AGENDA ITEM NUMBER **B.1**
(Assigned by City Clerk)

DATE SUBMITTED January 14, 2008

SUBMITTED BY Eric Danly, City Attorney

DATE ACTION REQUIRED: January 23, 2008

COUNCIL ACTION ( )
PUBLIC HEARING REQUIRED ( )
NOTICE SENT date: _____

ACTIONS REQUIRED OF COUNCIL/CDA:

- RESOLUTION ( )
- ORDINANCE 1ST READING ( )
- ORDINANCE 2ND READING ( )
- MOTION ACTION ( )
- DIRECTION/INFORMATION (X)

CLOVERDALE CITY COUNCIL/COMMUNITY DEVELOPMENT AGENCY
AGENDA ITEM

CONSENT CALENDAR: ( ) OTHER: (X)

SUBJECT TITLE: Workshop on Indian Gaming and California Indian Tribes

RECOMMENDED COUNCIL ACTION: Informational only.

BACKGROUND/SUMMARY: The Cloverdale Rancheria recently informed the City that it is seeking to purchase land to construct a casino project near the City. In order to inform the City Council and the community about the Indian gaming process, the City Attorneys' office has been asked to present a workshop. The intent of the workshop is to provide a neutral, factual and legal presentation of the steps necessary for a tribe to operate a casino in California and to provide some background information on tribes and gaming in California. An outline of the content of the presentation is attached to this Staff Report. The workshop will be in the form of a discussion and Power Point presentation, with an opportunity for public comment afterwards.

ATTACHMENTS:
PUBLIC HEARING NOTICE: ( )
AGREEMENT/CONTRACT: ( )
OTHER: Outline of presentation

SUBCOMMITTEE REVIEW / RECOMMENDATION:

BUDGET / FINANCIAL IMPACT: none

CITY MANAGER'S RECOMMENDATION: CITY MANAGER'S INITIALS _____

MOTION/ACTION

SECONDED:
AYES:
NOES:
ABSENT:
ABSTAIN:

APPROVED: ( ) REJECTED: ( )
FAILED: ( ) DEFERRED ( )

REFERRED TO: _____

1048002v1

PRESENTATION REGARDING CALIFORNIA TRIBES AND INDIAN GAMING

I. What Is a Tribe?
- Federally-recognized; government-to-government relationship
- Non-federally recognized

II. Tribal Sovereignty
- Complete sovereignty prior to formation of federal government (sovereignty is the authority of a political body)
- Sovereignty limited after formation of federal government. Not specifically addressed in Constitution.
- U.S. Supreme Court - Tribes are "domestic-dependent nations" that retain sovereignty over their internal affairs, subject to federal legislation.

III. Trust Relationship
- Initially established to protect tribes from state encroachment
- Subsequently applied as part of exchange whereby tribes agreed to give up some of their land and federal government promised to provide a reservation and other rights, such as hunting and fishing (*Cherokee Nation v. Georgia*; *Worcester v. Georgia*)

IV. Overview of Indian Lands and Indian Country
- Two basic ways Indians and tribes hold land: title in fee and title in trust
- Fee is how most property held, such as a house
- "Trust" means the federal government holds legal title to the land, with the tribe or individual Indian as a beneficiary
- Having land in trust is a prerequisite for a tribe to conduct gaming

V. Overview of California Indian History
- 1850 – California becomes a state
- Concurrent with statehood, federal representatives sent to California to negotiate treaties with tribes
- 1850-1852 – 18 treaties negotiated; sent to Washington, D.C. for ratification by Senate
- Treaties never ratified, but tribes not told
- Many California Indians were left homeless as a result of the treaties not being ratified. California had an indentured servitude law at the time, making it legal to indenture "homeless and vagrant Indians"
- Government set up Rancherias (small areas of trust land). No housing or infrastructure provided.
- 1950's – Congress enacted series of acts designed to terminate the trust relationship between the tribes and the federal government
- Congress enacted the Rancheria Act in 1958. Several tribes agreed to relinquish trust relationship in exchange for federal government providing infrastructure to lands (roads, water, sewer, housing)
- Tribes who agreed were terminated and land taken out of trust and transferred to individual heads of households in fee
- Infrastructure never provided

- 1970's- 1980's – numerous terminated tribes sued the federal government seeking restoration to federal recognition and were restored via court cases or congressional acts. Many restored tribes were landless when they were restored.
- 1953 – Congress enacted Public Law 280 (PL 280). Transferred federal government's criminal, and some limited civil, jurisdiction over Indian country in California and some other states to the state. Civil/regulatory laws of state do not apply in Indian country; criminal/prohibitory laws of state do apply.

VI. Tribal Sovereignty in California Today

- Civil/regulatory laws do not apply in Indian country/on Indian lands held in trust. These include:
  - state tax laws
  - state labor laws
  - state environmental laws (but most federal environmental laws do apply)
  - zoning and land use
- No city or county jurisdiction
- Sovereign immunity – tribes cannot be sued unless they have expressly waived their sovereign immunity to suit; waiver cannot be implied. Unless tribe expressly waives sovereign immunity in writing, agreements cannot be enforced against tribes in court

VII. Overview of California Gaming History

- 1976 – Bingo permitted (Art. IV sec. 19(c))
- 1984 – State lottery permitted
- *California v. Cabazon*
- 1988 – Indian Gaming Regulatory Act
  - provides statutory framework for gaming in Indian country
  - gaming permitted on Indian lands where gaming not prohibited by federal law and is conducted in a state that does not prohibit such gaming
  - IGRA Classes of Gaming:
    1) Class I – Traditional Indian gaming (ceremonial/social with minimal prizes); tribal regulatory authority
    2) Class II – Bingo and non-banked games (permitted if state allows)
    3) Class III – All other (banked games played against the house; slots, etc.); lawful if state permits gaming for any purposes; state compact; tribal gaming ordinance approved by National Indian Gaming Commission (NIGC).
- 1998 – Proposition 5 – enacted to address "stalemate" between tribes and Governor Wilson. Added sections to Government Code defining permitted gaming; set out sample compact. Court rejected as being inconsistent with State Constitution, except for provision in which the State agreed to waive its sovereign immunity to suit in federal court.
- 2000 – Proposition 1A – State constitutional amendment that allows Governor to negotiate compacts, subject to ratification by the legislature, for slot machines, lottery games and banked and percentage games by federally-recognized tribes in California

VIII. Indian Gaming Regulatory Act (IGRA)

- Class I is not subject to any regulatory authority outside of the tribe
- Class II gaming is subject to tribal and federal regulation, if the state permits the type of gaming at issue. Class II gaming is not subject to state regulation.
- Class III Gaming:

- Tribe must be federally-recognized
- Tribe must obtain approval of its gaming ordinance from the NIGC
- Tribe must possess/obtain "Indian land"
- Tribe must negotiate a State compact

IX. Federally-Recognized Tribe

- If listed in the Federal Register, then considered federally-recognized

X. Tribal Gaming Ordinance

- NIGC jurisdiction
- With narrow exception, requires that tribe have the "sole proprietary interest and responsibility for conduct of the gaming activity" (current compacts do not allow any exceptions)
- Approval of Management Contracts (no more than 40% of net revenues can go to management company; NIGC must approve company and any person within the organization that has a direct financial interest in the organization or management responsibility for the management contract)
- NIGC required to approve the gaming ordinance if it complies with IGRA requirements

XI. Indian Lands Under IGRA

- Pre-1988 reservation (on or contiguous with existing reservation)
- IGRA prohibits taking land into trust for gaming purposes after 1988 unless an exception applies
- Land is part of settlement of a land claim (exception)
- Land is the "initial reservation" of a tribe (exception)
- Land is "restored land" (exception)
- Any land accepted into trust if (exception):
    - After consultation with the tribe, other neighboring tribes, state and local governments, the Secretary of the Interior determines:
        1) Transfer is in the best interest of the tribe, and
        2) Gaming is not detrimental to the surrounding community
    - State Governor concurs
    - Known as the "two part determination"
    - Very difficult to meet these requirements
    - Only three tribes have had land accepted under this exception; Bureau of Indian Affairs (BIA) recently rejected numerous applications where tribe already had a reservation where land to be taken into trust was not a "commutable distance" from the tribe's existing reservation, even where local jurisdiction and Governor supported the project (Barstow)

XII. Restored Lands Under IGRA

- Applies to "restored lands" of a tribe restored to federal recognition
- No definition of "restored lands" or "restored tribe" in IGRA
- Courts have held a tribe that was terminated then restored to federal recognition is a "restored tribe"
- Criteria established by courts for "restored lands":
    - Factual circumstances of acquisition (existence of any prior restored lands; availability of tribe's prior reservation for purchase);

- Location of land to be acquired (distance from prior lands; historical and cultural significance of land to tribe); OR
- Temporal relationship of acquisition to tribal restoration (9 years and 14 years from restoration of tribe to application upheld; BIA recognizes difficulty in re-forming government, so time not necessarily determining factor; don't just looking at time of restoration – time from BIA approval of tribe's constitution; tribe's efforts to seek land)

- Policy considerations
  - Purpose of IGRA not to limit proliferation of casinos; purpose to provide authority for gaming facilities as a means of promoting tribal economic development and regulatory protections for tribal interests (*Grand Traverse II*)
  - Trust responsibility
  - Meant to compensate for "historical wrongs" and compensation of opportunities lost while tribe terminated (*City of Roseville*)
- Statutory construction – ambiguities in statutes resolved in favor of tribes (*Montana v. Blackfeet Tribe*)

XIII. Fee-To-Trust Process

- Pursuant to an act of Congress (Indian Reorganization Act)
- Secretary of Dept. of Interior (DOI) may take lands into trust:
  - If property located within exterior boundaries of reservation or adjacent thereto;
  - If tribe already owns the land; or
  - If acquisition necessary for tribal self-determination, economic development or housing.
- Steps for fee-to-trust transfer:
  - **Step One** – Tribe submits application to Regional Director of Bureau of Indian Affairs (BIA)
    1) Tribe identifies parcel
    2) Determination from Solicitor that land "restored land" (either separate application or part of BIA determination)
    3) Factors BIA must consider and address in processing the application:
       - Statutory authority for acquisition and any limitations on authority
       - Need of tribe for the land
       - Proposed use of land
       - Impact on the state and local governments resulting from removing land from the tax rolls
       - Jurisdictional issues and conflicts of land use that may arise
       - Ability of BIA to discharge its trustee obligations
       - Extent to which tribe has provided information sufficient for BIA to comply with National Environmental Policy Act (NEPA)
       - Location of land, including relative distance from tribe's reservation (if applicable)
       - Anticipated economic benefits to tribe
    4) Tribe must complete an Environmental Impact Statement (EIS) pursuant to NEPA because placing land into trust is a "project" for NEPA purposes. City may comment on draft EIS.
  - **Step Two** – BIA notifies the state and local governments of proposed application

1) Notify state and local governments where land is located
2) 30 days to submit written comments on potential impacts of acquisition, including impacts on regulatory jurisdiction and taxes
3) Provide information on any governmental services currently provided to the parcel and its current zoning
4) Local agreements addressing services and jurisdictional issues encouraged but not required
5) Local governmental opposition without supporting evidentiary documentation insufficient.

- **Step Three** – BIA sends local comments to tribe and seeks tribe's response
- **Step Four** – BIA reviews the application, comments, documentation, etc.
  1) BIA has a "checklist" it uses to determine whether the application is complete and all issues addressed
  2) Process subjective and BIA has wide discretion
  3) No ability of anyone other than applicant to obtain information on application processing at this point
- **Step Five** – BIA issues a decision (Assistant Secretary)
  1) Notification and analysis provided to tribe and any interested parties
  2) 30 days to appeal decision
- **Step Six** – Title evidence is requested
- **Step Seven** – Final decision to approve/disapprove the application is made
  1) If application approved and no administrative appeal is filed, notice of decision published in Federal Register or newspaper of general circulation 30 days before land taken into trust
  2) If appeal filed, notice of decision not published until appeal process exhausted and decision upheld
- **Step Eight** – BIA records the conveyance in the state's land recording system and BIA land records system
- **Step Nine** – Recorded instruments and title documents are forwarded to the Solicitor; the Solicitor issues a final opinion that the land is owned by the United States in trust for the tribe

- Auburn Indian Band/City of Roseville
  - City opposed fee-to-trust application; argued casino would increase crime, interfere with planned residential development in area and compromise family-oriented nature of area
  - If BIA engages in required weighing of factors, court will uphold the decision to take land into trust unless the BIA acted in an arbitrary or capricious manner in applying the factors
- Ione Band of Miwok/City of Plymouth, County of Amador
  - Letter from Governor opposing fee-to-trust application
  - Determination that land "restored land" not a final agency action for appeal purposes

XIV. State Compacts

- State must negotiate in good faith (tribe can sue for failure to do so)
- If tribe sues and court finds State failed to negotiate in good faith:
  - tribe and state have 60 days to reach an agreement
  - If fail to reach agreement, each party submits a proposed compact to a mediator
  - Mediator selects one (baseball-style)

    - State has 60 days to sign compact
    - If State does not sign, Secretary of DOI selects procedures for the tribe to follow in conducting Class III gaming consistent with the mediator's proposed compact
- Compacts are agreements between State and tribe. Local governments not parties; have no rights to enforce. State must enforce.
- Compacts must be ratified by the legislature and published in Federal Register before effective
- Recent compacts require that the tribe prepare a Tribal Environmental Impact Report (TEIR). Very short time frame for local jurisdictions to comment, typically 30 days; TEIR only addresses environmental concerns
- Current compacts require agreements with local jurisdictions addressing environmental and other off-reservation impacts. 90 days from completion of TEIR to negotiate agreements.
- If tribe and local jurisdiction fail to finalize an agreement within the 90 days, each party must submit a proposed agreement to an arbitrator. Arbitrator chooses one of the agreements (baseball-style)