The SHOSHONE-BANNOCK TRIBES

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June 17, 2015

Jonodev O. Chaudhuri, Chairman
National Indian Gaming Commission
1849 C Street, N.W.
Washington, DC 20240

Re: Comments on proposed rules under NEPA, Buy Indian Act and Privacy Act

Dear Mr. Chairman and Gaming Commissioners:

The Shoshone-Bannock Tribes Gaming Commission (SBGC) of the Fort Hall Reservation in Idaho, is pleased to provide the following comments on the National Indian Gaming Commission's (NIGC) proposed rules on implementing policies and procedures of the National Environmental Policy Act, the Buy Indian Act and Privacy Act.

I. Proposed National Environmental Policy Act Compliance Rules

The NIGC has proposed certain rules to comply with the requirements of the National Environmental Policy Act, 42 U.S.C. § 4321 et seq. ("NEPA"), and the Council on Environmental Quality regulations. "NEPA has twin aims. First, it 'places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action.' Second, it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process. NEPA is triggered and requires the inclusion of a detailed statement "in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C) (2005). The federal act does not define the terms of "proposal" or "major Federal action significantly affecting the quality of the human environment," or what the "detailed statement" is to consist of. Accordingly, the Council on Environmental Quality ("CEQ") regulations and specific federal

agency regulations, have attempted to fill in the gaps, and to define these terms as they apply to the particular agency and federal laws applicable to the agency.

The "human environment" impacts which trigger the NEPA process, is a broad term that is "interpreted comprehensively to include the natural and physical environment and the relationship of people with the environment." 40 C.F.R. § 1508.14. Economic and social affects will not, themselves trigger NEPA. 40 C.F.R. § 1508.14. Despite the term "human environment" being interpreted broadly, it still does not encompass the primary role and duties of the NIGC, its actions, and its day-to-day operations in the area of Indian gaming. The NIGC, as a federal agency, may at some point be a participant in a NEPA process, relating to a construction of gaming facility, but ordinarily it will not be the lead federal agency or primary federal decision-maker for approval of an environmental assessment or environmental impact statement. Given the unique obligations and responsibilities of the NIGC as provided under the Indian Gaming Regulatory Act, and its role in area of Indian gaming, we support the NIGC's efforts in issuing these NEPA rules that seek to clarify and fill in the gaps in the NEPA process as applied to the NIGC, and exclude certain NIGC actions from NEPA coverage.

No Federal Action. The most common major Federal actions subject to NEPA are construction projects, initiated or implemented by Federal agencies, such public housing, civil works, public roads, and like; projects that require Federal permits, such as use of public lands or for impacts to resources such as waters of the United States under 404 of the Clean Water Act; rights of way and easements across Indian lands and public lands; implementation of management plans such as Forest Management plans; and approvals of Federal funding or assistance for projects. Additionally, impacts to endangered species and National Register eligible historic or cultural resource sites, are common NEPA triggers. Certainly, these types of federal actions relating to the environment are not common or "federal actions" undertaken by the NIGC in its general oversight of Indian gaming.

The need for NEPA study hinges on the presence of major federal action, a term which NEPA does not define. The Council on Environmental Quality (CEQ), however, has issued regulations defining the term, and, as the Supreme Court has stated, "CEQ's interpretation of NEPA is entitled to substantial deference." *Andrus v. Sierra Club*, 442 U.S. 347 (1979). These regulations establish that major federal action encompasses not only actions by the federal

government but also actions by nonfederal actors "with effects that may be major and which are potentially subject to Federal control and responsibility." 40 C.F.R. Sec. 1508.18 (emphasis added). "Nonfederal" major federal action refers, inter alia, to activities "regulated or approved by federal agencies," id. at Sec. 1508.18(a), including "[a]pproval of specific projects such as construction ... activities located in a defined geographic area," Id. at Sec. 1508.18(b)(4). Such approval may occur through "permit or other regulatory decision as well as federal and federally assisted activites." Id. A leading commentator has observed: "[T]he distinguishing feature of 'federal' involvement is the ability to influence or control the outcome in material respects. The EIS process is supposed to inform the decision-maker. This presupposes he has judgment to exercise. Cases finding 'federal' action emphasize authority to exercise discretion over the outcome." W. Rodgers, Environmental Law 763 (1977).

The touchstone of major federal action is an agency's authority to influence significant nonfederal activity. This influence must be more than the power to give nonbinding advice to the nonfederal actor. See, e.g., *Almond Hill School v. United States Department of Agriculture*, 768 F.2d 1030, 1039 (9th Cir.1985) (no federal action where federal officials constituted minority of state advisory board which had power to recommend but not to act); *Atlanta Coalition on the Transportation Crisis, Inc. v. Atlanta Regional Commission,* 599 F.2d 1333, 1344-47 (5th Cir.1979) (federal funding assistance for local planning process does not constitute major federal action, where all "decisions are entrusted to the state and local agencies"). Rather, the federal agency must possess actual power to control the nonfederal activity. The Tenth Circuit, has found major federal action in nonfederal activities, such as the filing of documents with a federal agency, when the filing is a necessary but insufficient step to gain eligibility to apply for federal funds for a nonfederal project, *Scenic Rivers Association v. Lynn,* 520 F.2d 240, 243-44 (10th Cir.1975*), rev'd on other grounds*, 426 U.S. 776 (1976), and the BIA's approval of an Indian tribe's lease of its lands to nonfederal lessees, *Davis v. Morton*, 469 F.2d 593, 596-98 (10th Cir.1972).

The NIGC has proposed in Section 3 that certain NIGC activities are not subject to NEPA. These NIGC activities include Advisory Actions, Enforcement Actions, and Emergency Actions. We are persuaded that these activities, standing alone, do not constitute major federal action as interpreted by the court decisions. These non-federal action activities are consistent with NIGC's duty to insure that the tribal gaming activities are in compliance with the tribal laws, Indian Gaming Regulatory Act, and Tribal-State Gaming Compacts. Moreover, the role of the NIGC is

set forth under the federal Indian Gaming Regulatory Act, and there are no listed activities which effect nonfederal activity relating to the human environment.

Categorical Exclusions. An agency's proposal may be exempt or categorically excluded from compliance with NEPA. 40 C.F.R. § 1501.4. "Categorical exclusion" means a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a federal agency, and therefore do not require preparation of an Environmental Assessment ("EA") or Environmental Impact Statement. 40 C.F.R. § 1508.4. However, an agency may decide to prepare an EA in its discretion, and must provide for extraordinary circumstances in which a normally excluded action may have a significant environment effect. 40 C.F.R. § 1508.4.

The NIGC has proposed a number of Categorical Exclusions in Section 4. These include Administrative and routine office activities (Category 1), Regulation, Monitoring and Oversight of Indian Gaming activities (Category 2), and Management Contract and Agreement Review Activities (Category 3). Additionally, the NIGC has provided in Section 4.3 the required extraordinary circumstances provision to consider agency actions that may effect the human environment. The SBGC believes the proposed exclusions are appropriate, and are consistent with other agencies regulations lists of typically routine actions that are categorically excluded from NEPA. For example, the Department of Interior has categorically excluded from NEPA, in the absence of extraordinary circumstances, similar actions like nondestructive data collection and inventory, educational activities, some hazardous fuels reduction activities, and some post-fire rehabilitation activities. See Appendix 1 of 516 DOI Manual 2. The Department of Agriculture has excluded similar categories of routine actions. 7 C.F.R. § 1b.3. In addition to excluding routine administrative matters, the U.S. Army Corps of Engineers' list of exclusions under its permitting program is quite specific and includes fixed or floating small private piers and docks, minor utility lines and boat launching ramps. 33 C.F.R. § 325 App. B(6). The SBGC supports the NIGC's proposed categorical exclusions in Section 4.

Public Participation and Scoping. The NEPA process, preparation of an Environmental Assessment or Environmental Impact Statement, should be started as early as possible so that the document can serve practically as an important contribution to the decision-making process and

will not be used to rationalize or justify decisions already made. 40 C.F.R. § 1502.5. Thus, NEPA documents should be initiated as soon as the application is received.

One of the aims of NEPA is to provide for meaningful input from the public in order to inform agency decision-making. *See Committee to Preserve Boomer Lake Park v. Dept. of Transportation,* 4 F.3d 1543, 1554 (10th Cir. 1993). Thus public involvement is an important aspect of EA preparation even if the regulations do not provide as formal or prescribed steps as for an EIS. Further, the CEQ regulations enumerate the public responsibilities of agencies: (a) make diligent efforts to involve the public in preparing and implementing NEPA procedures, (b) provide public notice of NEPA-related hearings, public meetings, and availability of EAs and EISs in order to inform interested or affected agencies or persons, (c) hold public hearings when appropriate, (d) solicit appropriate information from the public, (e) explain where interested persons can get information, and (f) make EISs available to the public. 40 C.F.R. § 1505.6.

Proposed Section 5.1 Public Participation has provided an abbreviated version of the CEQ regulations. It does not detail out the necessary components as provided in the CEQ regulations, and the SBGC recommends it do so. We also recommend that the regulation add the "NIGC will invite the participation of any affected tribe in the scoping, EA and EIS process." Additionally, do the phrases "NEPA related hearings" and "NEPA related information" include all EA and EIS documents and information? Section 5.1 also fails to provide that agencies must make EAs available to the public and should provide notice to interested and affected parties. See CEQ, Forty Questions, Q. 38. In direct contrast to Section 5.1, Section 5.2 on Scoping references and will follow the regulations in 40 C.F.R. § 1501.7. The NIGC should adopt the CEQ regulations on public involvement.

Scoping is an "early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action." 40 C.F.R. § 1501.7. We support the NIGC's use of the CEQ regulations for the scoping process, and urge that it be applied in the EA and EIS process.

II. Proposed Buy Indian Act Regulations

The NIGC has proposed a rule for the procurement and services from Indian Economic Enterprises as provided under the Buy Indian Act. We commend the NIGC on adopting these policies and procedures and supporting tribal self-sufficiency. As we know, the Buy Indian Act preference was "designed to promote Indian economic development and self-sufficiency."

Glover Construction Company v. Andrus, 591 F.2d 554, 566 (10th Cir. 1979), *aff'd,* 446 U.S. 608 (1980). "The purpose of these preferences [25 U.S.C. §§ 44, 45, 46, 47, and 274], as variously expressed in the legislative history, has been to give Indians a greater participation in their own self-government ...." *Morton v. Mancari,* 417 U.S. 535, 591 (1974).

The Buy Indian Act uses terms such as "self-sufficiency", "participation", and "manage". This language strongly indicates Congress intended for Indians and Indian tribes to more involved with economic development through enterprises and to receive the preferences for procurement and supplies from federal agencies such as the NIGC. The language used also implies active involvement by Indians and Indian tribes in enterprises which may receive the preference and not an Indian "straw man" in nominal control, placed there for the purpose of obtaining for the enterprise or business contracts which it could not otherwise obtain, in direct opposition to the legislative policy.

Preference to Indian economic enterprises. The NIGC proposes that the definition for "Indian Economic Enterprise" be "combined Indian or Indian tribe ownership must constitute less than 51 percent of the enterprise". The SBGC supports this requirement provided there are sufficient regulatory safeguards to protect the integrity of the majority Indian owner(s) of the Indian economic enterprise, while promoting economic development. For example, this minimum is flexible enough to provide an incentive for outside investors to partner with Indian economic enterprises and contribute needed capital and seed money to Indian communities.

In addition, the rule defines Indian economic enterprise to include additional qualifications beyond just 51 percent Indian ownership to help prevent companies "fronting" as Indian economic enterprises. To be an Indian economic enterprise, Indian(s) or tribe(s) must manage the contract, receive the majority of earnings from the contract, and control management and daily business operations. To ensure actual control, the Indians must possess requisite management or technical capabilities directly related to the primary industry in which the enterprise conducts business.

Representation. The SBGC is deeply concerned about having contractors self-certify that they qualify as "Indian economic enterprises" and that NIGC will accept the representation without looking into financial statements of the enterprise. Moreover, the proposed rule fails to detail what is required of the contractors seeking the status of Indian economic enterprises.

There needs to be more detail in this section. We recommend that contractors claiming to be Indian economic enterprises provide an Indian preference form, up-front, as proof. For example, the offeror should be required to state, "The offeror represents as part of its offer that it [ ] does [ ] does not meet the definition of Indian economic enterprise as defined in rule _____." Also, the rule should state and require that all solicitations state, "Under the Buy Indian Act, offers are solicited only from Indian economic enterprises. NIGC will reject all offers received from ineligible enterprises." Such required statements may help deter ineligible contractors from applying and lessen the number of challenges.

As part of the representation process, we recommend the NIGC accept a Tribal Employment Rights Office certification for Indian contractors. Tribal Employment Rights laws and regulations ensure that all entities awarding contracts give preference to Certified Indian Preference Contractors for contract and subcontract work on the Reservation.

We note there are penalties for misrepresentation that should deter contractors from falsely claiming to be an Indian economic enterprise. Misrepresentation of eligibility as an Indian economic enterprise is a violation of Federal criminal statutes. (See 48 CFR 1480.802(c)).

The SBGC recommends that the NIGC establish a repository of Indian economic enterprises, either by setting up a Web site similar to the Small Business Administration (SBA) or working with the SBA to expand its Web site to identify Indian economic enterprises. Tribes also maintain their own lists of native-owned businesses which could be utilized at a website.

Challenges. This rule establishes a challenge process that is consistent with the FAR but specific to challenges to Indian economic enterprise representations. The self-certification approach or representation as provided in Section 48 CFR __.114, seems to follows the FAR approach for challenges to small-business set-asides. NIGC will look into financial statements only if someone challenges the representation as an Indian economic enterprise. We think this may be too restrictive and the NIGC should closely monitor the representation beyond the challenge process.

Section 48 CFR __.117 provides a challenge may be in writing and lists several forms of filing. Is it acceptable to challenge an Indian economic enterprise representation by email? Or

via a scanned letter sent via email? The section also covers untimely filed challenges. We support the NIGC's rule that it will challenge in a future review of an offeror. We also recommend that the challenged offeror should be closely monitored for continued eligibility.

Awards. The rule also provides for awards to Indian economic enterprises. Under the rule can the NIGC negotiate with an Indian economic enterprise on price if only one enterprise responds to a Buy Indian solicitation? We read the provisions on when deviations are permitted which state that receiving only one unreasonable offer is a basis for a deviation. We did not find in the rule what happens if one reasonable offer is received. Also, how does a tribe know who NIGC is awarding contracts to under this rule?

III. NIGC's Proposed Implementation of Privacy Act

This part implements the Privacy Act of 1974 (5 U.S.C. 552a) by establishing NIGC policies and procedures that permit individuals to obtain access to and request amendment or correction of information about themselves that is maintained in Agency systems of records. This part also establishes policies and procedures for administrative appeals of requests for access to, or correction or amendment of, records. The SBGC supports this rule.

The rule uses the phrase "Privacy Act Officer" as used in the Privacy Act. We recommend that it be rephrased to state "NIGC Privacy Act Officer" that refers to the agency person specifically responsible for record disclosures and appeals as opposed to the more generic term.

Section 515.10 proposes a fee for copying of records. We recommend that it be revised to state, "No fees will be charged for providing the first copy of a record or any portion of a record to an individual to whom the record pertains." A fee schedule for reproducing other records could be adopted or the NIGC could rely upon the schedule set forth in 40 CFR 21.07.

Section 515.11 provides for the assessment of penalties for persons who make false statements. What are the penalties in 18 U.S.C. 494 and 495? We recommend the penalties be set out in clear lay terms.

In conclusion, the Shoshone-Bannock Tribes Gaming Commission generally supports the three proposed rules. Our recommendations are set forth herein and ask that the NIGC consider the suggestions. Thank you.

Respectfully submitted,

Clinton Plentywounds, Chairman

Shoshone-Bannock Gaming Commission

Cc: file

Mark Phillips, NIGC Portland Area