



**OFFICE OF COUNTY COUNSEL  
MEMO TO BOARD OF SUPERVISORS**

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**TO:** Honorable Chair and Members of the Board of Supervisors  
**FROM:** County Counsel *KLM*  
**DATE:** September 15, 2015  
**RE:** Shingle Springs Band of Miwok Indians Development Projects

**INTRODUCTION**

The Shingle Springs Band of Miwok Indians (Tribe) has development plans for two parcels of property that were recently taken into trust on the Tribe's behalf by the federal government. The two parcels are located south of Hwy 50 with partial alignment of property lines that face each other on either side of Shingle Springs Drive. One parcel was originally proposed to be developed as an outdoor shooting range with 29 shooting lanes that would be open to the public potentially on a membership basis; however, that proposal was scaled back to a small gun range to be open only to Tribal members and their guests. The other parcel is proposed to be developed with a gas station and retail center and potentially a hotel.

Questions have been raised with regard to the County's ability to exert land use authority over the proposed projects and what, if any, authority is there to impose mitigation for off-site impacts of the projects. The short answer is that the County does not have land use authority over Tribal trust property due to Tribal sovereignty. The ability to impose mitigation for off-site impacts would only arise if the Tribe were required to obtain discretionary approval from a governmental entity or if governmental entity funds were being utilized to wholly or partially fund the project. According to the Tribe, no federal funds are being utilized for the outdoor shooting range project and no federal permits are required; therefore, National Environmental Policy Act (NEPA) environmental review is not required. At this point, it is unknown whether federal funds are involved in the gas station, convenience store and hotel project or whether federal permits are required due to the underground storage tank.

In order to answer the various questions that have been asked in relation to the proposed Miwok development projects, it is necessary to discuss the notion of tribal sovereignty in order to put the discussion into the proper context. Accordingly, this memo is divided into four parts: 1) Indian law and the notion of tribal sovereignty; 2) encroachment permits; 3) the Compact between the State of California and the Tribe; and, 4) the Memorandum of Understanding between the County and the Tribe.

## Indian Law and Tribal Sovereignty

- At the core of Indian Law is the notion of American Indian tribal sovereignty. Under the Constitution, Congress has plenary power to regulate commerce with the Indian tribes. The Indian Commerce Clause is at Article I, 8, clause 3, and it is the ultimate source of federal power over Indian tribes
- The foundation of the federal power over tribes is found in three Supreme Court decisions written by Chief Justice Marshall, referred to as the "Marshall Trilogy."<sup>1</sup> In those decisions, the Supreme Court established the doctrinal basis for interpreting federal Indian law and defining tribal sovereignty.
- The collective effect of the Marshall trilogy on the development of federal Indian law has been described as follows:

Three bedrock principles thus underlie *Worcester* and the earlier decisions: (1) by virtue of aboriginal political and territorial status, Indian tribes possessed certain incidents of preexisting sovereignty; (2) such sovereignty was subject to diminution or elimination by the United States, but not by the individual states; and (3) the tribes' limited inherent sovereignty and their corresponding dependency on the United States for protection imposed on the latter a trust responsibility. (American Indian Law Deskbook. (University Press of Colorado, 1993).)

These principles have continued to guide the federal courts in their interpretation of the respective rights of the federal government, the states, and the tribes.

- Due to the tribes "domestic dependent nation" status under the Marshall Trilogy, their sovereignty is not the same as that of a foreign nation. As a result, the tribes' sovereignty may and has been curtailed or diminished by the federal government. The relevant question is whether there is any limitation on the tribal government's ability to act, not whether any authority exists to permit the tribe to act.
- As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity.<sup>2</sup>
- The Foreign Sovereign Immunities Act (28 USC §1602 et seq.) does not apply to Native American tribes because the U.S. Supreme Court has determined that the

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<sup>1</sup> Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); and, Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832)

<sup>2</sup> *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998); *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991); *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 890 (1986); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978).

tribes are “domestic dependent nations” and are considered domestic governments and not foreign governments.<sup>3</sup>

- Indian lands are subject to State and local regulations if authorized by the Secretary of the Interior.<sup>4</sup>
- 25 CFR §1.4 specifically states that unless adopted or made applicable to Indian Lands by the Secretary of the Interior, local land use ordinances are not applicable to Indian land held in trust by the United States.<sup>5</sup>

### **Encroachment Permits**

- While the County does not have land use authority over Tribe trust property, the County does have management and control over County roads and highways.<sup>6</sup>
- EDC Ordinance Code Chapter 12.08 governs the issuance of encroachment permits for the purpose of protecting the safety and convenience of the public traveling on public roads and to protect public roads from unwarranted damage.
- Encroachment permits are required for excavations (EDC Ordinance Code Chapter 12.08.080), the obstruction of a right-of-way (EDC Ordinance Code Chapter 12.08.090), access roads/driveways connecting to a County road (EDC Ordinance Code Chapter 12.08.100), cuts and fills on ground adjacent to a County road (EDC Ordinance Code Chapter 12.08.110), oversize or overloaded vehicles being driven on County roads (EDC Ordinance Code Chapter 12.08.120), and for loading or unloading in the right-of-way (EDC Ordinance Code Chapter 12.08.130).
- The Tribe’s development projects will require encroachment permits from the County for access roads/driveways connecting to Shingle Springs Drive and for water, sewer, utilities and storm drain improvements, extensions and hook ups that

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<sup>3</sup> *Ingrassia v. Chicken Ranch Bingo and Casino* (2009) 676 F.Supp.2d 953, 959.

<sup>4</sup> *County of San Bernardino v. La Mar* (1969) 271 Cal.App.2d 718; cf. *Zachary v. Wilk* (1985) 173 Cal.App.3d 754.

<sup>5</sup> Title 25 Code of Federal Regulations

§1.4 State and local regulation of the use of Indian property. (a) Except as provided in paragraph (b) of this section, none of the laws, ordinances, codes, resolutions, rules or other regulations of any State or political subdivision thereof limiting, zoning or otherwise governing, regulating, or controlling the use or development of any real or personal property, including water rights, shall be applicable to any such property leased from or held or used under agreement with and belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States.

(b) The Secretary of the Interior or his authorized representative may in specific cases or in specific geographic areas adopt or make applicable to Indian lands all or any part of such laws, ordinances, codes, resolutions, rules or other regulations referred to in paragraph (a) of this section as he shall determine to be in the best interest of the Indian owner or owners in achieving the highest and best use of such property. In determining whether, or to what extent, such laws, ordinances, codes, resolutions, rules or other regulations shall be adopted or made applicable, the Secretary or his authorized representative may consult with the Indian owner or owners and may consider the use of, and restrictions or limitations on the use of, other property in the vicinity, and such other factors as he shall deem appropriate.

<sup>6</sup> California Constitution Article 11, Sec. 7; CA Streets & Highways Code Sec. 940

are in the public right-of-way. If access is required to Caltrans right-of-way, the Tribe will need an encroachment permit from Caltrans.

- The encroachment permits are discretionary in this situation; therefore, CEQA analysis is required; however, CEQA analysis is very limited because the County does not have land use authority over the land held in trust.

### **Amended State Compact Between the State of California and the Tribe (Amended State Compact)**

- The provisions of the Amended State Compact relating to off-reservation environmental and economic impacts only apply to the Project<sup>7</sup> as that term is defined in the Amended State Compact.
- The provisions of the Amended Compact relating to environmental review and off-reservation impacts only apply to activities whose principle purpose is to serve Gaming Activities or the Gaming Operation and that were not previously analyzed in an environmental document.
- It is the County's current understanding, based on representations of the Tribe that the Tribe considers the shooting range and gas station/convenience store to be stand-alone projects whose principle purpose is not to serve the Gaming Activities or the Gaming Operation.
- With regard to the proposed gas station/convenience store, the definition of "Gaming Facility" or "Facility" in the Amended State Compact specifically excludes a fuel station or convenience store south of Highway 50, the primary purpose of which is not to serve as an amenity to the Gaming Activities.

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<sup>7</sup> "Project" means any activity occurring on Indian lands, a principle purpose of which is to serve the Gaming Activities or Gaming Operation, and which may cause either a direct physical change in the off-reservation environment, or a reasonably foreseeable indirect physical change in the off-reservation environment. This definition shall be understood to include, but not be limited to, the addition of Gaming Devices within an existing Gaming Facility, the impacts of which have not previously been addressed in a tribal environmental impact report described in section 11, and construction or planned expansion of any Gaming Facility and related improvement thereto, a principle purpose of which is to serve the Gaming Facility rather than provide that facility with an incidental benefit, as long as such construction or expansion causes a potentially significant direct or indirect physical change in the off-reservation environment. For purposes of this definition, section 11.0, and Appendix B, "reservation" refers to the Tribe's Indian lands within the meaning of the IGRA or lands otherwise held in trust for the Tribe by the United States. Notwithstanding the foregoing, "Project" shall not include (a) the Tribe's Hotel and Casino Project, which was the subject of an Environmental Assessment...which was prepared by the Tribe...and which was resolved in federal and state litigation...and with respect to which the Tribe and the County of El Dorado entered into a "Memorandum of Understanding and Intergovernmental Agreement Between the County of El Dorado and Shingle Springs Band of Miwok Indians," in September 2006, ("the MOU/IGA"), for the purpose of mitigating all potentially significant, off-reservation environmental impacts and (b) the Tribe's Interchange Project, as described and evaluated in the September 2002 Final Environmental impact Report/Environmental Assessment issued by the California Department of Transportation and Bureau of Indian Affairs... (Amended State Compact Sec. 2.21)

**Memorandum of Understanding and Intergovernmental Agreement Between the County of El Dorado and Shingle Springs Band of Miwok Indians (and as amended by Amendment dated October 20, 2012) (MOU)**

- The County and the Tribe entered into the MOU in order to satisfy the State Compact's requirement that the Tribe mitigate the impacts of the casino project on the County and to settle the ongoing litigation between the County and the Tribe.
- The MOU specifically addresses impacts to the County associated with the Gaming and Interchange Projects.
- There is general language in the MOU regarding mutual benefits, health, safety and general welfare of the respective communities, cooperation, positive and constructive resolution of significant issues, enhancement of government-to-government relations and continuing a relationship that is both positive and responsive to the parties respective needs and desires.
- Section M.2. of the MOU states:

In an effort to foster the government-to-government relationship between the County and the Tribe, representatives of the County and the Tribe agree to meet on a regular basis, and no less than annually, to discuss any issues or concerns either or both may possess with respect to their respective communities, whether in connection with the Tribe's Gaming Project, impacts associated with the Gaming Project, this Agreement or otherwise.

- The County and the Tribe have continued to meet to discuss issues and concerns of both parties; however, as future discussions move forward it is recommended that such discussions include the Tribe's current and future development plans so that both the County and the Tribe can plan for the future in a coordinated manner.