



OFFICE OF THE GOVERNOR

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BILL ANOATUBBY
GOVERNOR

June 19, 2015

Mr. Jonodev O. Chaudhuri, Chairman
1849 C Street NW
Mail Stop #1621
Washington, DC 20240

Dear Chairman Chaudhuri:

We are pleased to submit the enclosed comments in response to the National Indian Gaming Commission's ("NIGC") Notice of Consultation dated February 26, 2015 ("Notice"). Our enclosed comments address the following topics identified in the Notice: (1) proposed Class III MICS guidance; (2) proposed NEPA manual; (3) proposed Buy Indian Goods and Services regulation; and (4) Discussion Draft of Privacy Act regulations.

The Chickasaw Nation commends the NIGC for reaching out to tribal governments early and prior to the commencement of any formal rulemaking activities. We respectfully seek your favorable consideration of the enclosed comments and look forward to continued cooperation and coordination in the spirit of the government-to-government relationship and in accordance with federal law and policy.

If you have any questions, please contact Mr. Matthew Morgan, director of gaming affairs, at (580) 272-7070.

Sincerely,

Handwritten signature of Bill Anoatubby in cursive script.
Bill Anoatubby, Governor
The Chickasaw Nation

Enclosure

**COMMENTS OF THE CHICKASAW NATION ON THE
NATIONAL INDIAN GAMING COMMISSION'S FEBRUARY 26, 2015
NOTICE OF CONSULTATION**

The Chickasaw Nation ("Nation") appreciates the opportunity to comment on the rulemaking proposals set forth in the National Indian Gaming Commission's ("NIGC") Notice of Consultation, which was issued to tribal leaders on February 26, 2015. The Nation welcomes the NIGC's decision to circulate these proposals for comment before undertaking any official rulemaking activity. Early tribal involvement is a key step towards developing policies and regulations that are reflective of tribal concerns and advance the interests of tribal governments. It is also critical to ensuring that the consultation process is meaningful and consistent with the special government-to-government relationship between tribal and federal governments.

The Nation encourages the NIGC to continue these important outreach efforts and respectfully requests favorable consideration of our comments below, which address the topics outlined in the February 26, 2015 Notice of Consultation in the following order: (1) Class III MICS guidance; (2) proposed NEPA manual; (3) Buy Indian Act; and (4) Discussion Draft of Privacy Act.

I. CLASS III MICS GUIDANCE

The NIGC is considering a proposal to withdraw 25 C.F.R. Part 542 regulations and to develop in their place non-mandatory Class III Minimum Internal Control Standards ("MICS") guidance. The Chickasaw Nation understands this proposal is driven by, both, NIGC recognition that it lacks legal authority to enforce such regulations and the agency's receipt of requests from tribal governments for assistance in establishing tribal internal control standards ("TICS"). We applaud the NIGC for seeking tribal input during the initial planning stages of this proposal as well as the NIGC's recognition of its Class II oversight authority under the Indian Gaming Regulatory Act. By focusing in on the issues early in this consultation process, we can work together to the best available approach.

However it may proceed, the NIGC *must not disrupt any existing state-tribal gaming compacts*. Part 5 of state-tribal gaming compacts in Oklahoma, for example, require tribal gaming enterprises to promulgate and "comply with [TICS] that provide a level of control that equals or exceeds those set forth in the [NIGC's MICS] (25 C.F.R., Part 542)," and given such reference, some might argue that withdrawal of the Part 542 regulations would create a regulatory "void." While such argument would be unfounded since the referenced provision serves *only* to isolate and memorialize a reference standard for purposes of tribal regulation, the fact that NIGC action *could* be construed as creating such problem requires the agency to act with deliberate caution.

For *our* part, the Chickasaw Nation will continue to operate and regulate its compacted gaming under TICS that meet or exceed the Part 542 MICS in place when we entered our compact with Oklahoma; it is our position that doing so would be our compact obligation *regardless* of what action the NIGC may take. For *its* part, we call on the NIGC to take pains to ensure that nothing it might do could serve as grounds for disrupting current state-tribal compact relations. The

NIGC could accomplish that end by specifying any withdrawal shall not be construed as relieving any tribe of complying with compact terms referencing or integrating the Part 542 MICS. It could also accomplish such end by not performing any withdrawal of regulations until replacement guidance has been promulgated. We would be glad to consult further as to how best this might be accomplished, but as a threshold matter, *the agency must ensure that it causes no disruptions through any action it might take.*

II. PROPOSED NEPA MANUAL

The NIGC has published a proposed NEPA policies and procedures manual, which clarifies, among other things, the appropriate level of environmental review for management contract related activities. The proposed manual is a revised version of an earlier draft that was published for public comment in December 2009 (“2009 Draft”).

In comparison to the 2009 Draft, we find that the current version is simpler, easier to follow, and more consistent with the limited responsibilities arising under NEPA. We appreciate and support the NIGC’s efforts to scale back its NEPA-related responsibilities, particularly in relation to approvals of management contracts. We believe these changes will provide greater clarity and certainty in the implementation of the NIGC’s NEPA responsibilities.

We are also encouraged by the apparent shift in policy regarding the extent of NEPA compliance for management contract related activities. The proposed manual now includes a broad categorical exclusion for *all* management contract approvals, regardless of the nature and scope of the underlying activity. This is a marked improvement from the 2009 Draft, which limited the scope of the categorical exclusion to include only those management contracts that did not involve physical construction or plans to increase patronage.

We believe, however, that the better approach would be to completely exempt management contract approvals from NEPA compliance. Under IGRA, the NIGC’s approval authority over management contracts is rather limited in scope and does not involve any direct control or supervision over the development of a gaming facility. Moreover, nothing in IGRA contemplates any meaningful influence by the NIGC over the environmental considerations of a gaming project.

Given the NIGC’s limited role in management contract related activities, we have serious doubts as to whether such activities rise to the level of a major federal action requiring NEPA compliance. Nevertheless, we view the NIGC’s approach in the proposed manual as an acceptable compromise and a positive development that will provide greater clarity to the overall NEPA process.

In addition to the foregoing, we also have more specific and technical concerns with the proposed NEPA manual. First, we believe the definition of “Controversial” could be improved by further narrowing the circumstances which would fall within this definition. As drafted, the definition requires that a “substantial dispute exist[] as to the environmental consequences.” While we agree that a substantial dispute must be present, it should be clarified that the dispute

must arise between members of the *scientific community* who have the expertise to fully understand the environmental effects of a proposed action. This definition should not be triggered for disputes in the general public that are otherwise without merit in the scientific community.

Our interpretation of “controversial” is in fact supported by federal case law. Federal courts often rely on scientific experts in related fields to determine whether a “substantial dispute” exists for NEPA purposes. In *Sierra Club v. United States Forest Service*, the Ninth Circuit Court of Appeals considered the meaning of “controversy” in the NEPA context, and explained that a “substantial dispute” requires evidence from numerous experts in fields relevant to the dispute at hand.¹ In *Foundation for North American Wild Sheep v. U.S. Department of Agriculture*, the same court considered critical responses from biologists and conservationists on the impact of a proposed action’s effect on bighorn sheep populations to be “controversial.”²

Finally, we wish to comment on a possible misstatement regarding NEPA’s applicability to NIGC actions. Section 1.5 of the proposed manual states that NEPA will apply to actions “where the NIGC has sufficient control and responsibility to condition approvals of a non-federal *entity*.” However, under IGRA, the NIGC does not necessarily have the authority to approve the entities involved in a management contract. The statement should therefore be amended to clarify the proper scope and extent of the NIGC’s approval authority.

III. BUY INDIAN ACT

The Nation supports the NIGC’s proposal to implement a Buy Indian preference pursuant to its general contracting authority under 25 U.S.C. § 2706(b)(6), (b)(7). Although the practice of “buy Indian” may be generally encouraged, it is currently not a mandatory practice. Once finalized, this proposed Buy Indian policy will mandate agency-wide, uniform procedures for encouraging procurement relationships with eligible tribal businesses. In doing so, this policy will have a positive impact on the federal-tribal contracting industry and on tribal economic development more broadly.

IV. PART 515 (PRIVACY ACT) DISCUSSION DRAFT

The Privacy Act of 1974 regulates how federal agencies must maintain, use, and disseminate covered records. As relevant here, the Act prohibits an agency from disclosing an individual’s records absent express written consent, unless the disclosure falls within one of the Act’s twelve exemptions, including if the records consist of investigatory material compiled for law enforcement purposes or for the purpose of determining suitability for Federal civil employment of Federal contracts.

As part of the NIGC’s amendments, the NIGC is proposing to update its Privacy Act procedures in 25 C.F.R. Part 515 and add a new exemption for the Management Contract Individuals Records System. We understand that this proposed exemption is not necessarily “new” but simply a codification of an existing policy published in the Notice of a New System of Records,

¹ 843 F.2d 1190, 1192 (9th Cir. 1988).

² 681 F.2d 1172, 1182 (9th Cir. 1982).

which was published in the *Federal Register* in 2004.³ However, in reviewing the exemption and considering the stated justifications, new questions come to mind as to the purpose and benefits of exempting these important personal information records.

We believe further consultation on this matter is warranted here to help us better understand the exemptions and determine whether they are consistent with the letter and spirit of the Privacy Act. We, therefore, reserve the opportunity to provide further comments until we have received more information on the need and effects of these proposed amendments.

In closing, the Nation would like to reiterate its appreciation for the opportunity to review and provide comments on the proposals outlined in the February 26, 2015 Notice of Consultation. The Nation is encouraged by the NIGC's early outreach efforts and looks forward to working closely with the NIGC on a government-to-government basis in this important endeavor.

³ 69 Fed. Reg. 12,182 (March 15, 2004).