

SEMINOLE TRIBE OF FLORIDA

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February 12, 2011

VIA EMAIL TO REG.REVIEW@NIGC.GOV

Tracie Stevens, Chairwoman
Steffani A. Cochran, Vice Chairwoman
Daniel Little, Associate Commissioner
National Indian Gaming Commission
1441 L Street, N.W. Suite 9100
Washington, DC 20005

ATTN: Lael Echo-Hawk, Counselor to the Chairwoman

Re: Comments on Notice of Inquiry and Request for Information (75 Fed.Reg.70680
(Nov. 18, 3010))

Dear Chairwoman Stevens, Vice-Chairwoman Cochran and Commissioner Little:

Attached are the Seminole Tribe of Florida's comments on the NIGC regulations in addition to those submitted on February 10, 2011.

Thank you for the opportunity to comment and I look forward to working with you in this important endeavor.

Sincerely,


Mitchell Cypress
Chairman

C: Tribal Council
Allen Huff, Seminole Gaming Commission Chair
Jim Shore, General Counsel
Ed Jenkins, Director of Gaming Compliance and Regulation

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IV. Regulations Which May Require Amendment or Revision

Part 502-Definitions of this Chapter

(1) Net revenues (Sec. 502.16)

The Indian Gaming Regulatory Act, Sec. 2703 defines “net revenues” as gross revenues of an Indian gaming operation less amount paid out as, or paid for, prizes and total operating expenses, excluding management fees.

This definition doesn't state any requirement for net revenues to be calculated in accordance with generally accepted accounting principles (GAAP) and the accounting basis to be used is not identified. Net revenues can be presented on a cash or accrual basis of accounting: either one may yield a different amount. Tribes that prepare audited financial statements are required to use the accrual basis of accounting and therefore it would be appropriate for the definition to be changed to include the wording “accrual basis of accounting” and that all calculations follow GAAP.

Once the definition of net revenues has been changed as stated above, then the definition of “net revenue – management fee” would not need to be changed.

(b) Net revenues – allowable uses

There is no need to further define by regulation allowable uses for net gaming revenues under IGRA. As noted above, IGRA clearly defines net revenues. Both IGRA and 25 CFR Part 290- Tribal Revenue Allocation Plans- define how net gaming revenues may be used. How tribal parties consider cash flow in the context of calculating or distributing net gaming revenue should be left up to each tribe given its individual financial requirements. For example, the financial integrity of a tribe's gaming operations could well fall within the tribe's approved RAP in the category of economic development (e.g. capital expansion of a casino) or it may be included in total operating expenses prior to the calculation of net gaming revenues. It is submitted that those are tribal decisions to be made outside the regulatory jurisdiction of the NIGC.

However, if the NIGC decides to further define “total operating expenses” through

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regulation, consideration should be given to each gaming tribe's accounting needs in this matter. This is of low priority.

As to the allowable uses of net gaming revenue, it is more important that the NIGC consider rescinding or completely rewriting its **Bulletin No. 05-1**.

First of all, the basic premise for issuance of the Bulletin appears flawed. On the first page, the NIGC recognizes that "tribal governments are well aware of the requirements for the uses of net revenues" but then drifts into a justification of the Bulletin on the grounds that the NIGC "attempt(s) to assist in the resolution of misunderstandings and disputes that can, and do, develop between tribal members and tribal entities regarding Indian gaming issues such as expenditures of gaming revenues." For gaming tribes, allocation of net gaming revenues is at the heart of the government functions of budgeting, human service delivery systems development and strategic planning typically within a political and cultural tribal context. In any event, 25 CFR Sec. 290.23 requires that tribes have mechanisms for dispute resolution regarding the allocation of net gaming revenue and per capita distributions. It is within those forums that intra-tribal "misunderstandings or disputes" be resolved without federal interference in the form of NIGC assistance.

Most of the Bulletin is simply a restatement of existing law and regulations with a few examples of typical tribal programs thrown in for apparent good measure. But more importantly, some of the Bulletin's statements are so imprecise as to be misleading or at best confusing. For example, the second full paragraph on page 2 states "Direct distribution of payments to individual tribal members, outside of a government program, are not allowed." Under a gaming tribe's fiscal year budget, this blanket prohibition might not be applicable if the tribe also utilizes non-gaming funds to make such payments over which IGRA does not apply and the NIGC lacks jurisdiction. The Bulletin then points out the exception to this rule: per capita payments - which in fact form the entire legal basis for Revenue Allocation Plans. The NIGC should assume that all gaming tribes know that they cannot make per capita distributions of net gaming revenues without an approved RAP.

While citing limited examples of "permissible" tribal programs and capital expenditures, the Bulletin then extends beyond the scope of the statutory five categories of allowable uses of net gaming revenue to take the position that tribes must justify their programs "to serve one or more needs or requirements of the tribal community" and

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must “establish eligibility criteria tied to financial needs or requirements of tribal membership” or “consider or determine whether the benefits received by members will be subject to federal withholding and taxation”. These attempts to add to the RAP requirements simply exceed the purpose of IGRA and the proper role of the NIGC. Even if well intentioned, the Bulletin unnecessarily intrudes into the essence of tribal government functioning and seeks to substitute federal government standards and values for tribal judgments and self-determination.

Finally, any NIGC Bulletin on uses of net gaming revenues need not substantively address issues of taxability. Tribes are not subject to state or federal taxes. RAP requirements include notification by tribes to their tribal members of federal taxes due and paid for per capita distributions. The entire last page of the Bulletin is dedicated to issues that the IRS’s Office of Indian Tribal Governments can address with tribes.

While the Bulletin may have been generated out of a spirit of being helpful, it could be interpreted as being paternalistic. If tribes need guidance on the operations of their governments, let them ask for help during audit discussions.

B. Part 514—Fees

The Commission should consider a late payment system in lieu of a Notice of Violation. This is of high priority.

As noted in the Notice of Inquiry, a NOV could lead to closure of a gaming facility. The issuance of a NOV is a very serious matter and can have extremely negative ramifications to a tribe contrary to the stated purpose of IGRA: As a means of promoting tribal economic development, self-sufficiency, and strong tribal governments.

And once an NOV is issued, the ancillary economic damage sustained by a tribe may be immediate and difficult to reverse. See comments under **K. Part 573 Enforcement**, below.

C. Part 518—Self-Regulation of Class II

See Seminole Tribe of Florida submission of February 10, 2011.

D. Part 523—Review and Approval of Existing Ordinances and Resolutions

Eliminate as obsolete. This is low priority.

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F. Proceedings Before the Commission

The Commission should consider issuing through rule-making Appellate Rules that might generally consolidate and/or coordinate existing Parts 519, 524, 539, and 577. Any additional procedural rules should be clear and not create undue financial burden for appeals by tribes.

Whether existing regulations regarding procedural rules are changed or not, the Commission's adherence to whatever is stated in the statute and regulations is most important. For example, the NIGC has taken the position that after the issuance of a NOV, but before an appeal is filed by a tribe, the tribe must be represented by an attorney pursuant to ABA Model Rules of Professional Conduct on the grounds that the Chairman who issued the NOV is represented by the NIGC General Counsel or Acting General Counsel. Yet NIGC regulation 25 CFR 577- Appeals Before the Commission - states that in the appeal of a NOV "[w]henver a representative (including an attorney) has entered an appearance...service shall be made upon the representative". Part 577.6. This regulation clearly indicates that a tribe need not be represented by an attorney in an appeal yet in practice must be represented by an attorney upon the issuance of a NOV and prior to an appeal. Either further clarification of NIGC practice or NIGC practice consistent with its regulations would assist tribes.

G. MICS & Technical Standards Part 542 Class III; Part 543 Class II; Part 547

See Seminole Tribe of Florida submission of February 10, 2011.

I. Part 599- Facility Licenses

See Seminole Tribe of Florida submission of February 10, 2011.

K. Part 573 – Enforcement

Pursuant to Part 573.3 Notice of Violation, the Chairperson has the discretion to issue a Notice of Violation and, prior to a tribe's appeal, should have the discretion to withdraw it.

The issuance of a Notice of Violation may have serious economic impacts on a tribe. There is nothing in Part 573 regarding the NIGC issuing a press release announcing a

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NOV on the same day of its issuance but this does occur. The immediate impact of a NOV issuance could be that a tribe's investment rating could be downgraded leading to increased costs in the issuance of bonds for gaming expansion or other economic development. If a NOV is withdrawn then the damage to a tribe's investment grade rating could be ameliorated.

V. Potential New Regulations

C. Communication Policy or Regulation Identifying When and How the NIGC Communicates with Tribes.

In communicating with gaming tribes on a general government to government basis, the approach for the NIGC's Notice of Inquiry seemed very effective. When communicating about particular regulatory matters with individual tribes, the NIGC should determine the official leadership structure of the tribe and address written communications to the Chairperson, Governor, President or other leader. Those leaders then may, or may not, delegate communication to staff. As well, the NIGC would need to determine whether a tribe has a regulatory gaming entity and then direct communication to the head of that entity as well. Any written approach to communications must be broad enough to respect the individuality of hundreds of gaming tribes which may argue against further regulation.

VI. Other Regulations

A major issue that is not addressed in regulation but is extremely important to the sovereignty of tribes and the integrity of the NIGC is whether the NIGC has the legal authority to enforce tribal compliance with individual Revenue Allocation Plans and the expenditure of net gaming revenue for tribes who do not make per capita distributions.

In other words, if the NIGC takes the position that it has the authority under IGRA to tell

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gaming tribes what specific government operations or programs, general welfare payments, programs or distributions, economic development, charitable gifts, or local government operations tribes may fund with net gaming revenue, then it should so state with specificity and transparency in its regulations. To date, it has not.

If IGRA does not specifically and clearly grant the NIGC the powers to police tribal compliance with Revenue Allocation Plans or with general budgetary funding under the five broad categories of allowable uses of net gaming revenues, then the NIGC must not use its usual standard refrain that it has broad authority over matters necessary to carry out the duties of the Commission to expand its regulatory jurisdiction inconsistent with its statutory jurisdiction.

IGRA is crystal clear in granting the authority to approve Revenue Allocation Plans to the Secretary of the Interior. Nowhere in IGRA does it state that the NIGC shall police tribal compliance with those plans. On the issue of NIGC authority over RAP compliance and the general use of net gaming revenue without a RAP within IGRA's five categories, Interior's regulations are most instructive. As pertains to violations of IGRA, Sec. 290.10 provides that if tribes make per capita payments (also defined) without approved revenue allocation plans then either the DOJ or NIGC may enforce the per capita requirements of IGRA. Just as the NIGC regulations do not provide for NIGC authority to enforce net gaming revenue expenditures with or without a RAP, nor do Interior regulations except for per capita payments made without a RAP. It would appear that the NIGC does not have the authority to police RAP compliance under IGRA's five broad categories of allowable uses.

In the past, the NIGC has sought to expand its statutory and regulatory authority by some verbal slights of hand. For example, the NIGC has taken the position that certain payments made within a tribal program may be considered by it as per capita payments and therefore in violation of IGRA. This is because the NIGC chose to ignore the legal definition of per capita payments : "the distribution of money or other thing of value to **all** members of the tribe, or to **identified groups of members**"...which "**does not apply to payments made for social welfare, medical assistance, education, housing ...**".

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The NIGC therefore has attempted to worm itself into the internal workings of tribal programs based upon Interior's regulation allowing NIGC enforcement of per capita distributions thereupon requiring tribal programs to have everything from eligibility criteria to policies and procedures to specific wording ("shall" rather than "should"). Will NIGC review of tribal government operations for RAP compliance be next ? Would NIGC approve a charitable gift to the Native American Rights Foundation but deem a charitable gift to a reservation church in violation of IGRA ?

In the CRIT case, the Court noted "a clear distinction between the power to approve the terms of an ordinance or contract and the power to police compliance with the terms of the ordinance or contract". 383 F.Supp.2d 123,134. Likewise, if Interior has the authority over revenue allocation plans on what basis would the NIGC have authority to police RAP compliance ? These issues should be addressed by the NIGC.

The Chairwoman's testimony before the U.S. Senate and the Commission's Notice of Inquiry both address the need to take a fresh look. Tribal comments to date support that view and effort.