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February 17, 2016

Jonodev Chaudhuri, Chairman
National Indian Gaming Commission
1849 C Street NW, SM-1621
Washington, D.C. 20240

Re: Standing Rock Sioux Tribe Comments on Updates to Class III MICS and NIGC NEPA Procedures

Dear Chairman Chaudhuri:

In 1988, Congress established through enactment the "Indian Gaming Regulatory Act" which acknowledges Indian Tribes as governments that have the right to regulate and manage gaming operations. It also provided a comprehensive regulatory system that involves three (3) levels of government regulation: tribal, federal and state. Through President Obama's Executive Memorandum of November 5, 2009 and Executive Order 13175, the President, the government reaffirmed tribal rights to consultation before policies or guidance would be adopted that have tribal implications. On January 21, 2016, the National Indian Gaming Commission ("NIGC") issued a Notice of Telephonic Consultation and Opportunity for Written Comments ("Notice") regarding four (4) topics on which NIGC proposed to issue various regulations or guidance.

The Standing Rock Sioux Tribe would like to respectfully submit these comments regarding the proposed Class III MICS guidance and the proposed NEPA manual.

<u>PROPOSED CLASS III MICS GUIDANCE</u>

NIGC has proposed to issue guidance regarding Class III MICS, noting in the Notice "the importance of Class III MICS to a large section of the Tribal gaming industry." While the Standing Rock Sioux Tribe does not, in general, oppose the issuance of guidance, the Tribe wishes to strongly and emphatically emphasize that, to the extent such guidance is issued, it be non-mandatory, but is issued only to be used as a tool for Tribes in their sole discretion.

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As you are aware, the United States District Court for the District of Columbia, in Colorado River Indian Tribes v. Nat'l Indian Gaming Comm'n, 383 F.Supp.2d 123 (D.D.C. 2005) aff'd 466 F.3d 134 (D.C. Cir. 2006), thoroughly and clearly held that mandatory MICS for Class III gaming "represents a significant incursion on tribal sovereignty." Id. at 147. The Court held that any federal attempt to make Class III MICS mandatory on tribes is not authorized by the Indian Gaming Regulatory Act ("IGRA"), would in fact be inconsistent with the provisions of the IGRA, and that – in general – the IGRA lacks authority to regulate Class III gaming. Id. at 135-40.

The holding in Colorado River remains in effect today, and it appears as though NIGC understands the implications of this holding, as the Notice specifically notes the "guidance" which is being proposed by NIGC would be "non-mandatory," and would be available for tribal regulators to "use in developing their own Class III internal controls." Therefore, it appears as though NIGC does not intend for such guidance to be binding; however, both for posterity and to further its exercise of sovereignty, the Standing Rock Sioux Tribe wants to be on the record as objecting to any Class III MICs language – whether described as guidance or otherwise – which would have any mandatory application on any Tribe conducting Class III gaming.

PROPOSED NEPA MANUAL

NIGC also proposes a NEPA manual that addresses management contracts, which would include a Categorical Exclusion ("CATEX") for approval of management contracts, where Tribes would not be required to prepare an Environmental Assessment or Environmental Impact Statement except in the case of extraordinary circumstances.

In general, the Standing Rock Sioux Tribe supports NIGC's proposal to update its policies and procedures to provide a CATEX for approval of management contracts. This proposal will generally, as recognized by the NIGC, conserve Tribal resources, and recognizes the general lack of necessity for environmental review when a management contract is entered. However, there are two points which Standing Rock finds it proper to make. First, the proposed NEPA Policy – while categorized in the Notice as being a "manual that addresses management contracts" does impact other areas of Indian Gaming. While the manual appears to be fair in its application of CATEX designations, we are cognizant that this policy will impact Tribes in areas outside the management contract capacity.

Second, we question the inclusion of 4.3.6 in the list of Extraordinary Circumstances which will disqualify an action from CATEX designation. Section 4.3.6 includes as an Extraordinary Circumstance situations where "[t]here is a reasonable likelihood the proposed action/project will have effects that are highly controversial on environmental grounds." While there is a general lack of guidance on precisely defining "extraordinary circumstances," 40 C.F.R. § 1508.4 defines "categorical exclusion," and notes that procedures providing for such exclusions "shall provide for extraordinary circumstances in which a normally excluded action may have a significant environment effect." (emphasis added). The possibility of a significant environmental effect is heavily covered in the other subsections of Section 4.3 enumerating situations constituting extraordinary circumstances. In contrast, 4.3.6 does not contemplate a situation where there may be a significant environment effect, but one which is simply highly

controversial. It does not appear appropriate – given the language of 40 C.F.R. § 1508.4 and the inclusion of potential environmental effects in the other subsections of 4.3 – to exclude from CATEX designation situations which are problematic purely from a political standpoint, with no actual finding of potential significant environmental effect.

Finally, the Standing Rock Sioux Tribe recognizes that this manual has long been in the works. However, during that period – and after the February 26, 2015 meeting cited by NIGC in the Notice at which a quorum was lost and consultation was paused until the beginning of this year – a federal court decided Jamul Action Comm. V. Chaudhuri, No. 2:13-CV-01920-KJM-KJ, 2015 WL 2358590 (E.D. Cal. May 15, 2015). In Jamul, the Court held that because a "major federal action" is defined as including approval of "management activities," NIGC will undertake a major federal action for purposes of NEPA if it approves a Tribe's proposed gaming management contract. Id. at * 5. While the Tribe supports NIGC's inclusion of management contracts as eligible for CATEX designation, and it is possible if not likely NIGC has already considered the holding in Jamul, the Tribe does question what effect, if any, Jamul has on the proposed NEPA Manual's provisions on management contracts. If Jamul is broadly interpreted, does it not nullify the very provision of the proposed Manual which has been highlighted for the Tribes as saving Tribal resources? Again, this may be a matter that NIGC has already considered and has distinguished Jamul, but the Tribe would be interested in NIGC's interpretation of the case and its effect on the proposed manual.

PROPOSED BUY INDIAN GOODS AND SERVICES

The Standing Rock Sioux Tribe supports the inclusion of language that encourages the purchase of Indian goods and services.

On behalf of the Standing Rock Sioux Tribe, we appreciate this opportunity to provide comments in response to NIGC's Notice of January 21, 2016. The Tribe looks forward to working with the NIGC as these important matters move forward. Please do not hesitate to contact us if we can provide any additional information.

Sincerely,

Dave Archambault II, Chairman
Standing Rock Sioux Tribe