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Via email to nepa_procedures@nigc.gov

George Skibine
Acting Chairman
National Indian Gaming Commission
1441 L Street, NW.
Suite 9100
Washington, DC 20005
Facsimile: (202) 632-7066

Re: Rincon Band of San Luiseno Indians Comments to Proposed NIGC -
National Environmental Policy Act Procedures Manual

Dear Acting Chairman Skibine,

On December 4, 2009, notice of the NIGC National Environmental Policy Act Procedures Manual ("NEPA Manual") was published in the Federal Register. See 74 FR 63765-63787. On January 14, 2010 the NIGC published notice extending the comment period 45 days to March 4, 2010. These comments and concerns from the Rincon Band of San Luiseno Indians ("RINCON BAND") are in response to the NIGC's proposed NEPA Manual.

In the Background section of the Federal Register notice, NIGC states that the NEPA Manual is "intended to clarify policies and procedures to ensure integration of environmental considerations into major federal actions *of the NIGC* that trigger NEPA review." 74 FR at 63765. The NIGC goes on to state that it has identified only one type of major federal action that it performs under the Indian Gaming Regulatory Act ("IGRA") that triggers NEPA review, i.e. approving contracts for the management of Indian gaming facilities pursuant to 25 U.S.C. § 2711. The RINCON BAND takes issue

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with NIGC's determination and disagrees with the manner in which NIGC proposes to implement NEPA when reviewing the submission of a management contract by a Tribe for review and approval under § 2711. While the NIGC is free to propose procedures as to how it as a federal agency will implement NEPA related to its own actions, federal law mandates that the NIGC consult with the RINCON BAND before it imposes such procedures on the Tribe.

1. Tribal Consultation. On November 5, 2009, President Barack Obama executed a Memorandum for Heads of Executive Departments and Agencies regarding tribal consultation, which in large part reaffirms Executive Order 13175. See Executive Order 13175 and Presidential Memorandum also found at 74 FR 57881-57882. This Presidential Memorandum on Tribal Consultation reaffirms that

Executive departments and agencies (agencies) are charged with engaging in regular and *meaningful* consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, and are responsible for strengthening the government-to-government relationship between the United States and Indian tribes.

Id. (emphasis added).

In addition to acknowledging the responsibility of agencies to consult and collaborate with tribal officials in the development of Federal policies that have tribal implications, the Presidential Memorandum directs each agency head to prepare (and implement) detailed plans of action to implement Executive Order 13175 *after consultation* with Indian tribes. Id. (emphasis added). In response to this Presidential mandate, the Department of Interior is currently meeting with tribal leaders to develop a consultation plan wherein the Department is soliciting input from tribal governments on the following:

- What Federal actions of the Department should initiate consultation?
- At what point in the process should tribes be involved and participate?
- How far in advance would the Department and its bureaus give notice of consultation?
- Who should participate in consultation?
- How should consultation occur?
- Should timelines be considered in consultation processes?
- How should consultation follow-up occur?
- How should the Department coordinate among its agencies and bureaus as well as with other Federal departments?
- What, if any, alternatives might be employed such as conferences, workshop sessions, or task forces to improve communication and coordinate with tribes?

See November 23, 2009, Dear Tribal Leader from Larry Echohawk, Assistant Secretary - Indian Affairs.



Additionally, the NIGC's own Consultation Policy also confirms that

the NIGC will engage in regular, timely, and **meaningful** government-to-government consultation and collaboration with Federally recognized Indian tribes, when formulating and implementing NIGC administrative regulations, bulletins, or guidelines, or preparing legislative proposals or comments for Congress, which may substantially affect or impact the operation or regulation of gaming on Indian lands by tribes under the provisions of IGRA. ... [and further that]

The NIGC will initiate consultation by providing early notification to affected tribes of the regulatory policies, procedures, programs, requirements, restrictions, and standards that it is proposing to formulate and implement, before a final agency decision is made regarding their formulation or implementation.

See NIGC Government-to-Government Tribal Consultation Policy found at 69 FR 16973 - 16979 (emphasis added). We encourage the NIGC to continue to develop its Consultation Policy in a manner consistent with the Presidential Memorandum and the Department of Interior's efforts to develop a more meaningful consultation policy.

As you are aware, the Draft NIGC NEPA Manual was published on December 4, 2009. Tribal governments and interested parties were then provided a 45 day period (subsequently extended an additional 45 days) within which to provide comment to the NIGC. This is too short of a time period given the misdirected and long term effects of the policy embodied within the NEPA Manual. Some within the NIGC may consider the NEPA Manual to be solely "internal" guidance because it addresses the NIGC's responsibility as a federal agency to comply with NEPA. Given NIGC's determination that the approval of third party management contracts under § 2711 of IGRA triggers NEPA review and converts a Tribe's simple request for approval of a contract into a full scale development "project", we do not believe that this is a fair characterization.

As proposed, the NEPA Manual governs the interaction of the NIGC and Indian tribes when NEPA is triggered, and accordingly would "substantially affect or impact the operation or regulation of gaming on Indian lands by tribes under the provisions of IGRA." Accordingly, pursuant to Executive Order, the Presidential Memorandum, and the NIGC's own Consultation Policy, instead of immediate publication and implementation of the NEPA Manual, **early meaningful** government-to-government tribal consultation is appropriate and necessary. Tribal governments are more than just interested parties who may comment on policy and regulation. Furthermore, given the assumptions made by the NIGC as to when NEPA is triggered and the burdens it NIGC places on Tribes when requesting the NIGC to approve a management contract under § 2711 of IGRA, NIGC is mandated to consult before adopting such procedures.

Since the NIGC failed to conduct any meaningful or early consultation with tribal governments regarding the NEPA Manual prior to its notice and publication, we demand that the NIGC rescind the notice and publication of the NEPA Manual. Instead we

suggest the NIGC should comply with Executive Order 13175 by having meaningful consultation with tribal governments regarding the implementation of a NEPA process that recognizes the preexisting mechanisms to protect the environment when gaming development projects are proposed and to treat the management contract approval process separately. Further, this meaningful government-to-government consultation must take place prior to publication in the Federal Register. If the NIGC wishes to proceed, it can strike those portions of the Draft NEPA Procedures Manual related to approval of management contracts which then morph into full-scale “projects” requiring NEPA review that enables NIGC to assume “lead agency status” (see § 5.2.1) and subverts the independent governmental authority of the tribes and states (within the context of the tribal-state compact) to address environmental issues that may ripen as the proposed management contract is implemented.

Should the NIGC proceed as we suggest and conduct meaningful consultation prior to publication and implementation of the NEPA Manual related to the sole basis it submits triggers NEPA review, ie. approval of third party management contracts under § 2711, the RINCON BAND would welcome the opportunity to discuss the impact and the scope of the proposed regulations with the NIGC at that time. By taking such a course of action many of the concerns that the RINCON BAND has with the current draft could be resolved. During the suggested consultations, we would welcome the opportunity to understand and discuss the NIGC’s view of its charge under the NEPA. As an initial matter we suggest that additional clarity on when the NIGC understands that the NEPA is triggered is appropriate.

The proposed Manual states that the NIGC has identified only one major Federal Action that the NIGC performs which triggers NEPA review - approval of management contracts. See NEPA Manual at Background. Yet elsewhere in the regulation there is a definition of “Proposed action(s)” which does not specifically refer to the approval of management contracts. See Manual at 1.8.5. Scoping and Defining the Project/Proposed Action. Further discussions regarding policy development on Scoping and the definition of defining of Project and Proposed Action are appropriate. As you are aware, the development or expansion of a gaming facility or related amenities do not individually trigger the procedural requirements of NEPA. As significant tribal gaming development can take place in the absence of a management agreement, and without triggering NEPA, we would like to understand the NIGC’s position on how to appropriately define the scoping a “Project” or “Proposed Action.”

2. Reference to Collateral Agreement. Similarly, tribal consultation is necessary to determine what the appropriate scope of documents for NIGC NEPA review. Throughout the NEPA Manual there is reference to “collateral agreements.” Once there is understanding as to how a Project/Proposed Action will be defined, it will be possible to provide meaningful comment on the entire scope of documents to be reviewed by the NIGC when discharging their duties under the IGRA and the NEPA.

3. Memorandum of Understanding (“MOU”). The Manual includes a requirement that a tribal government and Cooperating Agencies enter into a specific MOU with the NIGC. See NEPA Manual at 5.2. (“When cooperating agencies are identified, a Memorandum of Understanding will be prepared to outline their roles and responsibilities”) *see also* Manual Attachment B. Further we would like to understand

the NIGC's view on when the necessity of the MOU is triggered and how it would be implemented. While the NEPA Manual states that a MOU *should* be entered into, and that the MOU at Appendix B is an example, we are concerned that future NIGC staff may not view the form of MOU as an example or starting point from which to negotiate a more appropriate MOU specific to each situation, and instead may view that the MOU as a requirement which cannot be changed.

4. Cooperating Agency. Throughout the NEPA Manual it states that a Tribe may be Cooperating Agency "when appropriate." See NEPA Manual at 5.2.2, 5.2.4. Because of the text in this provision, it is unclear as to whether the NIGC would consider a Tribe a "Cooperating Agency" when a tribal gaming operation is seeking management contract approval for a gaming operation on the Tribe's lands. Further clarification on this point is appropriate and necessary to confirm when a Tribe will be defined or treated as a Cooperating Agency.

5. Considerably Increase Patronage. The NEPA Manual provides that management contract amendments which include "plans to considerably increase patronage" trigger NEPA compliance. We are aware that the NIGC has relied upon this concept in the past. See June 12, 2007 Letter from Brad Mehaffy, NIGC NEPA Compliance Officer to Sam Basile, Vice-President and General Counsel, Gaughan Gaming LLC. However, as it is an undefined term, we suggest that its inclusion within the NEPA Manual is inappropriate and accordingly, it should be stricken.

6. Term of an Environmental Assessment. The Manual states that an Environmental Assessment goes "stale" after 3 years and must be updated if used. We would suggest an increase in that term to 5 years as environmental conditions are unlikely to change during that time period.

Meaningful Consultation on the Draft NEPA Manual is Appropriate

The RINCON BAND encourages the NIGC to withdraw the proposed NEPA Manual, at least as it relates to NIGC's action related to the approval of management contracts and instead initiate meaningful tribal consultation so as to develop a NEPA Manual which both takes into account the impacts in Indian Country of this Federal policy, and more importantly, works in an efficient manner. Should NIGC choose to proceed on the current course without consultation, the RINCON BAND expressly reserves the right to supplement this letter with more specific comments on discrete sections of the NEPA Manual.

Should you have questions regarding these comments, please do not hesitate to contact me at (425) 802-5369.

Respectfully,

/S/

Scott Crowell on behalf of the
Rincon Band of San Luiseno Indians