Don’t Bet on NEPA: The National Environmental Policy Act has no Place in Indian Gaming

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Abstract: The Indian Gaming Regulatory Act (IGRA) does not require environmental reviews prior to the approval of gaming management contracts and the timeframes in the IGRA conflict with the National Environmental Policy Act (NEPA), therefore negating any need for NEPA compliance prior to approval of a management contract.

The National Indian Gaming Commission (“NIGC” or “Agency”) is undergoing a sea change. After eight years of the same leadership, the helm of the young Agency has been passed to three new Commissioners, who have undertaken a review of all regulations and policies. As a result, the NIGC sent a notice of inquiry advising tribes of the comprehensive review and a subsequent notice of regulatory review. One area of vital importance to many Indian tribes that is not mentioned in either of these notices, but which is currently under discussion, is the relationship of the Indian Gaming Regulatory Act (“IGRA”) to the National Environmental Policy Act (“NEPA”). A proper understanding of the interplay between these federal statutes could affect tens of tribes through implementation of the NIGC’s Draft National Environmental Policy Act Manual (“Draft Manual”), which was published in the Federal Register on December 4, 2009 and has yet to be finalized.

The NIGC has thus far operated under the assumption that NEPA applies to management contract reviews and other final agency actions taken by the Agency. However, this position puts Indian tribal gaming enterprises at a severe disadvantage to other businesses, which do not have to spend millions of dollars on an Environmental Assessment (EA) or Environmental Impact Statement (EIS) for the same project, nor undertake months or years of delay before beginning construction. This delay has the effect of outdating market analyses, dramatically increasing project costs, involving the general public in the sovereign decisions of tribal governments, and deterring potential investors.

A review of the intersection between NEPA and IGRA, coupled with government policies towards Indian tribes, indicates that it would be more appropriate for the NIGC to determine that NEPA does not apply to the IGRA. In fact, based on statutory conflict and categorical exclusion, the legal arguments for not requiring EISs to be prepared are so strong and the experience to date

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is so unequivocal that continuing to require NEPA compliance for management contracts is a waste of tribal, management contractor and federal resources.

From a policy, legal, and practical standpoint, NIGC review of management contracts need not trigger NEPA review except in the most unusual circumstances. There are four considerations indicating that this is the proper approach:

1. The time limitations in the Indian Gaming Regulatory Act (IGRA) preclude the preparation of Environmental Impact Statements and warrant the conclusion that there is a statutory conflict with NEPA;
2. Substantively, management contract approvals are not major federal actions and warrant categorical exclusion from NEPA review;
3. IGRA does not grant the NIGC authority to deny management contract proposals based on environmental grounds except in the most narrow and unusual (and probably nonexistent) circumstances, warranting a conclusion that there is a statutory conflict and grounds for categorical exclusion; and
4. The NIGC’s own experience with NEPA compliance demonstrates that management contract determinations do not significantly affect the human environment and warrant categorical exclusion from NEPA review.

Based on the reasons listed above, the NIGC should act to save Indian tribes from the unnecessary time and expense burden of compliance with NEPA.

A. The Time Limitations in IGRA Preclude the Preparation of EISs and Create a Statutory Conflict with NEPA

While NEPA requires federal agencies to comply with its terms “to the fullest extent possible”, Congress and the courts recognize that compliance is excused when a statutory conflict within the agency’s authorizing legislation renders NEPA review impossible. The NIGC failed to consider the applicability of this exception to NEPA for management contract approvals when creating the Draft Manual.

As the NIGC has properly identified in Section 2.5.5.1 of its Draft Manual, the NIGC’s approval or disapproval of gaming ordinances is statutorily inconsistent with NEPA on time grounds, and therefore does not require NEPA compliance. This conflict occurs because IGRA requires that the NIGC Chairman approve or disapprove an ordinance submitted to the Commission within ninety (90) days. If no action is taken by the Commission within the ninety (90) day time frame, the ordinance will be deemed approved. It is simply impossible to complete an EIS within the ninety day period that Section 2710 of IGRA gives the NIGC Chairman to approve or disapprove a tribal gaming ordinance.

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7 42 U.S.C. § 4332.
The completion of an Environmental Impact Statement ("EIS") takes a considerable amount of time, with its concomitant public comment period for the Draft Environmental Impact Statement ("DEIS"), review and revision in response to feedback, publication of a Final Environmental Impact Statement ("FEIS"), and the potential submission of a supplemental DEIS. As a result, the ninety-day period allowed for approval or disapproval of management contracts is far too short for the agency to prepare an "EIS." Additionally, the NIGC must approve or disapprove a gaming management contract within one hundred and eighty (180) days, with a possible ninety (90) day extension, or a tribe may sue to compel action. 25 U.S.C. § 2711(d). Using the same reasoning, the NIGC should list management contract approvals as having a statutory conflict negating the Commission’s responsibility to comply with NEPA.

As demonstrated by the NEPA conference committee reports, Congress discouraged any attempt by agencies to avoid NEPA compliance through excessively narrow constructions of their statutory authorizations. Conference Report, 115 Cong. Rec. (Part 29) 39702-703 (1969), quoted in Calvert Cliffs’ Coordinating Committee, Inc. v. United States Atomic Energy Commission, 449 F.2d 1109, 1114-15 (D.C. Cir. 1971). (“Thus, it is the intent of the conferees that the provision ‘to the fullest extent possible’ shall not be used by any Federal agency as a means of avoiding compliance with the directives set out in section 102. . . . [N]o agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance.”). Nevertheless, the Supreme Court has found that NEPA compliance is not required where there is a “clear and unavoidable conflict in statutory authority.” Flint Ridge, 426 U.S. at 788-89.

In Flint Ridge, NEPA was deemed inapplicable as there was an “irreconcilable and fundamental conflict with the Secretary’s duties under the [Interstate Land Sales Full Disclosure] Act.” This conflict existed because statements of record had to go into effect within 30 days of filing, absent inaccurate or incomplete information, and it would be impossible to simultaneously prepare Environmental Impact Statements on the proposed developments. Id. Therefore, the Supreme Court held that, when a “clear an unavoidable conflict in statutory authority exists, NEPA must give way . . . NEPA was not intended to repeal by implication any other statute.”10 The proper test was “whether, assuming an environmental impact statement would otherwise be required in this case, requiring the Secretary to prepare such a statement would create an irreconcilable and fundamental conflict with the Secretary’s duties.”11 Concordantly, the six to nine month statutory review period allowed the NIGC for management contracts is prima facie too short to allow the agency to create an EIS.

The average time for completion of an EIS is 3.4 years based on a study by deWitt and Carole A. deWitt of 2,095 EISs prepared by 53 different federal agencies, based on the time between publication of the Notice of Intent in the Federal Register and the EPA’s Notice of Availability of the Final EIS.12 This is very similar to a 3.6 year timeframe found by a Federal Highway

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10 Id. at 788 (internal citation omitted).
11 Id.
Administration study using the signing date of the Notice of Intent as a start point and the signing date of the Record of Decision as an end point.\textsuperscript{13}

One of the reasons for the large period of time to create an EIS involves set timeframes for public involvement. A federal agency cannot make a decision based on a DEIS until ninety (90) days after publication of a Notice of Availability of the DEIS or thirty (30) days after publication of a Notice of Availability of a FEIS, whichever is later.\textsuperscript{14} The minimum public comment period for EIS review is forty-five (45) days.\textsuperscript{15} If the agency holds a public hearing for the public to consider the DEIS, it must give fifteen (15) days prior notice.\textsuperscript{16} The agency must then respond to the public comments in the FEIS. Comments are received from the general public and environmental groups all over the country as well as from cooperating agencies, who are often given an informal Pre-Notice of Availability comment period so that their input can be included in the draft presented to the public.

Management contract review and approvals thus present a statutory conflict with NEPA that merit categorical exclusion from the NEPA review process. The NIGC’s six month deadline, or even the nine months allowed with an extension, is considerably shorter than those of other statutes where the courts did not excuse NEPA compliance. Courts have found a period of four years presented sufficient time to create an EIS,\textsuperscript{17} and that a one year, nine month period was sufficient to finish the EIS process and offer contracts.\textsuperscript{18} One case, \textit{Texas Committee on Natural Resources v. Bergland}, relied on language requiring NEPA in legislative history to find that a two year period to develop a forest management plan did not present a conflict.\textsuperscript{19} In contrast, the IGRA does not mention NEPA compliance or refer to environmental concerns even once.

Even if the NIGC extended the deadline to the statutory limit of nine months, there is still insufficient time for the agency to complete the EIS process. By the time a management contract application is received, contractors hired, the project scoped, a DEIS prepared, a period for comments and possible public hearings allowed, comments evaluated and addressed in an FEIS, and a record of decision created, more than nine months will have elapsed under the best of circumstances.

While exceptions to the regulatory minimum times set by the Council of Environmental Quality for public comment and delay of decision at the end of the process are allowed (see exceptions to the CEQ minimum time limits under sections 1507.3(b), (d)), it is still unlikely that the NIGC could complete an EIS in the maximum nine month period. For instance, on one of the two occasions when an EIS was used by the NIGC, for the Nottawasepi Huron Band of Potawotami Indians, the EIS was prepared under court order by the Bureau of Indian Affairs on the fee to trust and Section 20 actions involved in a proposal and took approximately two years and three

\textsuperscript{14} 42 C.F.R. \S\ 1506.10(b).
\textsuperscript{15} \textit{Id.} at \S\ 1506.10(c).
\textsuperscript{16} \textit{Id.} at \S\ 1506.6(c)(2).
\textsuperscript{17} \textit{Westlands Water Dist. v. U.S. Dept. of Interior}, 275 F. Supp. 2d 1157 (E.D.Cal., 2002).
\textsuperscript{18} \textit{Forelaws on Board v. Johnson}, 743 F.2d 677, 685 (9th Cir. 1985).
\textsuperscript{19} 573 F.2d 201 (C.A. Tex. 1978).
months to prepare. The NIGC appears to have taken another 18 months to prepare the record of decision on the management contract. The second occasion, for the Graton Rancheria, took just under two years from publication of the DEIS in March 9, 2007, until issuance of the FEIS on February 27, 2009.

Even when the NIGC simply prepares an Environmental Assessment (EA), the nine-month limit appears to be too short a time for completing and taking action on the EA. For instance, the NIGC’s most recent Finding of No Significant Impact on an EA took nine months from the time the draft EA was released for public comment to approval, which doesn’t account for the time required for any of the preceding work including hiring contractors, conducting scoping, and preparing the draft EA. The NIGC NEPA Manual should therefore list management contract approvals as excused from NEPA compliance due to statutory conflict. While not a statutory requirement, it should be noted that these time periods also are not adequate for the NIGC to consult with Indian tribes pursuant to the Commission’s government-to-government consultation policy.

B. Management Contract Approvals Are Not Major Federal Actions and Warrant Categorical Exclusion from NEPA Review.

NEPA was enacted to assist Federal agencies in ensuring that significant environmental impacts are considered in the Federal decision-making process and are communicated to the public along with mitigation decisions, thus guaranteeing that relevant information is available to the public who may provide input into the decision-making process and the implementation of the agency decision. Thus, an EIS should be created only when the agency will be “undertaking an activity that rises to the level of a major federal action which significantly affects the quality of the human environment.” 40 C.F.R. § 1508.18 defines the term major federal action:

"Major Federal action" includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly (Sec. 1508.27). Actions include the circumstance where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals

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The Final Environmental Assessment does not indicate when the management contract application was received.

under the Administrative Procedure Act or other applicable law as agency action.

(a) Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals (Secs. 1506.8, 1508.17). Actions do not include funding assistance solely in the form of general revenue sharing funds, distributed under the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. 1221 et seq., with no Federal agency control over the subsequent use of such funds. Actions do not include bringing judicial or administrative civil or criminal enforcement actions.

(b) Federal actions tend to fall within one of the following categories:

* * * *

4. Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities.

1. NIGC Has a Limited Role in Management Contract Approvals

The NIGC’s approval of a management contract, covering a specific project located in a defined location involving activity that may be regulated by the Commission, appears at first blush to meet CEQ’s definition of a major federal action in subsection 1508.18(b)4. However, the approval provisions of subsection (b) may be read as interpreting the general statement of subsection (a). Subsection (a) clarifies, in pertinent part, that it applies to projects or programs “entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies”. Close examination shows that the federal interest in a management contract, other than for enforcement of its terms, is slim. Gaming, the regulated activity, may take place with or without the contract. For Class III gaming, there is federal oversight rather than regulation of the gaming activity.25

Indian tribes have had the authority to build and operate gaming facilities on their reservations, and likely in Indian Country, prior to the enactment of the IGRA.26 Under the IGRA, an Indian tribe has the right to build and operate a gaming facility on its lands once it adopts a gaming ordinance that receives the approval of the NIGC Chairman; no federal review of the construction design, location, or site, if there is to be construction of a facility, is required other than a possible ministerial need for an opinion that the selected site qualifies as Indian lands.27 The lands involved may be land owned in fee or restricted fee, reserved from cession, or held in

25 Colorado River Indian Tribes v. NIGC, Colorado River Indian Tribes v. NIGC, 466 F.3d, 134 (D.C. Cir. 2006).
trust status for a tribe or individual Indians.\textsuperscript{28} Trust lands, while owned by the federal government, are held for the benefit of the individual Indians or tribe and are not public lands.\textsuperscript{29}

A management contract for Class III gaming activities is a project between two non-federal actors. \textquotedblleft A project conducted by non-federal actors, such as oil and gas drilling by private parties, will only trigger NEPA if it requires a federal agency to undertake ‘affirmative conduct’ before the non-federal actor may act.\textquotedblright\textsuperscript{30}

The Indian tribe and management contractor use the management contract to define how they will interact, allocate responsibilities, and allocate income.\textsuperscript{31} The Commission’s authority to review management contract provisions is aimed at keeping organized crime out of Indian gaming and ensuring that the fee provisions are not unreasonable.\textsuperscript{32} The NIGC’s approval is often of a project with no construction activity, as evidenced by the NIGC’s proposed Category 3 categorical exclusion for approval of these management contracts as part of the Draft Manual § 3.3.3.

When a management contract incidentally does involve construction activity, the NIGC has no ability to control or regulate the size, design, or construction of the project. The NIGC’s authority to approve and enforce management contracts for Indian casinos is very limited in the scope of its review.\textsuperscript{33} Congress directed the Commission to examine the background of each person or entity with a financial interest or management responsibility in the contract; ensure certain accounting, tribal access provisions, and time limits are in the contract; and determine that the fee provisions are reasonable.\textsuperscript{34}

If a contract is approved, the NIGC Chairman has the authority to modify or void the contract and to enforce its terms.\textsuperscript{35} In fact, the only real estate provision in the management contract authority of IGRA is simply a mandatory requirement that the Chairman may not approve a management contract that “shall transfer or, in any other manner, convey any interest in land or other real property, unless specific statutory authority exists and unless clearly specified in writing in said contract.”\textsuperscript{36} IGRA’s text and its legislative history do not once mention NEPA compliance and gives the NIGC no legal authority to deny a management contract based on the environmental impacts of a facility that would be operated by the management contractor. For example, 25 U.S.C. § 2711 limits the disapproval of a management contract to a limited number of specific situations, none of which involve the scope or impact of the facility to be operated.

\textsuperscript{28} 25 U.S.C. §§ 2703(4), 2719. The land must also meet specific eligibility requirements not discussed here.
\textsuperscript{30} Id. at § 2711(g).
\textsuperscript{32} 25 U.S.C. § 2711.
\textsuperscript{33} 25 U.S.C. § 2704(2).
\textsuperscript{34} 25 U.S.C. § 2711(a)-(c).
\textsuperscript{35} 25 U.S.C. §§ 2712, 2706(b), 2713.
\textsuperscript{36} Id. at § 2711(g).
2. NIGC Approval of Management Contract Terms Does Not Create Significant Federal Involvement in the Project

In view of the NIGC’s limited role in management contract review and approval, the question should be focused on whether the NIGC’s level of involvement in the activity underlying its approval even rises to the level of major federal action. “The requirements of NEPA, which include, among other things, the submission of an EIS, apply only when the federal government's involvement in a project is sufficient to constitute ‘major federal action.” 37

Despite the passage of decades since the enactment of NEPA, “no litmus test exists to determine what constitutes major ‘federal action,” as “federal courts have not agreed on the amount of federal involvement necessary to trigger the applicability of NEPA.” 38 Because state and private actors are not subject to NEPA, 39 the determination of whether a major federal action is involved hinges on whether a project is federal or non-federal in nature and the amount of control or influence that the federal agency can impose on the project. 40 Factors considered include whether the agency has authority only to give nonbinding advice or whether it possesses actual power to control the nonfederal activity. 41

When non-federal activity is involved:

[T]he court shall consider the following factors: (1) whether the project is federal or non-federal; (2) whether the project receives significant federal funding; and (3) when the project is undertaken by a non-federal actor, whether the federal agency must undertake “affirmative conduct” before the non-federal actor may act. No single factor of these three is dispositive. 42

An Indian gaming management contract is not a federally initiated, operated, or owned project. The IGRA requires “the tribe to have the sole proprietary interest and responsibility for the conduct of any gaming activity.” 43 The tribe may begin construction of a gaming operation without any federal approval and may offer gaming activities as soon as its gaming ordinance has been approved by the NIGC Chairman. 44 The Indian gaming operation receives no federal funding; instead the tribe pays fees to the government to cover regulatory and oversight costs. 45 The management contract itself is between two non-federal entities: an Indian tribe desiring to have a management company operate either a new or existing casino and the private company

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37 Save Barton Creek Ass’n v. Fed. Highway Admin., 950 F.2d 1129, 1133 (5th Cir.1992).
38 Id. at 1134.
41 United States v. Southern Florida Water Mgmt. Dist., 28 F.3d 1563, 1572 (11th Cir. 1994) (“The touchstone of major federal activity constitutes a federal agency's authority to influence non-federal activity.”).
42 See Sierra Club v. Hodel, 848 F.2d 1068, 1089 (10th Cir. 1988) (“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. . . . Rather, the federal agency must possess actual power to control the nonfederal activity.”) (overruled on other grounds); Village of Los Ranchos de Albuquerque, 956 F.2d at 973.
vying for the contract. Unapproved management contracts are void\(^\text{47}\) and subject to federal criminal penalties.\(^\text{48}\)

The issue therefore comes down to the third prong of the test, whether the federal agency must undertake affirmative conduct before the non-federal actor may act, and the scope of the action.

A non-federal project may be considered a federal action “if it cannot begin or continue without prior approval of a federal agency.”\(^\text{49}\) On the other hand, there has been reluctance to require NEPA compliance on actions “that are marginally federal.”\(^\text{50}\) “Where federal funding is not present, this court has generally been unwilling to impose the NEPA requirement.”\(^\text{51}\)

Federal approval of aspects of a project does not necessarily federalize the project such that NEPA compliance is required. Several cases specifically on point involve Federal Aviation Authority (FAA) approval of airport layout plans by non-federal airport authorities, a preliminary step to federal funds being granted.\(^\text{52}\) As described by the Friends of the Earth court, “[d]etermination of whether federal and state projects are sufficiently interrelated to constitute a single “federal action” for NEPA purposes will generally require a careful analysis of all facts and circumstances surrounding the relationship. At some point, the nexus will become so close, and the projects so intertwined, that they will require joint NEPA evaluation.”\(^\text{53}\)

The approval of airport layout plans does not require an EIS.\(^\text{54}\)

Moreover, NIGC approval of any construction or building terms in the management contract are likely approved in a ministerial nature because they are outside the scope of the Commission’s review. “[I]f the agency does not have sufficient discretion to affect the outcome of [an] action, and its role is merely ministerial, the information that NEPA provides can have no affect on the agency’s actions, and therefore NEPA is inapplicable.”\(^\text{55}\)

These combined factors do not lead to a conclusion that the approval of the NIGC Chairman for a management contract necessitates NEPA compliance. This case does not involve the need for additional Secretarial approvals once the management contract is approved, or involve federal interests in land, such as potential liability for injury or damages on lease property.\(^\text{56}\) No federal-tribal partnership on a joint project is involved with tribal casino management contracts. The project is non-federal and receives no federal funding. The NIGC is not in control of the project, nor may it exert significant influence on any construction or environmental mitigation terms of the gaming management contract.\(^\text{57}\) Moreover, Indian tribes have the authority to build and

\(^{50}\) State of Alaska v. Andrus, 591 F.2d 537, 541 (9th Cir.1979).
\(^{51}\) Id. (citing Friends of the Earth, Inc. v. Coleman, 518 F.2d 323 (9th Cir. 1975) (mere federal approval of aspects of airport expansion insufficient).
\(^{52}\) Friends of the Earth, 518 F.2d 323; City of Boston v. Volpe, 464 F.2d at 254 (1st Cir. 1972).
\(^{53}\) 518 F.2d at 329.
\(^{54}\) Friends of the Earth, 518 F.2d at 328; Volpe, 464 F.2d at 259-60 (“A state may, after all, proceed with construction wholly independently of the federal government.”)
\(^{56}\) Davis v. Morton, 469 F.2d 593 (10th Cir. 1972).
\(^{57}\) Sierra Club v. Hodel, 848 F.2d at 859.
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 of or subsequent to the approval process. While the NIGC may have authority to regulate the gaming activity, the federal government’s only involvement with an approved management contract is to enforce its terms, require contract modifications or void the contract if the provisions required by IGRA are not met. 25 U.S.C. § 2711(f).

In light of these factors indicating that the NIGC has no ability to control or influence the significant nonfederal activity, it is appropriate to conclude that NIGC action in approving a management contract does not rise to the level of a major federal action that requires NEPA compliance.

3. IGRA Does Not Grant the NIGC Authority to Deny Management Contract Proposals based on Environmental Grounds Except in the Most Narrow and Unusual (Probably Nonexistent) Circumstances

The primary section of IGRA that establishes terms under which the NIGC can elect to approve or disapprove management contracts, 25 U.S.C § 2711, makes clear that the NIGC has no authority to make such a decision on grounds for which NEPA or the preparation of an Environmental Impact Statement would be applicable. Close analysis of 25 U.S.C § 2711 makes clear that the following are grounds for denying a management contract:

A. Under subsection (a), the Chairman of the NIGC can require certain minimal information on the persons and entities that will have a direct financial interest in or management responsibility for the management contract, including obtaining certain information on their experience related to the gaming industry and a financial statement. Persons with a direct financial interest include members of the board of directors of a corporation and stockholders who hold 10% or more of its stock. By implication, if such information is not provided, the Chairman may not approve the management contract.

B. Under subsection (b), the Chairman may approve a management contract only if he determines that it provides adequate accounting procedures, provides certain access to the tribe’s governing body, meets certain financial terms, does not exceed certain time limits, and provides the grounds and mechanism for contract termination.

C. Under subsection (c), the Chairman may approve a management contract providing for a fee based on a percentage of the net revenues of a tribal gaming activity if the fee is reasonable and within a range of 30-40% or less (amounts in excess of 30% must meet a somewhat higher financial test).

D. Under subsection (d), the Chairman must approve a management contract within 180 days, or 270 days upon notice of a reason for extending the period.

E. Under subsection (e)(1)-(3), the Chairman may not approve a management contract based on the characteristics or actions of the individuals involved in the contract such as contracts involving persons with a criminal record or persons
who have unduly interfered with or influenced a tribal government relating to the gaming activity.

F. Under subsection (e)(4), the Chairman may not approve a management contract if, acting as a trustee and exercising the skill and diligence that a trustee is commonly held to, he or she would not approve the contract. An argument might be made that this opens the door to making decisions based on environmental considerations, but the provision is better read as covering financial and governance concerns. To stretch the provision to cover environmental consequences to be considered by the Chairman as a trustee would necessarily be narrowly tailored to the question of whether the environmental consequences of the management contract, if the contract addressed any activities with environmental consequences at all, would have environmental consequences that would adversely affect the tribe or another tribe, rather than the public at large.

G. Under subsections (g) and (i), the Chairman would be required to disapprove the management contract if the contract provided for the transfer of land or other real property where not authorized or clearly specified in the contract, or if the potential contractor refused to pay certain fees to cover investigative costs.

Nowhere in this list is the Chairman given the authority to disapprove a management contract based on its environmental consequences unless, in the unrealistic circumstance as identified under item 6, above, the environmental consequences of the management contract were sufficiently adverse to the tribe (or, perhaps some other tribe) that they would rise to the level of invoking the Chairman’s trust responsibility to the tribe or tribes to disapprove the contract. Such an instance based on environmental circumstances would be exceedingly unlikely to occur in practice, and, based on the record of Findings of No Significant Impacts in all cases so far examined by the NIGC, has not occurred since IGRA was enacted.\(^{58}\) If the NIGC considered the environmental consequences of approving a management contract to potentially create a trust concern related to the tribe involved or some other tribe, then it could conduct a review of that narrow issue. That is insufficient grounds, however, to require all management contracts involving construction of a facility to undergo NEPA review.

4. The NIGC’s Own Experience with NEPA Compliance Demonstrates that Management Contract Approvals Do Not Significantly Affect the Human Environment

Finally, from a practical perspective, there is a clear factual record that Agency approvals of management contracts do not have significant environmental effects. According to the NIGC’s website, in the sixteen years between 1994 and 2009, the NIGC approved 27 Findings of No Significant Impact (FONSIs), while denying none.\(^{59}\) In the only instance where an EIS was used by the NIGC, it appears that the Bureau of Indian Affairs prepared the document unrelated to NIGC’s management contract approval authority, and the NIGC then relied on the document

\(^{58}\) See NIGC website pages covering NEPA compliance and listing all approved FONSIs and other NEPA actions at www.NIGC.gov.

when signing a record of decision concluding that the management contract could be approved.\textsuperscript{60} When every Environmental Assessment (EA) prepared over a sixteen year period and involving such a large number of EAs results in a FONSI, there is a \textit{prima facie} basis for concluding that management contract approvals do not have significant environmental effects.

The use of categorical exclusions under NEPA has drawn new attention with the recent announcement by the Chair of the Council on Environmental Quality (CEQ) of initiatives to modernize and reinvigorate NEPA.\textsuperscript{61} The announcement included a memorandum for heads of federal departments and agencies proposing and seeking comments on new guidance to establish and apply categorical exclusions under NEPA.\textsuperscript{61} As stated in the memorandum,

\begin{quote}
A “categorical exclusion” describes a category of actions that do not typically result in individual or cumulative significant environmental effects or impacts. When appropriately established and applied, categorical exclusions serve a beneficial purpose. They allow Federal agencies to expedite the environmental review process for proposals that typically do not require more resource-intensive Environmental Assessments (EAs) or Environmental Impact Statements (EISs). Id. at 1.
\end{quote}

The reason for using a categorical exclusion in the case of management contracts would be to save resources of tribes or their management contractors (which surely translate into costs passed on in some way to the gaming enterprise and lower payments for the tribe). With 27 such FEAs, undoubtedly costing millions of dollars to prepare, further expenditures can be curtailed. The CEQ guidance also provides a backstop to assure that there are no extraordinary circumstances where NEPA compliance would be appropriate.

Before applying a categorical exclusion, a Federal agency reviews a proposed action to ensure there are no factors that merit analysis and require documentation in an EA or EIS. This review assesses whether there are any “extraordinary circumstances” to determine whether the application of a categorical exclusion is appropriate. Extraordinary circumstances are a required element of all Federal agency NEPA implementing procedures.\textsuperscript{62}

As argued in section 3, the extraordinary circumstances that could apply would be if the Chairman concluded in his or her capacity as a trustee there was a reasonable chance that approval of a management contract would have such significant environmental effects on the tribe for which the approval is sought or on another tribe that the Chairman would have to

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\textsuperscript{60} Id. (Identifying the signed record of decision for a management contract for the Nottawaseppi Huron Band of Potawatomi Indians.)
\textsuperscript{61} Memorandum for Heads of Federal Departments and Agencies, Subject: Establishing and Applying Categorical Exclusions Under the National Environmental Policy Act http://www.whitehouse.gov/sites/default/files/microsites/ceq/20100218-nepa-categorical-exclusions-draft-guidance.pdf (February 18, 2010).
\textsuperscript{62} Id. at 1-2, citing 40 C.F.R. § 1508.4.
\end{flushright}
disapprove the contract. We submit that this is never likely to occur, and that if it did, it would be rare and an extraordinary circumstance.

C. Conclusion

Final agency actions under the IGRA are limited to the Chairman’s decision to approve or disapprove gaming ordinances and management contracts and the imposition of civil penalties. The IGRA’s stated policy of promoting tribal economic development, self-sufficiency, and strong tribal governments while shielding the gaming from organized crime and corrupting influences, assuring a tribe is the primary beneficiary, and gaming is conducted fairly and honestly has nothing at all to do with the environment.

Due to this statutory mandate, the NIGC’s role is to regulate the gaming, not be a participant in it, and the Agency’s part in management contract approvals does not rise to the level of major federal action under NEPA. And, because both gaming ordinance and management contract review and approval periods are limited to short statutory timeframes, there is a statutory conflict with NEPA. NEPA should therefore be held inapplicable to these decisions. This reality is reflected in the disapproval authority for management contracts given to the NIGC in IGRA, which does not make environmental concerns a valid basis for disapproving a contract.

As the NIGC’s own experience demonstrates, continuing to require preparation of NEPA documents is a clear waste of tribal, management contractor, and Agency money and time. Therefore, based on both statutory conflict and categorical exclusion grounds, it is clear that NEPA coverage for management contracts is not required.

Should the NIGC hesitate to take the bold move of declaring that NEPA does not apply, the NIGC has another alternative approach available. Many agencies prepare Environmental Impact Statements to cover the broad environmental consequences of an entire program. Thus, the Bureau of Land Management may prepare a programmatic EIS on its coal leasing program, which may then be supplemented by a site specific FONSI or used as the basis for a categorical exclusion. The NIGC could prepare a programmatic EIS on its management contract approval program. Such an EIS would have the advantage of amassing and evaluating information on a nationwide basis of relevance to management contracts for gaming under IGRA. The 36 Final Environmental Assessments completed to date would provide data that could inform the analysis.

With a single programmatic EIS providing definitive data and analysis, a categorical exclusion could be supported or the work of preparing contract-specific environmental documents could be streamlined. The streamlining could take place through what CEQ describes as “tiering,” where information presented and evaluated once need not be repeated in subsequent documents, but can simply be referenced. 42 C.F.R.§ 1500.20. Such an approach would save substantial time and money if the NIGC erroneously concludes that it is required to prepare environmental assessments and FONSI, or even contemplates potential use of EISs for management contracts.

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64 Id. at § 2702.