

National Indian Gaming Commission

National Environmental Policy Act Record of Decision

Selection of the Preferred Alternative: Approval of Gaming Management Agreement between the Jamul Indian Village (JIV) and San Diego Gaming Ventures for Operation and Management of a Gaming Facility Previously Constructed on the JIV Indian Reservation Located in Unincorporated San Diego County, California.

AGENCY:

National Indian Gaming Commission (NIGC).

ACTION:

Record of Decision on Selection of Preferred Alternative.

SUMMARY:

The decision made by way of this Record of Decision (ROD) is the selection of the Proposed Action as the preferred alternative over the No Action Alternative. The Proposed Action, as set forth in the Draft Supplemental Environmental Impact Statement (DSEIS), the Final Supplemental Environmental Impact Statement (FSEIS), and the administrative record for this decision is the approval by the NIGC of a Gaming Management Agreement (GMA) between the Jamul Indian Village (JIV or Tribe) and San Diego Gaming Ventures (SDGV). The GMA provides that SDGV will assume responsibility for the operation and management of an existing gaming facility located on the JIV Indian Reservation in San Diego County, California. A DSEIS analyzing the potential effects of the Proposed Action was made available for public review and comment on April 8, 2016. The review and comment period remained open for 45 days and closed on May 23, 2016. A total of nine comment letters were received. All comments received by the NIGC were considered and addressed in the FSEIS, and made available for public review and comment on July 8, 2016. The DSEIS and FSEIS also consider the effects of a No Action Alternative. The No Action Alternative assumes that the GMA is not approved, and, therefore, that the JIV tribal government will manage the day-to-day operations of the gaming facility instead of SDGV.

As explained in the DSEIS and FSEIS, the Proposed Action will have no adverse effect on the environment. The consequence of this approval is that SDGV will have the "...exclusive authority to conduct and direct all business and affairs in connection with the day-to-day operation, management and maintenance of the [JIV] Gaming Facility..." In other words, SDGV will control operation of the gaming facility during the term of the contract, which is seven years. The matters that SDGV would control include: use of vendors; rates; pricing; charges to guests or patrons; concessioners; the issuance of credit; the granting of complementaries; the terms of admittance to the gaming facility for purposes of entertainment; staffing levels; and the type and character of publicity, marketing, advertising, entertainment, and promotion. These demonstrate that the GMA is merely a contract governing the operations of the existing gaming facility. Its approval will not result in any direct or cumulative impacts to the physical environment.

This ROD, the DSEIS and FSEIS do not discuss or decide upon the environmental and other off-reservation impacts related to the construction and operational baselines of the gaming facility because they are not within the scope of the Proposed Action. The decision to construct the gaming facility was an independent determination made by JIV and was never subject to NIGC review. These effects, however, were reviewed by JIV in its Final Tribal Environmental Evaluation (FTEE) in 2013. Pursuant to the Tribe's Gaming Compact with the State of

California, JIV was required to enact an environmental protection ordinance which incorporated the policies of the National Environmental Policy Act¹ and the California Environmental Quality Act.² The ordinance that was ultimately approved required the Tribe to prepare an environmental impact report, in this case the FTEE, and to consult with relevant government agencies and the public regarding the report's findings. In 2013, following the completion of that environmental review process and in accordance with the JIV's ordinance and Compact, the Tribe accepted the results of the FTEE, and elected to move forward with the project. Consequently, since the decision to complete the gaming facility on the Tribe's reservation was not part of the Proposed Action, its effects are not included within this ROD, nor as effects of the Proposed Action within the DSEIS, or the FSEIS.

Additionally, as set forth in the DSEIS, FSEIS, and the administrative record related to the Proposed Action, approval of the GMA will provide JIV with a dependable, sustainable source of income to allow it to achieve self-sufficiency, self-determination, and a strong tribal government. These effects are consistent with the goals of the Indian Gaming Regulatory Act, which was enacted to promote tribal economic development.³ These are beneficial economic factors associated with the Proposed Action that may properly be considered by the NIGC Chair.⁴

With the issuance of this ROD, NIGC announces that the Proposed Action is the preferred alternative in accordance with 40 C.F.R. § 1505.2. The NIGC Chair finds that the Proposed Action will not result in any significant impacts to the environment and that it will provide JIV with the best opportunity for developing and maintaining a source of revenue sufficient to allow it to meet the needs of its tribal members in accordance with Federal policies enunciated in the IGRA, the Indian Reorganization Act, and related laws and regulations. The NIGC Chair's decision is based on his review of the DSEIS, the FSEIS, the administrative record, and comments received from the public, federal agencies, state agencies, local government entities, and potentially affected tribes.

FOR FURTHER INFORMATION CONTACT:

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¹ 42 U.S.C. §§ 4321-4370h

² Cal. Pub. Res. Code §§ 21000-21178

³ See 25 U.S.C. § 2701(4).

⁴ See 40 C.F.R. § 1505.2(b).

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ATTACHMENTS

Attachment I – Final SEIS Notices

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1.0 INTRODUCTION

1.1 History of the JIV Reservation and Gaming Facility

The Jamul Indian Village (JIV) is a federally recognized Indian tribe, and the JIV Reservation is located in the unincorporated portion of southwestern San Diego County, approximately one mile south of the community of Jamul. The JIV Reservation occupies approximately six acres of land, and is held in federal trust for the benefit of JIV. State Route 94 (SR-94) provides regional access to the JIV Reservation, including from downtown San Diego, which is located approximately 20 miles to the west. Local access to the JIV Reservation is provided directly from SR-94 via Daisy Drive.

In 1999, JIV entered into a Tribal-State Gaming Compact with the State of California pursuant to IGRA. JIV's initial proposal contemplated the acquisition of approximately 101 acres of additional land in order to build a large casino-resort/hotel complex. Acquisition of the additional lands would proceed via a fee-to-trust transfer and would require Bureau of Indian Affairs approval. JIV also proposed to enter into a gaming management contract as part of this larger casino-resort complex project, subject to NIGC approval of the contract. During this early phase of the request, the BIA served as the lead agency while NIGC acted as a cooperating agency. The agencies subsequently developed an EIS for the proposed fee-to-trust and management contract requests. The notice of availability (NOA) for the Draft EIS was published in the Federal Register on January 17, 2003, and after considering all comments, the NOA for the Final EIS was published on November 14, 2003.

Following 2003, JIV greatly reduced the size and scope of its proposal. JIV redesigned its gaming project to remove the resort/hotel component and ensure that the JIV gaming facility component would fit entirely within the existing six-acre JIV Reservation. Because the gaming facility was redesigned to fit entirely on the existing Reservation, and was constructed entirely on the existing Reservation, the fee-to-trust conveyance of additional land was no longer necessary and BIA approval was no longer needed. The Tribe thus withdrew its fee-to-trust application for the 101 acres.

In accordance with its obligations under the Tribal-State Gaming Compact, JIV evaluated all environmental effects of the redesigned gaming facility through preparation of a Final Tribal Environmental Evaluation (FTEE). Between the release of the Draft and Final Tribal Environmental Evaluation, the JIV provided a public comment period and held a public meeting to accept comments on the Draft Tribal Environmental Evaluation. All written and oral comments provided by the public during the comment period were responded to and incorporated into the FTEE. The FTEE was finalized in 2013 and the Tribe completed the redesigned gaming facility on its Reservation.

Having withdrawn its fee-to-trust application, it could have chosen to manage the gaming facility on its own and thereby eliminated all federal involvement in the project. Instead, however, JIV continued to pursue the proposed GMA with SDGV to professionally manage the gaming facility. Since the Indian Gaming Regulatory Act requires the NIGC Chair to approve a

gaming management agreement before it can become legally enforceable, this became the only aspect of the project still subject to federal review. Consequently, because BIA no longer had any role in the project NIGC replaced it as lead agency.

The gaming facility, itself, was always designed to be located on JIV's Indian lands; however, in conjunction with the redesign of the project, several aspects changed. Features that were originally designed to be located on adjacent land north of the proposed project were moved to fit within the existing reservation. The reconfiguration of the project together with the passage of time since the publishing of the Final EIS in 2003, led the NIGC to develop and issue a Supplemental Environmental Impact Statement to address the changes. The NIGC had no authority regarding the other aspects of the revised project, and therefore it addressed only alternatives that concerned the GMA (i.e., 1) the No Action Alternative pursuant to which JIV would manage the gaming facility; and 2) the Proposed Action whereby SDGV would manage the proposed gaming facility). No other alternatives were addressed in the Supplemental Environmental Impact Statement.

1.2 Description of the Proposed Action

If approved, the Proposed Action would allow SDGV to manage the day-to-day operation of the JIV gaming facility. SDGV would select food and beverage vendors; set service rates and product pricing; levy charges to guests or patrons; hire and fire concessioners, control the issuance of credit to guests or patrons; determine the terms of admittance to the gaming facility for purposes of entertainment; determine staffing levels and staff organizational structure; and control the type and character of marketing, advertising, entertainment, and promotion for the gaming facility.

1.3 Purpose and Need for the Proposed Action

The purpose and need for implementing the GMA with SDGV is to provide for a level of professional management of the gaming facility that will ultimately improve the long-term economic condition of JIV and its members through the development of stable, sustainable sources of employment and revenue. Revenues generated from the gaming facility will promote tribal economic development, self-sufficiency, and strong tribal government, including supporting social, governmental, and educational programs for tribal members, all as Congress intended in enacting IGRA.

2.0 ANALYSIS OF ALTERNATIVES

2.1 The No Action Alternative

Under the No Action Alternative, the Tribe would manage the gaming facility's day-to-day operations. JIV's Tribal government would assume responsibility for selection of all vendors; setting of prices/rates; charges to guests/patrons; concessioners; issuance of credit; granting of complementaries; the terms of admittance to the gaming facility for purposes of entertainment; staffing levels and staff organizational structure; and the type and character of publicity, marketing, advertising, entertainment, and promotion.

2.2 Comparison of Alternative and Proposed Action

Approval of the Proposed Action would result in experienced, professional management of the gaming facility's operations. SDGV is a wholly owned subsidiary of Penn National Gaming. Penn National was incorporated in 1982, and became a publicly traded company in 1994. It operates twenty-six gaming and racing facilities in seventeen jurisdictions. In the aggregate, its facilities feature approximately 31,000 gaming machines, 800 table games and 3,000 hotel rooms. Moreover, since 2012, Penn National and their joint venture partner have opened thirteen Hollywood branded regional facilities in eight states. This extensive experience in the gaming industry enables SDGV to immediately step in as manager for the Tribe and maximize the profit potential of the gaming facility.

By contrast, JIV does not have any gaming management experience. Therefore, it is likely that, at least at the outset of the gaming facility's operations, it would not be able to manage with maximum efficiency. Rather, the Tribe would experience an initial "learning curve" before optimal results are achieved. This lag could increase operating costs and reduce net revenues. SDGV's management of the gaming facility would presumably result in greater net income and substantially greater profits than those realized through facility management by JIV.

3.0 DISCUSSION OF FSEIS ENVIRONMENTAL IMPACT ANALYSIS

3.1 Environmental Impacts Associated with the No Action Alternative

The Final Rule for the Department of Interior's Implementation of NEPA (October 15, 2008) states that "[t]he 'no action' alternative is not the alternative that results in 'no change' to the environment; rather it represents the state of the environment without the proposed action or any of the alternatives."⁵ Since the NIGC did not have the authority to prevent JIV from constructing the gaming facility or to control the gaming facility's operational baselines, it was required to identify a no action alternative based on the predictable action the JIV would take if the Proposed Action was denied.⁶ The predictable action documented by the FSEIS is the completion and opening of the gaming facility and the JIV managing its day-to-day operations instead of SDGV. Therefore, these actions constitute the No Action Alternative for purposes of this environmental review.

As mentioned throughout this ROD, the impacts associated with the No Action Alternative were analyzed and reviewed as part of the Tribe's 2013 FTEE. The effects analyzed within the FTEE are incorporated into the FSEIS and the accompanying administrative record as they are effects associated with the No Action Alternative. Since those impacts were not within the scope of the NIGC's decision-making authority, the NIGC was only responsible for reviewing the effects of the Proposed Action against those incorporated into the No Action Alternative rather than against a baseline that assumes no change to the environment.⁷

⁵ 73 Fed. Reg. 61291, 61310 (October 15, 2008).

⁶ See 46 Fed. Reg. 18026 (March 23, 1981).

⁷ 73 Fed. Reg. 61291, 61310 (October 15, 2008).

3.2 No Additional Environmental Impacts Associated with the Proposed Action

As discussed in section 2.2 above, the Proposed Action and No Action Alternative differ only in terms of the entity managing the gaming facility operations and the potential profits to be realized through facility operations. No new temporary or permanent structures beyond those identified in the FTEE will be erected as part of the Proposed Action. Moreover, approval of the GMA does not alter the external look or scope of the gaming facility, and does not change the operational baselines as reviewed and discussed within the approved 2013 FTEE. The GMA is merely a contract to manage the operations of the existing gaming facility to maximize the monetary benefit to JIV.

Consequently, the SEIS documents the findings of the previously completed FTEE, evaluates the effects of the Proposed Action against the No Action Alternative and concludes that approval of the GMA would not result in environmental effects greater than those associated with the No Action Alternative. The FSEIS demonstrates that with or without the Proposed Action, each of the factors analyzed will have the same resultant impact on the environment. Therefore, it concludes that implementation of the Proposed Action would not result in any additional environmental impacts as compared with the No Action Alternative.

4.0 ENVIRONMENTALLY PREFERABLE ALTERNATIVE(S)

As explained in Section 3.0 above, implementation of the Proposed Action instead of the No Action Alternative does not result in any additional effects on the physical environment. Because both the Proposed Action and the No Action Alternative result in the same amount of environmental impacts, both are considered environmentally preferable alternatives.⁸

5.0 PREFERRED ALTERNATIVE

As discussed herein, the purpose and need for the Proposed Action is to provide JIV with the opportunity to develop and maintain a source of revenue sufficient to allow it to meet its governmental needs and the needs of its tribal members in accordance with Federal policies enunciated in the IGRA, IRA, and related laws and regulations. As discussed in Section 2.2, management of the gaming facility by SDGV is the best option to maximize JIV's profits to allow it to meet its obligations and benefit its tribal members. Penn National, SDGV's parent corporation, has successfully managed gaming facilities for more than thirty years and can immediately apply its experience to maximize operational efficiencies at the gaming facility. Those increased efficiencies will result in greater initial net profits and revenues to the Tribe than those associated with the No Action Alternative.

For the reasons stated above, the NIGC Chair finds that the Proposed Action is the preferred alternative because the revenue realized by JIV through SDGV's management of the gaming facility would be substantially greater than the revenue realized through facility management by JIV. Accordingly, approval of the GMA with SDGV best meets the purpose and need of the Proposed Action.

⁸ See 40 CFR §1505.2.

6.0 MITIGATION MEASURES

All mitigation measures associated with the No Action Alternative were analyzed and incorporated into the 2013 FTEE. Since those measures were incorporated into the No Action Alternative and are not within the authority of the NIGC to control, they are not discussed here. In any event, there are no additional impacts imposed through implementation of the Proposed Action and, therefore, no mitigation measures are required.

7.0 DECISION TO IMPLEMENT THE PREFERRED ALTERNATIVE

The NIGC Chair selects the preferred alternative as described herein. This decision is made based upon the analyses and information contained in the DSEIS, FSEIS, and the administrative record related to that analysis. Based upon the information and analyses contained in the foregoing documents, the NIGC Chair finds that the preferred alternative will not result in any adverse effects on the environment and it will maximize the economic benefit to JIV over and above the economic benefit that could be realized through the No Action Alternative.

8.0 SUMMARY OF RESPONSES TO COMMENTS ON THE SEIS

In accordance with the requirements of 40 C.F.R. § 1503.4, the NIGC considered and responded to all comments submitted in connection with the DSEIS, the Notice of Availability (NOA) for which was published in the Federal Register on April 8, 2016. All comments on the DSEIS and the responses to those comments are attached to the FSEIS in accordance with 40 C.F.R. § 1503.4(b).

Although NIGC was not required to solicit and consider comments on the FSEIS,⁹ it nevertheless afforded interested parties an opportunity to comment on the FSEIS. The NOA for the FSEIS was published in the Federal Register on July 8, 2016. The purpose of this section is to briefly describe and respond to the comments on the FSEIS.

The majority of comments on the FSEIS restated comments previously submitted on the DSEIS. The comments primarily related to the effects of the construction of the gaming facility and the baseline operational effects of having the gaming facility on the JIV reservation, rather than the effects associated with the Proposed Action being considered by NIGC. As explained in the DSEIS and the responses to comments on the DSEIS, the JIV gaming facility is not part of the Proposed Action. The Proposed Action consists solely of the approval of the GMA between the JIV and SDGV. The NIGC is not responsible for evaluating the environmental consequences of the JIV gaming facility and is not responsible for imposing mitigation to alleviate any environmental impacts associated with the presence of the JIV Gaming Facility on the Tribe's reservation. The NIGC is responsible, through the SEIS, only for addressing the environmental consequences, if any, of approving the GMA between the JIV and SDGV. For reference, the environmental impacts of the JIV gaming facility and its presence on the JIV reservation were previously addressed through two public processes: (1) JIV's 2013 Final Tribal Environmental Evaluation, and (2) the California Department of Transportation's 2016 State Route 94 Improvement Project Final Environmental Impact Report.

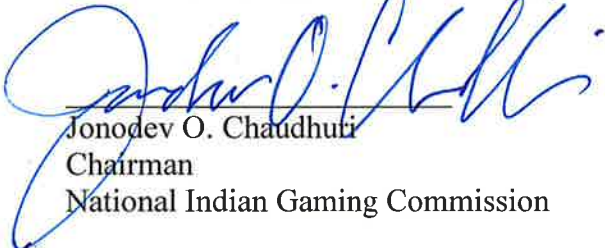
⁹ See 40 C.F.R. § 1503.1(b).

Furthermore, certain comments on the SEIS concerned the NIGC's decision not to hold a public hearing on the SEIS; however, NEPA does not require federal agencies to hold public hearings.¹⁰ The decision whether or not to hold a public hearing rests solely with the federal agency.¹¹ The NIGC made the decision not to hold a public hearing due to 1) the extensive public review previously provided for the JIV gaming facility project through the FTEE, and 2) the limited scope of the Proposed Action. With regard to the public review of the FTEE, five public hearings were held on the gaming facility over a twelve-year period, allowing ample opportunity for the public to provide input on gaming related issues, including gaming management. The NIGC, therefore, determined that holding an additional public hearing would not significantly contribute to an understanding of the issues. Second, while the Proposed Action is limited to the issue of gaming management, the majority of written comments provided during the SEIS scoping period and the DSEIS comment period did not address NIGC's review of gaming management, but instead focused on traffic circulation and safety as the main issue. Given that the JIV could operate the gaming facility without the Proposed Action, none of the physical effects commented on applied to the project under review by the NIGC.

In sum, by soliciting and responding to two rounds of written comments, and in light of the nature of the comments received, the NIGC afforded all interested parties ample opportunity to participate in the review and approval process for the Proposed Action.¹²

9.0 SIGNATURE

By my signature, I indicate my decision to implement the preferred alternative.


Jonodev O. Chaudhuri
Chairman
National Indian Gaming Commission

9/30/16
Date: _____

¹⁰ See 40 C.F.R. § 1506.6(c).

¹¹ *Id.*

¹² The NIGC also received comments on the SEIS pointing out that an incorrect email address for NIGC's receipt of comments was provided in a letter to interested parties. The NIGC refers these commenters to the Notice of Availability of the FSEIS, which discloses that the correct email address, (Andrew.Mendoza@nigc.gov), was provided in the NOA that was published in the Federal Register. Furthermore, the NIGC notes that the physical address for NIGC was provided in the NOA, as was the telephone number for NIGC. Thus, all interested parties were able to submit comments via U.S. mail or contact NIGC by telephone to obtain a different email address.