Quapaw Tribal Gaming Agency
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April 30, 2015

Jonodev O. Chaudhuri, Acting Chairman
Daniel J. Little, Associate Commissioner
1849 C Street NW
Mail Stop #1621
Washington, DC 20240

Re: February 26, 2015 Notice of Consultation

Dear Commissioners:

On behalf of the Quapaw Tribal Gaming Agency ("QTGA"), I am pleased to submit the following comments in response to the National Indian Gaming Commissioner's ("NIGC") Notice of Consultation ("Notice"), which was issued to tribal leaders on February 26, 2015. Our comments below address the following topics identified in the Notice: (1) proposed NEPA manual; (2) proposed Buy Indian Goods and Services regulation; (3) proposed Privacy Act Discussion Act; and (4) proposed guidance for Class III minimum internal control standards ("MICS"). We appreciate the opportunity to share our views on these important matters and hope our comments are received in the positive spirit in which they are intended.

1. Proposed NEPA Manual

A. General Comments

The proposed NEPA manual is, in many important respects, a significant improvement from the previous version published in the *Federal Register* on December 4, 2009. To begin, the policies and procedures in the proposed manual have been simplified and scaled back considerably to reflect the minimal responsibilities arising under NEPA in relation to NIGC actions. The 2009 version contained a number of provisions that were both unnecessary and unwarranted given the limited application of NEPA to NIGC actions and the Indian Gaming Regulatory Act ("IGRA"). We are encouraged by and welcome the NIGC's new approach with respect to its NEPA-related roles and responsibilities.

We are also encouraged by the NIGC's shift in policy regarding the applicability of NEPA to management contract related activities. In the 2009 draft manual, such activities were identified as major federal actions requiring NEPA review and eligible for the categorical exclusion, but only if the underlying contract did not involve physical construction or any plans to increase patronage. In the current proposed manual, these limitations have been removed so that all

management contract review and approval activities – whether they involve new construction or expansion plans – will qualify for the categorical exclusion.

Although we believe management contract approval actions should be completely exempt from NEPA, we find the NIGC's approach to open up the categorical exclusion to *all* management contract related activities an acceptable compromise. We believe this change will have a positive impact by reducing compliance costs and burdens for both federal and tribal governments. Nonetheless, our position remains that management contract approvals are *not* major federal actions necessitating NEPA review because the NIGC's management contract approval authority is limited and does not instill the NIGC with authority to actually control or influence the development of a gaming facility. Nor has the NIGC ever taken the position that its consent is necessary for the construction a new gaming facility or the expansion of an existing facility.

Even when a management contract incidentally involves construction activity, the NIGC does not control the environmental aspects of the project or exert significant influence on any environmental considerations of the project. Because the NIGC does not exercise discretion to consider environmental impacts in deciding whether to approve a management contract, we do not believe the NIGC's management contract approval activities should be subject to NEPA compliance.

B. Specific Comments

In addition to the foregoing observations, we would like to suggest several technical comments on improving the content of the proposed manual. First, we view the definition of "Controversial" in Section 1.2.7 as an improvement from the previous definition in the 2009 manual and a step in the right direction. However, we believe further revisions are necessary to clarify that the "substantial dispute" must exist within the *scientific community* rather than within the general population at large.

As the NIGC is aware, NEPA compliance is a highly technical and specialized process requiring skilled and specially trained experts. If there is a dispute as to the environmental impacts of a proposed project, the NIGC must take into consideration whether the dispute arises from members of the general public or members of the scientific community possessing the requisite knowledge and background to fully establish the potential impacts on the human environment. The views of the general public should not be given the same level of regard as those developed by specialized experts knowledgeable in the relevant field.

There is, in fact, case law supporting our interpretation of a "substantial dispute." When considering the issue of "controversy" in the NEPA context, federal courts tend look to experts in fields related to environmental impacts, including conservationists and biologists.[1] In *Sierra Club v. United States Forest Service*, the Ninth Circuit Court of Appeals explained that a "substantial dispute" requires evidence from numerous experts in fields relevant to the dispute at

[1] *See Sierra Club v. U.S. Forest Service*, 843 F.2d 1190, 1193 (1988); *Foundation for North American Wild Sheep v. U.S. Dept. of Agr.*, 681 F.2d 1172, 1182 (1982).

hand to be considered "controversial."[2] The concern here, is that federal agencies otherwise risk opening up their NEPA process to unnecessary delay and expense caused by the non-expert "heckler's veto."[3]

Our second technical comment also relates to the definition of "Controversial." We agree that the term should not include "the mere existence of opposition to a proposed action." However, the definition should also clarify that controversy in this context does not mean *preference among the alternatives*. The focus should be on whether there is significant disagreement among scientists and experts about the environmental impacts of a proposed action, not on the preferred choice of alternatives.

Our third and final comment relates to the "Applicability" paragraph in Section 1.5 of the proposed manual. As currently written, this Section is confusing and appears to suggest that the NIGC has the authority to condition approvals of non-federal *entities*. In defining major federal actions by the NIGC, the Section states that "[t]hese actions may be directly undertaken by the NIGC or where the NIGC has sufficient control and responsibility to condition approvals of a non-federal *entity*." We are unaware of any NIGC responsibilities under IGRA that involve the approval of entities. If the intent was to describe the NIGC's approval authority with respect to non-federal *projects*, then the language should be changed accordingly for purposes of clarity.

2. Proposed Buy Indian Goods Rules

We wish to express our support for the NIGC's proposed Buy Indian Goods and Services ("BIGS") policy, which is consistent with and in furtherance of the NIGC's authority under IGRA to "procure supplies, services, and property by contract in accordance with applicable Federal laws and regulations" and "enter into contracts with Federal, State, tribal and private entities."[4] The NIGC's BIGS policy establishes uniform procedures for the procurement of supplies and services from eligible tribal business entities. Once adopted, these policies will have a positive impact on the federal-tribal contracting environment and on tribal economic development more broadly. We therefore support the BIGS policy and its overall objective of encouraging procurement relationships with tribal businesses.

3. Proposed Privacy Act Discussion Draft

We understand that the NIGC is seeking to update and streamline its Privacy Act regulations, which were first issued in 1993, and also add a new Privacy Act exemption for the system of records maintained for management contractors. While we appreciate the chance to review and comment on an early Discussion Draft of the proposed regulations, we wish to reserve the opportunity to comment further on the Draft until we have received more information regarding the purpose and intent for developing these new procedures.

As a tribal gaming regulatory agency, we understand and appreciate the importance of privacy protection and accountability, especially with respect to records regarding an individual's

[2] 843 F.2d 1190, 1192 (9th Cir, 1988).
[3] *State of N.C. v. F.A.A.*, 957 F.2d 1125, 1133-1134 (4th Cir. 1992).
[4] 25 U.S.C. § 2706(b)(6)-(7).

personal background history and information. We also understand that there may be circumstances under which such records must be protected from disclosure and withheld from public release. Whether these circumstances are present in the context of the NIGC's regulatory responsibilities are not clear to us at this time, and we look forward to receiving additional information and guidance on the the need and effects of these proposed changes.

4. Proposed Guidance for Class III MICS

To begin, we commend the NIGC's outreach efforts during the early planning stages to withdraw 25 C.F.R. Part 542 and issue the Class III MICS as non-mandatory guidance. Early tribal involvement is not only consistent with the consultation responsibilities under Executive Order 13175, but also a key step towards developing federal policies that will be at least minimally acceptable to tribal governments. It also ensures sufficient time for tribal governments to explore the underlying concepts behind the proposed changes and consider alternatives, including the alternative of no further action. We appreciate and welcome the opportunity to engage in this type of dialogue with the NIGC.

While we generally approve of the concept of issuing internal controls standards as non-mandatory guidance, we note that there are tribal-state compacts and, in some instances, tribal gaming ordinances, that rely on 25 C.F.R. Part 542 for the establishment of Class III gaming standards. For instance, the Model Tribal-State Compact with the State of Oklahoma provides that tribal gaming operations must comply with tribal internal control standards that equal or exceed the NIGC Class III MICS in 25 C.F.R. Part 542.

By withdrawing the Class III MICS regulation, there is the potential of disturbing the regulatory balance struck in these compacts. In lieu of this, we would not necessarily object to leaving the regulation in place for those tribes whose compacts incorporate the federal standards in 25 C.F.R. Part 542. We look forward to continued dialogue on this important question in the period leading up to the publication of any notice of proposed rulemaking pertaining to Part 542.

CONCLUSION

Thank you for this opportunity to share our views and concerns regarding the topics outlined in the Notice. We respectfully seek your favorable consideration of the above comments and look forward to the continued cooperation and coordination of the government-to-government relationship and in accordance with federal law and policy.