



## MEMORANDUM TO THE COMMISSION

DATE: January 22, 2015

FROM: Miles Janssen, Staff Attorney

THROUGH: Eric Shepard, Acting General Counsel

CC: Christinia Thomas, Acting Chief of Staff

RE: Options for Categorical Exclusion (CATEX)

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### Background

The NIGC has previously determined that approving a management contract for the operation of gaming under IGRA is a major Federal action that requires NEPA review. NIGC is seeking to obtain a Categorical Exclusion (CATEX) for that type of action.

In December 2009, the NIGC published a NEPA policies and procedures draft manual that identified three categories of CATEXs. They included: 1) Administrative and Routine Office Activities, 2) Regulation, Monitoring, and Oversight of Indian Gaming Activities, and 3) Management Contract and Agreement Review Activities. However, a final copy of the NEPA manual was never adopted. In May 2012, the NIGC established a protocol for two of the three CATEXs previously identified in the draft NEPA manual. Specifically, the protocol covered: 1) Administrative and Routine Office Activities and 2) Regulation, Monitoring, and Oversight of Indian Gaming Activities.

On January 9, 2015, the NIGC met with Horst Greczmiel, Associate Director for NEPA Oversight, to discuss the process for establishing a protocol for the final CATEX category identified in the draft NEPA manual: 3) Management Contract and Agreement Review Activities. After explaining the action taken in approving a management contract, Mr. Greczmiel suggested it was possible that a new CATEX may not be needed. Rather, the management contract approval process may fall within the previously established CATEX for the Regulation, Monitoring, and Oversight of Indian Gaming Activities. To accomplish our goal, NIGC would only need to draft a memo explaining the legal rationale and basis for such a determination.

Mr. Greczmiel also stated that NIGC needs to finalize a NEPA policy and procedures manual. As of now, the NIGC contracts with the BIA to conduct required NEPA review. BIA is required to follow their policies and procedures since NIGC does not have established policies

and procedures. It is possible that BIA policies and procedures are overly broad for the NEPA review NIGC requires. If BIA fails to follow their policies and procedures while completing NEPA work on behalf of NIGC, there is a risk of litigation against NIGC. Finally, the NIGC is unable to contract with anyone else for NEPA review if NEPA policies and procedures are not established.

### Analysis

It is unlikely that the approval of a management contract can be included as part of the CATEX for the Regulation, Monitoring, and Oversight of Indian Gaming Activities. The 2012 CATEX for Regulation, Monitoring, and Oversight of Indian Gaming Activities specifically covers:

- A. Promulgation or publication of regulations, procedures, manuals, and guidance documents necessary for NIGC's oversight of Indian Gaming Facilities and intra-agency operations at existing facilities.
- B. Support of compliance and enforcement functions by conducting compliance training for tribal gaming regulators and managers in classrooms, meeting rooms, gaming facilities, or via the Internet.
- C. Preparing and issuing subpoenas, holding hearings, and taking depositions for informational gathering purposes, not associated with administrative enforcement actions.

The three subcategories appear to be narrowly tailored to specifically address certain activities. The activities listed cannot be read to involve the approval of management contracts. Thus, it does not appear that the approval of management contracts can fall under this CATEX.

It is also important to note that the 2012 notice establishing the protocol for the two CATEXs specifically reference the 2009 draft manual and three CATEXs the Agency had considered adopting. The third specifically addressed the approval of management contracts. It would be difficult for NIGC to now argue that although the Commission clearly never intended the adopted CATEXs to include approval of management contracts, as evidenced by the third, unadopted CATEX; it nonetheless is now doing so. Such a decision by the Commission would make future contract approvals more susceptible to NEPA challenges.

Moreover, the NIGC has already proposed a CATEX for management contract approvals, for which it has sought public comment and consulted with Tribes on several occasions. Adoption of this CATEX would not make the agency substantially more susceptible to litigation than shoe-horning management contract approval into the previously adopted exclusion. Also, any litigation that does result from adopting a new CATEX would be easier to defend.

The NIGC may follow Mr. Greczmiel's suggestion and adopt a NEPA policies and procedures manual that include the previously proposed CATEX for the approval of

management contracts. This option allows NIGC to accomplish two goals: 1) establishing a CATEX for the approval of management contracts and 2) ending future uncertainty regarding NEPA review. Specifically, NIGC would have defined categories for what actions require NEPA review and as well as the process for conducting such review. Also, the NIGC would be free to contract with groups outside the government to conduct NEPA review in the future.

#### Decision Options

1. Adopt the third, previously published and discussed CATEX for the approval of management contracts.
2. Adopt a newly drafted CATEX for the approval of management contracts.
3. Adopt a NEPA policies and procedures manual that includes a specific CATEX for the approval of management contracts.
4. Draft a memo that specifies the legal basis for considering the approval of management contracts to fall within the previously established CATEX for Regulation, Monitoring, and Oversight of Indian Gaming Activities

#### Recommendation

Option 3. This accomplishes the goal of establishing a CATEX for the approval of management contracts while ending future uncertainty regarding NEPA review requirements. It is important to note that this option will take longer than Option 1, due to the fact that OGC will need to conduct a full review of the 2009 draft manual.