



Preserving America's Heritage

November 14, 2006

Mr. Brad Mehaffy, REM
NEPA Compliance Officer
National Indian Gaming Commission
1441 I Street, N.W., Suite 9100
Washington, D.C. 20005

REF: *Proposed Approval of a Management Contract for the Expansion of Existing Gaming Facility by the Poarch Band of Creek Indians
Wetumpka, Alabama*

Dear Mr. Mehaffy:

On October 3, 2006, the Advisory Council on Historic Preservation (ACHP) received the additional documentation regarding the referenced undertaking. ACHP requested this information in response to your notification that the National Indian Gaming Commission (NIGC) was reviewing the Poarch Band of Creek Indians' (Poarch Band) proposed management contract for expansion of the existing gaming facility on Hickory Ground, a property listed in the National Register of Historic Places. Based upon this documentation, it is apparent that activities undertaken by the Poarch Band prior to the completion of the review required by Section 106 of the National Historic Preservation Act (NHPA) have adversely affected the National Register-listed property.

According to the documentation provided, the Poarch Band sponsored extensive investigations and ultimately data recovery at Hickory Ground between 1988 and the present. The investigations included archaeological site identification surveys within the approximately 16-acre trust property and the approximately 5-acre tract of fee land. As a result, a multi-component archaeological site, Hickory Ground, was delineated, boundaries expanded, and finally, extensive archaeological data recovery was undertaken, including the removal of numerous human burials. As we understand, the recovered remains, artifacts, and site documentation are in various stages of analysis and curation by the Poarch Band's consultants.

Regrettably, the archaeological surveys and data recovery were not carried out in compliance with Section 106 of the NHPA. Since the Section 106 process must be initiated by a Federal agency prior to the initiation of project activities, it is unclear why the applicant, a tribe with a tribal historic preservation office approved by the National Park Service pursuant to Section 101(d)(2) of the NHPA, proceeded with project planning and archeological investigations. As you know, the Federal agency must consult with the State Historic Preservation Officer (SHPO), any Indian tribes that attach religious and cultural significance to historic properties affected by the undertaking, and other appropriate stakeholders, and provide adequate notification to the public in carrying out the steps of the Section 106 review.

ADVISORY COUNCIL ON HISTORIC PRESERVATION

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Based on the information provided, there was no Federal agency review of the archaeological investigations carried out by the Poarch Band; no consultation with the Alabama SHPO prior to excavation of the portion of the site on fee lands, and no consultation with any other Indian tribe, particularly the Muscogee Creek Nation. The initial notification of the ACHP (see 36 CFR 800.6(a)(1)) did not occur until after the destruction of the site. Furthermore, there is no indication that the public has been notified about the nature of the undertaking and its effects on historic properties (36 CFR 800.3(e)).

In your correspondence, you indicate that the Poarch Band completed more than 90% of the archeological data recovery within the area of potential effect for the proposed project. In the initial letter to the ACHP regarding this project, you invited us to participate in consultation to resolve the potential adverse effects of the undertaking. You have also indicated that NIGC intends to invite the Alabama SHPO to participate in any further Section 106 consultation, and have outlined steps NIGC will take to complete the Section 106 review process for any areas where there has been no land disturbance. NIGC has indicated that it proposes to develop a memorandum of agreement with all parties following consultation.


Please note, however, that Section 110(k) of the NHPA requires that

Each Federal agency shall ensure that the agency will not grant a loan, loan guarantee, permit, license, or other assistance to an applicant who, with intent to avoid the requirements of section 106 of this Act, has intentionally significantly adversely affected a historic property to which the grant would relate, or having legal power to prevent it, allowed such significant adverse effect to occur, unless the agency, after consultation with the Council, determines that circumstances justify granting such assistance despite the adverse effect created or permitted by the applicant (16 U.S.C. 470h-2(k)).

While NIGC has provided documentation regarding archeological work conducted to date, we have no indication of NIGC's views regarding the applicability of Section 110(k) and no record of the views of the Alabama SHPO and others, specifically the Muscogee Creek Nation regarding this matter. In accordance with Section 800.9(c)(2) of the ACHP's regulations, NIGC must determine whether or not the Poarch Band's actions were undertaken with the intent to avoid the requirements of Section 106. If NIGC determines that this did occur, NIGC should notify the ACHP and provide documentation specifying the circumstances under which the adverse effects to the historic property occurred and the degree of damage to the integrity of the historic property. This documentation must include any views obtained from the applicant, SHPO, and other parties known to be interested in the undertaking. Within thirty days of receiving such information, unless otherwise agreed to by NIGC, the ACHP will provide the agency with its opinion as to whether circumstances justify NIGC granting its approval to the applicant and any possible mitigation of the adverse effect. If, after considering the views of the ACHP, NIGC determines to grant its approval, NIGC should consult further with the ACHP and other consulting parties to conclude a memorandum of agreement for treatment of the remaining effects to historic properties resulting from the project.

Should you have any questions or wish to discuss this matter further, please contact Valerie Hauser, Native American Program Coordinator at 202-606-8530, or by email at vhauser@achp.gov.

Sincerely,



John L. Klima

Director

Office of Federal Agency Programs