

November 6, 2014

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**VIA FIRST CLASS MAIL**

National Indian Gaming Commission  
Attn: Jonodev Osceola Chaudhuri, Acting Chairman  
90 K Street NE, Suite 200  
Washington, DC 20002

Dear Acting Chairman Chaudhuri:

Earlier this year, the National Indian Gaming Commission ("NIGC") conducted four consultation sessions with tribal leaders to discuss what level of environmental review under the National Environmental Policy Act ("NEPA") is required before the NIGC may approve a management agreement. As you likely know, in 2013, San Diego Gaming Ventures, LLC ("SDGV"), which is a subsidiary of Penn National Gaming, Inc. ("Penn National"), submitted the management agreement it entered into with The Jamul Indian Village of California (the "Jamul Tribe") to the NIGC for approval. We are counsel to SDGV and Penn National. SDGV and the Jamul Tribe are in the process of constructing a gaming and entertainment facility east of San Diego, California that is scheduled to open in late 2015 (the "Casino"). Currently, the NIGC requires Indian tribes that have entered into management agreements with casino operators to comply with NEPA requirements when construction is involved. Penn National supports the adoption of a categorical exclusion for approval of management agreements by the NIGC under NEPA.

Basis for Categorical Exclusion

The NEPA regulations define a categorical exclusion as "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 in implementation of these regulations and for which, therefore, neither an environmental assessment nor an environmental impact statement is required."<sup>1</sup> In its Protocol for Categorical Exclusions from NEPA effective May 22, 2012, the NIGC identified a category pertaining to the regulation, monitoring, and oversight of Indian gaming activities as being the type of action categorically excluded from NEPA. The management agreement between SDGV and the Jamul Tribe sets forth the parameters of how SDGV will regulate, monitor, and oversee the gaming activities at the Casino when it opens in late 2015. Approval of a management agreement should be included in the categorical exclusion related to the regulation and oversight of Indian gaming activities.

NEPA was enacted in 1970 with two aims: (1) requiring a federal agency "to consider every significant aspect of the environmental impact of a proposed action" and (2) ensuring "that the agency will inform the public that it has indeed considered environmental concerns in its decision-making process."<sup>2</sup> An Environmental Impact Statement ("EIS") under NEPA is created when a federal agency is "undertaking an activity that rises to the level of a major federal action which significantly affects the quality of the human

<sup>1</sup> 40 C.F.R. § 1508.4.

<sup>2</sup> *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97 (1983).

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environment.”<sup>3</sup> NIGC review and approval of a management contract is not a major federal action that significantly affects the quality of the human environment. For a casino that involves construction, the NIGC, in its review of a management agreement, does not have the ability to regulate the scope, design or size of the casino project. When reviewing management agreements, the scope of the NIGC’s review is narrow. Congress specifically instructed the NIGC to review the background of each person with a financial interest or management responsibility in the casino, to ensure that certain accounting provisions and time limits are contained in the agreement, and to review the reasonableness of the management fee provisions.<sup>4</sup> Given the limited nature of the NIGC management agreement review and the fact that such review is not a major federal action that significantly affects the quality of the human environment, the NEPA review requirement is burdensome, unnecessary, and likely discourages investment in Indian country.

#### The Time Periods in IGRA Preclude Preparation of NEPA Documents

The completion of an EIS takes a considerable amount of time. The process involves multiple drafts of the EIS being circulated and discussed by attorneys and the federal government. A federal agency cannot make a decision based on a draft EIS until ninety days after publication of a Notice of Availability of the draft EIS or thirty days after publication of a Notice of Availability of a final EIS, whichever is later.<sup>5</sup> The minimum public comment period for an EIS is forty-five days and if the federal agency holds a public hearing to allow concerned individuals to provide comments to the draft EIS, the agency must give fifteen day prior notice of such a hearing. Following such a hearing, the public agency must respond to the comments in the final EIS.<sup>6</sup> Given these required time periods under NEPA, by the time a final Record of Decision is published, the average time period to prepare the EIS is 3.4 years.<sup>7</sup> This length of time makes it highly unlikely that the NIGC will be able to approve or disapprove a management agreement within the maximum period of 270 days before a tribe is authorized to sue to compel action under 25 U.S.C. § 2711(d).

#### Consequences of NEPA Review Requirement

By requiring a NEPA environmental review in connection with the approval of a management agreement, the NIGC increases the cost of developing a casino project and adds time to the development schedule of the project. Both of these results are detrimental to the tribe developing the casino. The tribe ultimately pays the increased cost of the casino project. Additionally, the casino opening, which will likely result in the economic self-sufficiency of the tribe, is delayed.

In addition to the cost and delay attributable to a NEPA environmental review, the requirement for such a review generally results in additional claims being asserted in litigation related to the planned casino project. As noted above, NEPA was enacted in 1970 with two aims: (1) requiring a federal agency “to consider every significant aspect of the environmental impact of a proposed action” and (2) ensuring “that the agency will inform the public that it has indeed considered environmental concerns in its decision-making process.”<sup>8</sup> When analyzing a federal agency’s efforts to comply with NEPA, the “role of the courts

<sup>3</sup> *Department of Transportation v. Public Citizen*, 541 U.S. 752, 763 (2004).

<sup>4</sup> See 25 U.S.C. § 2711(a)-(c).

<sup>5</sup> 42 C.F.R. § 1506.10(b).

<sup>6</sup> *Id.* at §§ 1506.10(c) and 1506.6(c)(2).

<sup>7</sup> See “How Long Does It Take to Prepare an Environmental Impact Statement?”, Piet and Carole deWitt, *Environmental Practice*, Vol. 10, Issue 4, December 2008.

<sup>8</sup> *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97 (1983).

is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious.”<sup>9</sup>

The Class III gaming compact that the Jamul Tribe entered into with the State of California required that the Jamul Tribe adopt an ordinance which incorporated the policies and purposes of NEPA and the California Environmental Quality Act (“CEQA”) and that provided for the preparation, circulation, and consideration by the Jamul Tribe of environmental impact reports concerning off-reservation environmental impacts associated with the development of a casino and related projects. Pursuant to its ordinance, the Jamul Tribe has studied the possible environmental impacts of a casino project and prepared an environmental evaluation (“EE”) that addresses all of the substantive requirements of both NEPA and CEQA. The EE was submitted for public review and comment in a manner substantially similar to the requirements for related environmental documents under NEPA and CEQA. Therefore, the NEPA review requirement related to NIGC review of the management agreement is a superfluous requirement in that the Jamul Tribe has procedures in place to ensure that the environmental impacts of a planned casino development are assessed and addressed consistent with a NEPA review.

The requirement of a NEPA review when the NIGC reviews the management agreement simply opens the door for additional claims to be asserted in litigation against a planned casino development. With the NEPA requirement in place, litigants are able to assert claims alleging that the NIGC failed to adequately consider the environmental impact of its actions in its decision-making process in approving a management agreement. The ability to assert such claims, in connection with an action under NEPA, increases the risk related to a casino development project, which inevitably results in higher project-related costs that are passed onto and borne by the tribe.

#### Conclusion

The requirement that the NIGC conduct an environmental review in conjunction with its review of a management agreement discourages investment in gaming development in Indian country. Developers and casino companies are dissuaded from investing in tribal gaming projects given the increased cost and inevitable delay to a project attributable to a NEPA review. As one of the stated purposes of IGRA is to encourage business investment in Indian country, Penn National believes that the NIGC should adopt a categorical exclusion to the NEPA requirement for the approval of management agreements.

Thank you for considering our comments. Please feel free to reach out to us if you have any questions.

Sincerely,



Andrew D. Moore

cc: John Hay, Senior Attorney, National Indian Gaming Commission (via mail)  
Carl Sottosanti, Senior Vice President & General Counsel, Penn National Gaming, Inc.  
(via email)  
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<sup>9</sup> *Id.* at 98.