this field hearing in Northern California where the issues surrounding tribal gaming and reservation shopping have taken on such profound importance. My name is Valerie Brown, I am currently a member of the Sonoma County Board of Supervisors and serve as Sonoma County's representative to the Consortium.

The Consortium

The Consortium is a collaboration between Napa, Solano and Sonoma counties. It is a new and growing organization founded by county governments, in the northern part of the San Francisco Bay Area, based upon the realization that we must work together to share expertise and to respond effectively to the legal and policy decisions at the federal level which often drive tribal development. Our counties are also similarly situated on the northern edge of the lucrative San Francisco Bay Area urban gaming market and are the target for an increasing number of new

gaming proposals. The Consortium's Policies (attached as Exhibit A) are consistent with those of the proposed legislation, in that they make a deferential distinction for development proposals from tribes that have significant demonstrated ties to an area. Significant ties mean more than a tribe passed through, hunted, or had some other tenuous connection to an area but rather exercised a tribal jurisdictional presence in a meaningful and direct manner. The key distinction for development therefore should be not necessarily urban or rural but rather presence or absence of a documented relationship of a tribal group to the land on which it seeks to develop. Further, the Consortium Policies recognize large-scale gaming (and other development) projects have significant local and even regional impacts that, to be successfully addressed, require a collaborative effort involving both county governments and affected tribes.

California, more than any other state, has experienced an explosion of tribal gaming and land development since the 1988 enactment of the Indian Gaming Regulatory Act ("IGRA"). This development accelerated in California with the 1999 passage of Proposition 1A, and the 1998 passage of Proposition 5. The result is 54 operational casinos maintained by 53 tribal governments in 34 counties, with at least 25 additional tribal casinos in the planning stage. The scope of potential casino development is also reflected in the over 100 federally recognized tribes in California, with over 60 existing compacts, many of them providing for two casinos per tribe. As these IGRA casinos have proliferated, increased tribal gaming wealth, or its promise, has provided capital for still more gaming and non-gaming tribal development. All levels of state government now face significant challenges raised by tribal development initiatives.

It is often stated that when IGRA was enacted in 1988, it was intended to serve as a delicate balance between the rights of states, tribes and the federal government to address tribal gaming. The "delicate balance" is now upset. When IGRA was passed Indian gaming was, nationally, a \$100 million business. Today Indian gaming enterprises account for over \$18 billion in revenues with California alone responsible for about one-third of that amount. IGRA's original premise (and that of Propositions 5 and 1A in California) was that, with limited exceptions, gaming would be limited to existing reservations. Sadly, that is not how it is today.

This is especially critical in Northern California where a growing number of tribal entities are attempting to acquire land, seek trust status, and advance development proposals for casinos and other uses in locations based solely upon market appeal. Some tribes are attempting to develop land without regard to current reservation location or the existence of historic or other significant ties to a chosen location. There are many legal permutations of "reservation shopping," and many jurisdictions are forced to deal with the complex legal issues it raises, often on an emergency basis. It is important to point out that the issue of "reservation shopping" extends beyond gaming. Developers are partnering with tribes to use the shield of sovereignty to embark on development projects that would otherwise never be approved due to land use inconsistencies or other impacts.

The Consortium was formed to address these challenges. With respect to the issues specifically now before the Committee the following Consortium Policies apply:

- * The Consortium is opposed to any federal fee-to-trust request, for gaming or other development purposes, on behalf of a tribe that lacks significant, long-term and

documented ties to the area where the trust land acquisition or development is proposed.

- * The Consortium is committed to working with tribes on a government-to-government basis to consider development proposals within the Consortium's policy framework.
- * The Consortium members are prepared to work with tribes to insure that county-tribal agreements will fully mitigate environmental impacts of a proposed project and that there will be guarantees of substantial compliance with county ordinances, zoning and environmental policies through an enforceable Memorandum of Understanding or similar agreement.

These policies recognize counties have an obligation to work on a government-to-government basis with tribes which have a significant historic connection to a community. Implicit in the policies, as in the proposed bill, is the recognition that the long-term success of Indian gaming depends upon a partnership with local communities to address off-reservation impacts and work together to accomplish common goals.

The Consortium Experience

Our participating counties are all members of the California State Association of Counties (CSAC) and we support and endorse the testimony submitted to this Committee by CSAC. The Consortium submits its own testimony, however, to share the unique experience of tribal gaming in the Northern San Francisco Bay Area. This experience underscores the importance of Chairman Pombo's legislative proposal to address the "reservation shopping" issue in a manner which places significant importance on a tribe's historic ties to a community. Like the legislation, our approach also is deferential to tribal sovereignty and economic development but acknowledges that the impacts of these projects are borne by the off-reservation community and, in particular, by county government regardless of whether the proposed project is located in a city or county. The need to form the Consortium, itself, illustrates the breakdown of the balances struck in the enactment of the Indian Gaming Regulatory Act when tribes are allowed to move far from their ancestral territory in search of greater gaming market share and profit.

Of the Consortium member counties, only Sonoma County has federally recognized tribes. One of these tribes has an existing casino facility and the four others are at various stages of attempting to establish gaming operations. Napa and Solano do not currently have any recognized tribes within their jurisdictions. Due to our shared proximity to the lucrative San Francisco urban market, gaming promoters representing, or loosely affiliated with tribal clients, continually approach Consortium members. Each is attempting to cash-in on the gaming market without regard to a tribe's connections or historic ties to a community.

These, often investor driven efforts, are an affront both to county governments that have worked with local tribes on a government-to-government basis to address gaming and other

tribal development issues as well as to locally based tribes. IGRA (which was intended to have very narrowly drawn exceptions), as well as the California Propositions 1A and 5, were passed with the expectation that gaming would be conducted on existing Indian lands. Now the exceptions seem to be the tail that is “wagging the dog” and upsetting the carefully designed balance that afforded tribes the monopoly of Class III gaming in California.

In Sonoma, for example, I and other county representatives were recently approached by financial backers of an unnamed “mystery” tribe that wanted to establish a Sonoma County casino. It was clear this tribe, the identity of which the investors refused to disclose, had not consulted with locally based tribes and was interested only in finding a location that placed them within reach of the lucrative San Francisco market. This is but the latest of a series of overtures made to Consortium members and of regional reservation shopping efforts, some of which the Committee has already heard testimony. These investor driven efforts have little regard for a tribe’s historic ties to an area or to true concepts of tribal sovereignty and jurisdiction except to the extent it allows them to open a casino.

The newest California twist to the “reservation shopping” issue also shows how the current law now serves to pit tribe against tribe. The Consortium is now observing tribes with established casinos trying to “leap-frog” over other tribal gaming operations to get closer to a population center. For example, the Hopland Band of Pomo Indians, a Mendocino County based gaming tribe located north of Sonoma, is trying to move south along the Highway 101 corridor towards San Francisco, passing a Sonoma County tribe’s operations that apparently is reducing its profits. The location the Mendocino tribe has chosen for its new casino is within the historic Rancheria boundary of another Sonoma County tribe. The Mendocino tribe has applied to the BIA and NIGC to transfer the land to its own tribal trust property and to have it designated as “restored” so that it is eligible for gaming. The Mendocino’s tribe’s trust transfer application, which is opposed by other Sonoma County tribes, is currently pending before the BIA.

The Draft Legislation

The draft legislation before the Committee takes several important steps towards addressing the types of “reservation shopping” abuses that now appear prevalent in Northern California. The Consortium particularly endorses the need recognized in the bill to ascertain a tribe’s historic and ancestral ties to an area as a threshold before allowing newly recognized, restored or landless tribes to take land into trust for gaming purposes. This approach is in accord with the Consortium policies and explicitly recognizes a distinction between tribal entities that have significant documented historical ties to a specific area and those that do not.

Similarly the Consortium fully endorses the need to have local government participating in the decision making process. This measure affords local government the opportunity to work in a constructive manner with tribes to insure that projects are appropriately sited and that the off-reservation environmental impacts of gaming development are minimized. One amendment the Consortium would support is to have section (1)(A), which addresses newly recognized tribes, provide for the same type of local government input as required under section (1)(B) for landless or restored tribes. It appears that the equities (and need for land and economic

opportunities) of newly recognized tribes is no different than the needs of landless tribes and both similarly require local input and consultation regarding mitigation. An unintended consequence of treating the groups differently is to place even additional pressure on the current acknowledgment process by providing incentives for gaming interests to promote the recognition of new tribes to avoid the requirements faced by placing land into trust for landless or restored tribes.

The Consortium also supports amendments to the bill which clarify that a county or similar other general government entity providing health, welfare and public safety services to the trust land must approve a gaming trust acquisition. In California, even if a facility and trust land is surrounded by cities, it is still the county that is responsible for many public programs that will be impacted by a gaming establishment including: emergency services, probation, jail services, child and adult protective services, welfare, roads and bridges, alcohol and drug rehabilitation, and indigent health. For a tribal facility to be truly successful county government must play a role in the process.

The experience in California, driven in part by the restoration of illegally terminated rancherias, is that the restored land exception to prohibiting gaming on lands acquired after 1988 is being misused. This is illustrated in the Hopland tribe's attempt to have land found eligible for gaming under the restored land provision (25 U.S.C. 2719 (b)(1)(B)(iii)) despite the fact the tribe already has land in trust upon which it operates a casino and that the land sought is within another tribe's historic jurisdiction. Similarly, Alameda and Contra Costa counties have been faced with numerous proposals to have land "restored" from remote tribes for gaming purposes. These efforts are all attempts by tribes and their investors to evade the two-part test under IGRA that provides for consultation between local communities (and local tribes) and the Secretary to determine whether gaming on newly-acquired trust lands is detrimental to the surrounding community and concurrence by the governor in that determination. As the "restored lands" exception appears to be fueling much of the reservation shopping effort, it may be appropriate to consider, at this point in IGRA's history, elimination or narrowing of the provision and to require local government approval of a facility as contemplated under the draft legislation.

Finally, the Consortium is interested in working further with the Committee to refine the Indian Economic Opportunity Zone concept. It provides a creative mechanism to facilitate the co-location of gaming operations to help avoid the "leap-frogging" phenomena that now appears to be developing while also giving tribes in remote locations an opportunity to share more fully in the economic benefits of gaming. It appears, however, that additional provisions should be considered that take into account various issues, including, the potential size of the zone, county approval and a limitation to take future land into trust for gaming purposes outside of the created zone(s).

Conclusion

The Consortium appreciates the sensitive nature of these issues and the controversy surrounding any amendments to IGRA. It is therefore with genuine appreciation to Chairman Pombo and the Committee for their leadership in trying to forge a solution to the reservation-shopping problem that the Consortium appears today to present these comments. It may be that circulation of the draft bill itself has already had a positive effect as the BIA just recently rejected a gaming compact in Oregon because land for the facility had not gone through the appropriate fee-to-trust process or been subject to IGRA's two-part test.

The proposed bill gives voice to local government concerns and creates an opportunity for tribes and local government to work together in a respectful constructive manner to achieve mutual goals. The Consortium stands ready to assist the Committee as it works towards addressing the problems created by "reservation shopping" and to work with other interested parties to find a balanced fair resolution that honors tribal sovereignty and respects the legal responsibility of counties to provide for the health, safety, environment, infrastructure, and general welfare of all members of their communities.