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BILL ANALYSIS
SB 162 (Anderson)
As Amended May 21, 2012

RECOMMENDED POSITION
Staff recommends the Commission **Oppose** SB162.

SUMMARY
In relevant part to the Commission, SB 162 would prohibit any state agency from opposing a tribal "fee-to-trust" acquisition application if the acquisition was intended for the purpose of housing, environmental protection or cultural restoration. The bill would also define a "federally recognized tribe" as a tribe that has been included on the list of "Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs", published pursuant to Section 479a-1 of Title 25 of the United States Code.

EXISTING LAW
Section 465 of Title 25 of the United States Code authorizes the federal government to acquire land in trust for an Indian tribe's benefit. This process is known as a "fee-to-trust acquisition." The Bureau of Indian Affairs (BIA), under the Department of the Interior (DOI), has jurisdiction over fee-to-trust applications. Once land is annexed in a federal fee-to-trust process, the land is taken out of city/county/state jurisdiction in perpetuity and added to the reservation of the tribal applicant. The practical effect of this within the coastal zone is that tribal lands taken into trust are removed from the coastal zone for purposes of the Commission's review authority under the Coastal Act or the Coastal Zone Management Act (CZMA). Because federally recognized tribes are considered sovereign nations, state and local land use laws and regulations have no force and effect on trust lands. Once taken into trust, the regulations in 25 CFR Part 151 do not authorize the Department to impose restrictions on a Tribe's future use of land, or revoke its status. Only Congress can revoke trust status.

Because a fee-to-trust acquisition is a federal action, the Coastal Commission has review authority under the Coastal Zone Management Act. The Commission and other state agencies also have the ability to comment as part of the NEPA consultation process. This process allows state agencies to concur with or object to the acquisition. The BIA's action is subject to appeal and ultimately to judicial review. Plaintiffs must have standing in order to litigate.

ANALYSIS
The Commission's authority over fee-to-trust acquisitions is expressed through federal consistency review. Recognizing that fee-to-trust acquisitions may be an important mechanism for facilitating Native American self-determination, the Commission has generally been supportive of these acquisition applications when they are for purposes, such as economic development, that can be carried out consistent with Coastal Act policies Since 2000, the Commission has concurred with nine of the ten fee-to-trust applications it has considered. At least three of the Commission's concurrence determinations relied upon changes pre-negotiated with the tribes relating to future uses of the lands taken into trust. The Commission concurred

with every fee-to-trust application since 2000 except for one: the Big Lagoon Rancheria's application to take five acres of land into trust for housing. The Commission's objections were based on cumulative impacts and concentration of development. The Commission is currently participating in an administrative appeal regarding this matter.[1]

While the Commission rarely objects to applications for fee-to-trust acquisition, the ability to do so when necessary is important, because there is little state oversight once an acquisition is complete. The development that follows fee-to-trust acquisition has the potential to cause significant environmental and land use impacts, including impacts to traffic and circulation, sensitive habitat, public access and public service impacts. Subsequent development does not undergo environmental review under CEQA, nor any local permit process. Because local governments cannot regulate tribal trust lands, LCP standards do not apply to development. Nor do standard regulatory instruments such as coastal development permits, discharge permits, streambed alteration permits.

Because there is no prohibition for a change of use once land is taken into trust by a tribal government, a tribe can apply to the federal government to take land into trust for purposes of non-gaming activities such as housing, environmental protection, or cultural preservation and upon approval of the application immediately begin planning and implementation of a gaming facility or other type of project. This has occurred on some fee-to-trust lands in the past, including Big Lagoon. While many fee-to-trust acquisitions don't raise public agency concerns, those that have been pursued to facilitate controversial projects such as casinos, golf courses, and resorts have generated controversy with surrounding communities and local governments.

Because federally recognized tribes are sovereign nations and trust lands are not subject to the same regulatory process as land uses on other privately held lands, the only meaningful opportunity for the State to influence the outcome of a fee-to-trust acquisition is before the land is taken into trust. Aside from the federal consistency review process, this occurs during the public comment period when the BIA is considering the application and conducting NEPA review. If state agencies are prohibited from objecting to these acquisition applications, the State will forfeit this opportunity to raise issues and objections on the part of the state and local communities where the impacts are most significant. At least one such action is currently pending. On May 14 of this year, the Attorney General objected to a 535-acres fee-to-trust acquisition in the City of San Jacinto, based on the impacts to city residents and municipal services.

If SB 162 were to become law, the Commission would retain its federal consistency review authority under the Coastal Zone Management Act. However, the language prohibiting a state agency from opposing a fee-to-trust acquisition would arguably prevent the Commission from either objecting to, or conditionally concurring with, future consistency determinations by the BIA regarding fee-to-trust acquisitions.

The Commission would also lose the benefit of other agencies' review of such applications. In its own analysis, the Commission would not be able to utilize information generated by the Department of Fish and Game, State Parks, Caltrans, the State Water Resources Control Board, etc. SB 162 would significantly diminish state authority in these matters, and has the potential to undermine the Commission's existing authority under the CZMA. **For the forgoing reasons, staff recommends the Commission oppose SB 162.**

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[1] The Commission's concurrence was conditional. The Big Lagoon Rancheria did not accept the conditions. The practical effect of this is the same as an "objection."