November 24, 2014

National Indian Gaming Commission
Attn: Mr. Jonodev Osceola Chaudhuri, Acting Chairman
1849 C Street NW,
Mail stop #1621
Washington, DC 20240

Dear Acting Chairman Chaudhuri:

I am writing on behalf of the people of the Jamul Indian Village of California, a federally recognized Indian Tribe that is one of 13 bands of the Kumeyaay Nation of Southern California ("Jamul Tribe"), to urge the Commission to adopt a categorical exclusion from the National Environmental Policy Act ("NEPA") for the NIGC's casino management agreement approval process.

As you may know, for the past twenty years, the Jamul Tribe has been steadfastly working toward building a casino as a means of economic development and self-sufficiency. It has not been easy. At long last, after numerous project revisions/reductions and extensive environmental impact analysis, working with our partner Penn National Gaming, Inc. ("Penn National"), we broke ground on the land and commenced construction of the casino in February 2014 (scheduled to open in late 2015). Getting to this point, however, required a lot of determination, hard work and perseverance.

It has meant defending more than two dozen lawsuits filed by a few litigious local opponents. They were so litigious in fact that the United States Court of Federal Claims described their efforts as a "fifteen-year campaign of legal challenges, perpetuated in the face of repeated dismissals and adverse judgments on the merits, a campaign that has already wasted enormous administrative and judicial resources . . .." *Rosales v. United States of America*, 89 Fed. Cl. 565 (2009). Undeterred, this small group of opponents recently filed new lawsuits as soon as ground was broken on the casino development and we have no doubt they will use every avenue they can to impede progress and harass our members again and again, including raising NEPA claims related to the Commission's review and approval of the Jamul Tribe's casino management agreement with Penn National.

It has meant listening actively to the community and responding to community concerns by repeatedly reducing the size and scope of the Tribe's casino. The casino development has changed (at considerable cost in terms of time and money) from a 12-story high rise that took realistic advantage of our Tribe's small land size to what we are building now – a facility that only rises three stories above the ground and blends in naturally with the land and will be a welcome complement to our geography.

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Naturally, in getting to this stage, we have vigorously reviewed and complied with the laws and regulations governing the casino development. In 2013, we certified completion of the comprehensive and rigorous environmental review required by our 1999 Gaming Compact with the State of California. We contracted with a professional environmental consultant experienced in the field, provided extensive public notice, and provided an opportunity for all interested parties to review and comment on our environmental impact analysis and mitigation plans.

We held public hearings and solicited further comments from all interested parties, including those in San Diego County and our local community. The resulting Final Tribal Environmental Evaluation is two volumes large. (See http://www.jamulindianvillage.com.php53-9.dfw1-1.websitetestlink.com/relevant-documents/.) As you can see, we listened to and worked with our community and made significant changes to improve the design and reduce the scope of the facility in response to the concerns that were raised, including but not limited to:

- Structural Height: 58% shorter
- Apparent Height from SR 94: 76% shorter
- Square Footage: 61% smaller floor area
- Parking: 20% fewer parking spaces
- Dark sky ordinance-compliant project lighting and signage
- 58% less potable water
- 49% less wastewater generated
- No wastewater removal trucks required
- No untreated storm water leaving the site
- No significant impact of light spillage, view shed, or riparian oak/willow stream

Further, as a result of those efforts, the casino development will now include water and wastewater reclamation facilities and address fire protection measures on-site. Visually, the casino facility will feature an earth tone color palette and downcast lighting to integrate with and complement the surrounding area. The Jamul Tribe is also working diligently with the California Department of Transportation (Caltrans) and San Diego County traffic engineers to improve casino access and nearby roadways in an effort to mitigate traffic impacts associated in part to the Tribe's new casino and improve the safety of SR 94 and ancillary roads for the community and future customers. Indeed, this effort is currently undergoing even further environmental review by Caltrans under the California Environmental Quality Act.

On the heels of all of that work and as casino construction progresses, the Jamul Tribe is now turning its planning efforts to the management and

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operation of its casino. However, contrary to the time of first European contact in 1524 when the native population of the San Diego area was estimated at 20,000, today, the Jamul Tribe has just 53 members. That means we cannot possibly self-staff and manage the casino ourselves as it is expected to provide more than 1000 jobs. As noted above, we are working on the development and future operation/management of our casino with the developer/management company, Penn National, and pursuant to the Indian Gaming Regulatory Act ("IGRA"), our casino management contract with Penn National was submitted in 2013 for review and approval by your Commission.

For the reasons discussed below and to ensure that NIGC's straightforward casino management contract approval process is not delayed and burdened by unnecessary and impractical NEPA compliance for tribes in the future, the Jamul Tribe urges you to adopt a categorical exclusion for approval of management agreements by the NIGC under NEPA.

Earlier this year, the Commission conducted four consultation sessions with tribal leaders and sought the advice of tribes on what level of environmental review under NEPA, if any, should be required before the Chairman can approve a management contract. I write today to ask that the NIGC follow the path that I believe it knows is right. That is, simply, that it makes no business, policy or practical sense for the NIGC to apply NEPA to its management contract approval process. There are three significant reasons why NEPA does not apply in this context and thus why it is important for the NIGC to formally acknowledge this by adopting a new categorical exclusion specifically pertaining to management contract approvals.

First and foremost, the NIGC has no authority to make a decision to approve or disapprove a management contract based on environmental factors or related grounds for which NEPA review would be applicable and appropriate. IGRA neither expressly mentions (or even impliedly suggests) NEPA compliance nor gives the NIGC authority to deny, condition or otherwise shape a management contract based on the environmental impacts of the location, construction or operation of the casino. (*See* 25 U.S.C. § 2711.) Indeed, NIGC's scope of review of such management contracts is narrow, focusing on the backgrounds of individuals with a financial interest or management responsibility in and business plan for the casino, and the limited grounds upon which a management contract can be disapproved are similarly silent with respect to environmental issues and narrowly focused to avoid self-dealing and criminal activity in casino operations. (*Id.* at § 2711(e).) Simply put, NIGC decisions on casino management contracts do not regulate or have any impact on the location, size or construction of the casino. Indian tribes have the authority to build and operate gaming operations on their lands even without an approved management contract and no federal funding is granted by the NIGC or any other federal agency as part

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of or subsequent to the management contract approval process. For these reasons, it is clear that NEPA, which only applies to major federal actions that have the potential to significantly affect the quality of the human environment, is inapplicable to the NIGC's casino management contract approval process under the IGRA.[1] Adding this additional layer of bureaucracy increases costs for tribes and delays their important casino projects, simultaneously providing those who would seek to stop Indian self-reliance (including those called out above by the federal court) with yet more opportunities to file frivolous lawsuits and impede progress. As noted above, the Jamul Tribe has not neglected the environment – we have already painstakingly considered it and made many accommodations to protect it.

Second, particularly in light of the NIGC's limited scope of review and in recognition that a management contract is merely an agreement between two parties concerning the management of a casino, common sense dictates that there is no environmental change to analyze in association with a management contract approval. Since a tribe may construct a casino with or without a management contract, the contract itself is merely a piece of paper, and the way in which a casino may be managed itself generates no impacts to the environment, NEPA has no logical seat at the table.

Third, assuming *arguendo* that NEPA might apply in this context (as discussed above, it does not), the NIGC's management contract approval process is naturally excused from NEPA compliance because a statutory conflict between IGRA and NEPA makes full environmental review impossible within the short time the NIGC has to decide whether to approve a management contract. Pursuant to IGRA, NIGC must approve or disapprove a management contract within a maximum of 270 days (180 days plus one possible 90 day extension) before a tribe can sue to compel the NIGC to act. (25 U.S.C. § 2711(d).) Completing an Environmental Impact Statement ("EIS") under NEPA, on the other hand, typically takes much longer than one year because it entails the preparation of multiple drafts of the EIS, agency and public review and comment on the draft EIS, and public hearings before

[1] Courts have routinely observed that "[t]he touchstone of major federal action [subject to NEPA] is an agency's authority to influence significant nonfederal activity," and stated that "the federal agency must possess actual power to control the nonfederal activity." (*Sierra Club v. Hodel* (10th Cir. 1988) 848 F.2d 1068, 1089 [reversed on other grounds]; accord *United States v. Southern Florida Water Management District* (11th Cir. 1994) 28 F.3d 1563, 1572 (noting that NEPA focus "is on the federal agencies' control and responsibility over material aspects of a specific project."); *Citizens Against Rails-to-Trails v. Surface Transportation Board* (D.C. Cir. 2001) 267 F.3d 1144, 1151 (court rules that absence of significant discretion removed action from reach of NEPA, reasoning that because the agency had not been granted any discretion to base its approval on environmental consequences, "it would make little sense to force the [agency] to consider factors which cannot affect its decision . . .."); *Sugarloaf Citizens Assn. v. FERC* (4th Cir. 1992) 959 F.2d 508, 513 (court observed that "when an agency has no discretion to consider environmental values implementing a statutory requirement, its actions are ministerial and not subject to NEPA".)

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the EIS can be finalized and a final record of decision can be made.[2] Simply put, the short time period within which NIGC must take action on a proposed management contract does not allow sufficient time for environmental review under NEPA. Determining that NEPA compliance is impossible due to a statutory timing conflict is consistent with U.S. and California Supreme Court precedent.

For example, in *Flint Ridge Development Co. v. Scenic Rivers Assn. of Oklahoma* (1976) 426 U.S. 776, the U.S. Supreme Court ruled that the short time-frame within which the Department of Housing and Urban Development is obligated to review certain reports submitted to it by property owners wishing to market subdivided lands through interstate commerce made NEPA review impossible. There, the court stated that the proper inquiry was to assume that a full EIS would be required and noted that when "a clear and unavoidable conflict in statutory authority exists, NEPA must give way" since "NEPA was not intended to repeal by implication any other statute. (*Id.* at p. 788.) Similarly, the California Supreme Court recently used the same rationale to hold that the California Environmental Quality Act (NEPA-like state law) does not apply to a city's adoption of a qualified voter initiative approving a commercial supercenter project, in part, because the applicable California Elections Code section does not mention CEQA and because it would be impossible to complete CEQA review during the short time period the City was mandated to act on the initiative under the Elections Code. (See *Tuolumne Jobs & Small Business Alliance v. The Superior Court of Tuolumne County* (2014) 59 Cal.4th 1029.)

For the above-stated reasons, on behalf of the Jamul Indian Village, I urge the Commission to adopt a categorical exclusion from NEPA for the NIGC's casino management agreement approval process by either: (1) formally acknowledging that the management contract approval process falls squarely under the NIGC's existing NEPA categorical exclusion for actions pertaining to the regulation, monitoring, and oversight of Indian gaming activities (*See* NIGC's Protocol for Categorical Exclusions from NEPA effective May 22, 2012 ["Category 2 – Regulation, Monitoring and Oversight of Indian Gaming Activities"].) or (2) amending NIGC's list of activities categorically excluded

[2] While the federal Council on Environmental Quality ("CEQ") noted in 1981 that it takes "about 12 months for the completion of the entire EIS process" (*See* Forty Most Asked Questions Concerning CEQA's NEPA Regulations at http://energy.gov/sites/prod/files/G-CEQ-40Questions.pdf), more modern observations show that the actual time required to prepare an EIS is much, much longer. (*See* Piet and Carole deWitt, "How Long Does It Take To Prepare An Environmental Impact Statement?" 10 Envtl. Prac. 164 (2008) [finding an average EIS preparation time of 3.4 years based on study of 2,095 EISs prepared by 53 different federal agencies]; Larson, Krieg *et al.*, Federal Highway Administration, "Evaluating the Performance of Environmental Streamlining: Development of a NEPA Baseline for Measuring Continuous Performance," (2000) [finding EISs take an average of 3.6 years].)

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from NEPA to expressly reference and include a new category covering decisions to approve casino management contracts pursuant to IGRA. As discussed above, for tribes like the Jamul Tribe that are already federally recognized, have a tribal reservation and gaming compact with the state and have already conducted extensive environmental review of and begun construction on a casino, a categorical exclusion from NEPA makes perfect sense. For other tribes who may not be as far along as the Jamul Tribe, implementing the categorical exclusion we advocate for herein does not preclude environmental review under NEPA should "extraordinary circumstances" exist such that NIGC's approval of the management contract actually does have the potential to significantly impact the environment. Furthermore, for tribes not as far along that require some other federal approval before a casino may be constructed and operated, such as a fee-to-trust process, NEPA will attach and will be complied with in full at a time and in a context where meaningful changes can be made to address environmental concerns.

We ask that the Commission use its limited resources where they are most needed to help tribes like ours move forward with the economic development that IGRA was intended to promote. To that end, I welcome any questions you may have and would be pleased to speak with you if you would like more information about our experience and perspective on this important issue.

Sincerely,

Raymond Hunter
Chairman

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