

EL DORADO LAFCO

LOCAL AGENCY FORMATION COMMISSION

AGENDA OF JULY 23, 2008

REGULAR MEETING

TO: Francesca Loftis, Chair, and
Members of the El Dorado County Local Agency Formation
Commission

FROM: José C. Henríquez, Executive Officer

AGENDA ITEM #5: CONSIDER THE PREPARATION OF REQUESTS FOR LEGAL OPINIONS FROM THE CALIFORNIA ATTORNEY GENERAL, OFFICE OF THE UNITED STATES SOLICITOR GENERAL AND ANY OTHER OFFICE OR AGENCY AUTHORIZED TO PROVIDE OPINIONS REGARDING THE LEGAL QUESTIONS SURROUNDING THE SHINGLE SPRINGS RANCHERIA ANNEXATION TO THE EL DORADO IRRIGATION DISTRICT (LAFCO PROJECT #87-15) AND CONSIDER NOTIFYING OTHER AGENCIES OF LAFCO'S FINDINGS AS APPROPRIATE

RECOMMENDATION

Staff recommends that the Commission provide direction on how to proceed regarding the issue of seeking legal opinions from the California Attorney General, the United States Solicitor General or any other office or agency authorized to provide opinions and whether any other agency should be notified of the Commission's findings on this issue.

REASON FOR RECOMMENDED ACTION

At the June meeting, the Commission held a public workshop on staff's efforts in 2007 to resolve the legal issues surrounding the 1988 Rancheria annexation into the El Dorado Irrigation District. Also covered in the discussion was new information that cast doubt on the validity of the annexation itself. The Commission directed staff to place this item on the July Agenda to discuss and possibly authorize requests for legal opinions from various offices.

BACKGROUND

Summary of Legal Issues

For twenty years, the Shingle Springs Rancheria annexation to the El Dorado Irrigation District (LAFCO Project #87-15) has been under a legal cloud. While most observers focus on the LAFCO conditions imposed at the time of approval, those are but one of several legal issues. These were covered in depth at the June workshop, so they will only be summarized in this staff report:

- 1) LAFCO Law requires that a petition be filed by either the landowners of the territory in question, registered voters in the subject area, or by resolution of the governing board of a local agency requesting a change in its boundaries. In this annexation, the petition was filed by the Shingle Springs Band of Miwok Indians (Tribe), who is not the landowner of the Rancheria parcel. The parcel is owned by the US Department of Interior – Bureau of Indian Affairs (BIA). It is unclear whether BIA's consent to a 1987 Annexation Agreement between the Tribe and the El Dorado Irrigation District (EID) constituted landowner consent to initiate the annexation.
- 2) The Tribe was required to waive sovereign immunity for the LAFCO proceedings in order to establish LAFCO jurisdiction over the proceedings. If LAFCO had no jurisdiction, then it could not authorize the expansion of EID's service area in a petition initiated by the Tribe. It is not clear whether the Tribe's waiver of sovereign immunity for the Annexation Agreement between the Tribe and EID constituted the required waiver of immunity to complete the annexation with the conditions imposed by LAFCO.
- 3) LAFCO imposed conditions on the annexation that some argue directly regulate land use; however, the record shows that the motion to approve the annexation "represented a good faith agreement between the parties." By continuing the item twice, the record also shows that the Commission would not give a carte blanche approval to the annexation.
- 4) The conditions imposed by LAFCO were not contemplated in the 1987 Annexation Agreement, and no evidence exists that BIA specifically reviewed or consented to the annexation itself. It is not clear whether BIA's consent to the Annexation Agreement constituted de facto consent to the annexation, as required for the annexation to be valid.
- 5) If a court were to rule that the conditions are invalid, it is unknown whether that determination would also invalidate the annexation. As stated above, there is sufficient evidence to indicate that the Commission would not have approved the annexation absent the agreement to the conditions.
- 6) On May 28, 2008, EID approved a Memorandum of Understanding with the Tribe under the assumption that the LAFCO conditions are not "legally valid or binding upon EID." EID has no judicial authority under the law to make those determinations by itself.

Need for this Agenda Item

During the workshop, several Commissioners were concerned about the legal implications of these and other legal questions. They directed staff to place on the July

Agenda the consideration of preparing requests for legal opinions from various agencies on the application of legal precedence to these issues. These agencies would include the California District Attorney's Office and the Office of the US Solicitor General.

Several questions were voiced at the meeting and are included in this report, but this list is not exhaustive and the Commission may have other questions to consider by the time of the July Meeting. However, staff cautions that the number of questions sent to individual offices should be pared down in order to prepare requests that are timely, appropriate and likely to be answered. In addition, staff will also include comments on some of the questions already posed.

The Commission may also take action on notifying other agencies of its findings as appropriate.

Questions to the California Attorney General

On potential conflicts with State and Federal Law

1. The United States Department of Interior – Bureau of Indian Affairs (BIA) owns the Rancheria for the use and benefit of the Shingle Springs Band of Miwok Indians (Tribe). Was the Tribe the proper applicant, given that it was not the landowner of the Rancheria? What would be the impact to the filing of an annexation petition if the Tribe acted as the applicant if it was not the proper applicant according to the Cortese-Knox Hertzberg Act?

Staff comments: Because BIA approved the 1987 Annexation Agreement between EID and the Tribe, which called for a LAFCO petition, this question may not be as important because it could be argued that the Tribe submitted the annexation with de facto BIA consent.

2. If LAFCO is generally prohibited by Federal Law from having jurisdiction over Tribal lands unless a Tribe waives sovereign immunity for the LAFCO proceedings, did LAFCO have sufficient standing to process this annexation if there was no waiver of sovereign immunity from the Tribe? What would be the impact to this annexation if there was no waiver of sovereign immunity?

Staff comments: It is known that LAFCO had standing if EID had been the applicant. It is also known that EID is subject to LAFCO jurisdiction and EID may not expand services without LAFCO approval. The question is whether EID could expand its service area to include Federal land without LAFCO approval or whether it can expand without LAFCO having sufficient standing to approve such an expansion since, in this case, the Tribe was the applicant.

3. If Federal Law requires the review and consent of the Bureau of Indian Affairs on an annexation beyond what has already been reviewed and consented to by BIA, what is the impact to the annexation if there is no BIA approval?

Staff comments: This is a key question that should be asked to both State and Federal agencies.

On the consequences of any or all of the above

4. If the annexation is invalid for any or all of the reasons stated above, is the El Dorado Irrigation District (EID) providing services outside of its service territory?

Staff comments: This question is related to questions #2 and #3 above and can be answered indirectly based on the response to questions #2 and #3 if they are submitted.

5. Does EID have the judicial authority to determine that LAFCO conditions are not "legally valid or binding upon EID" absent a court ruling? Does EID have any other authority under State Law to make such determinations?

Staff comments: Staff and counsel are unaware of any such authority resting with EID, but this question could be asked to confirm this conclusion.

6. Can LAFCO enforce its conditions in light of no BIA approval/sovereign immunity waiver?

Staff comments: This question is also related to questions #2 and #3 above and can be answered indirectly based on the response to questions #2 and #3 if they are submitted.

7. If LAFCO has no authority to enforce its conditions, and because LAFCO is a State agency, what would be the extent of Attorney General's enforcement authority if service is provided without a valid annexation?

Staff comments: This is a key question that should be asked to State agencies.

8. If a LAFCO action is contingent upon a conditional approval and the conditions are subsequently found to be invalid, would the annexation also be invalid if there is no severability clause in the annexation resolution?

Staff comments: This is a key question that should be asked. The Legislature gave LAFCOs only three courses of action when evaluating a petition: Denial, Approval or Conditional Approval. The Legislature gave the third option to LAFCOs so that they can amend the petition into a modified project that the Commission can approve. It is staff's contention that, without a clause in the approval indicating that the annexation will be valid even if some conditions are not, the entire annexation is invalid if some conditions are invalid.

Miscellaneous questions

9. What happens when an applicant misrepresents the intention behind the annexation? Would LAFCO have any recourse if an applicant deliberately misrepresents the impact of an annexation to win a favorable outcome during the annexation proceedings only to subsequently amend the land use after these proceedings are complete?

Staff comments: This is a difficult question to pose since LAFCO would have to prove that the applicant deliberately intended to deceive the Commission at the time of the hearing. However, it is a question that several LAFCOs have brought to the attention of the Legislature. Staff believes that is probably the proper venue to address this question.

10. If EID's provision of water service to the Rancheria transitions from mostly residential purposes to mostly commercial ones, is this a "new or different service" requiring LAFCO approval as the Third District ruled under *South San Joaquin Irrigation District v LAFCO*?

Staff comments: This situation may not be an issue under *South San Joaquin* because EID currently provides retail water service to both the Rancheria and its service area as a whole and, in the latter case, a customer base that includes commercial, residential and industrial customers. The Tribe and EID envision the provision of retail commercial water service to the Tribe in addition to residential service.

Questions to the Office of the US Solicitor General

On potential conflicts with State and Federal Law

11. If LAFCO is generally prohibited by Federal Law from having jurisdiction over Tribal lands unless a Tribe waives sovereign immunity for the LAFCO proceedings, did LAFCO have sufficient standing to process this annexation if there was no waiver of sovereign immunity from the Tribe? What would be the impact to this annexation if there was no sovereign immunity waiver?

Staff comments: These are key questions that should be asked; however, staff notes that there is concern regarding the amount of time to prepare the necessary material to submit these questions. If this is the case, LAFCO staff recommends the serious consideration of giving preference to question #12 below. Otherwise, staff recommends asking both #11 and #12.

12. If Federal Law requires the review and consent of the Bureau of Indian Affairs on an annexation beyond what has already been reviewed and consented to by BIA, what is the impact to the annexation if there is no BIA approval?

Staff comments: This is a key question that should be asked because LAFCO approved an annexation with conditions that the property owner, BIA, never considered or accepted.

Questions to other agencies

In addition to these two agencies, the Commission may choose to submit these or other questions to other entities authorized to provide opinions, such as the Legislative Counsel (Leg Counsel). For example, the Commission may decide to submit questions number 5 and 8 to Leg Counsel instead of, or in addition to, the Attorney General.

Process

In order to submit questions to the Attorney General, LAFCO would have to request the assistance of either El Dorado County Counsel or a state legislator, most likely the two local representatives, Senator Dave Cox or Assemblyman Ted Gaines. Questions to Leg Counsel must also be submitted through a legislator. Staff is currently researching the process that must be utilized to submit questions to the Solicitor General.

Notification to Other Agencies

The Commission may also wish to notify other agencies of its recent findings. In addition, given the new gambling compact the Tribe has entered into with the State of California, the Commission may also consider requesting the Governor's assistance in this matter.