



CROW TRIBE EXECUTIVE BRANCH

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Crow Gaming Commission

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November 2, 2006

Hon. Philip Hogen, Chairman
Vice-Chairman Choney
National Indian Gaming Commission
1441 L Street, N.W.
Washington, D.C. 20005

Re: Class II Classification Standards and Facility Licensing

Dear Chairman Hogen and Vice-Chairman Choney:

This document constitutes the Crow Tribal Gaming Commission's (Commission) comments and suggestions regarding the National Indian Gaming Commission's (NIGC) Class II Technical Standards Draft Regulation and the Draft Proposed Facility Licensing Regulations. As a regulatory Commission, we are quite concerned with the overall process NIGC utilized developing these proposed regulations in addition to the certain negative consequences these regulations will create once final and effective.

First, the Commission is concerned that NIGC has, frankly, failed to respectfully engage in meaningful government-to-government consultation regarding the Class II Technical Standards Draft Regulation. As you are aware, NIGC is mandated to work with Indian Tribes through methods that "fully respect the rights of self-government and self-determination due tribal government," as required by President Bush in his Executive Memorandum Subject: Government-to-Government Relationship with Tribal Governments, September 23, 2004. Also, the Commission is concerned with the NIGC's unilateral development of its facilities licensing regulations. NIGC completely failed to consult with and/or solicit Tribal comments prior to the publication of the proposed facilities licensing regulations.

Class II Game Classification Standards

As you are aware, the Tribal Gaming Commissions are the primary regulating entities in accordance with the Indian Gaming Regulatory Act (IGRA), see 25 U.S.C. 2710(b)(1). The proposed regulations shift the primary regulation responsibility from the Tribal Gaming Commissions directly to NIGC. The proposed regulations directly intrude

upon the sovereign right of the Tribe to regulate its Class II operations with limited oversight by NIGC. As written, the proposed regulations would explicitly exclude both the Crow Tribe and the Crow Gaming Commission from any significant participation in game classification that currently is within the Crow Gaming Commission's realm of authority.

Frankly, it appears the proposed regulations would completely deprive the Crow Gaming Commission of all authority to make this critical legal determination. Most problematic, is that this critical legal determination would be conveyed to independent game testing laboratories. The NIGC would require the private laboratories to apply rules wholly promulgated and controlled by the NIGC. Further, the laboratories would be subject only to NIGC oversight and control. The Tribes have absolutely no control over the laboratories and their legal determinations and/or rules applied to them. As the Crow Tribe's regulators, the Crow Commission would be prohibited from establishing its own laboratories and tests.

The Crow Commission basically has no further jurisdiction in the area. NIGC will dictate what games the Crow Tribe can operate in its Casino under the NIGC's rules, regulations and tests. Clearly, this change in regulation is contrary to IGRA. If adopted, the proposed rules will immediately divest the Crow Gaming Commission of an important and crucial function, one clearly contemplated by Congress when it adopted IGRA, see 25 U.S.C. 2710(b) et.seq. Again, as written, the proposed regulations constitute an unprecedented unlawful shift of governmental authority directly to the private sector (private laboratories). Again, as the Crow Tribe's regulating body, the Commission objects to the divestiture of its duties and responsibilities under IGRA without a supporting statutory change in IGRA. NIGC's unilateral divestiture of the Tribal Gaming Commissions of their powers, duties and responsibilities under IGRA is both patently unfair and contrary to law.

Also problematic in this area is the fact that under the proposed rules, only the NIGC Chairman may object to a classification decision. Tribes have no right to appeal or object to the decision unless the Tribe is defending itself in an enforcement action. Additionally, it is important to note that the NIGC will approve or certify the laboratories annually. In short, NIGC will control the laboratories, the tests and the decisions. The Tribe has no rights whatsoever in this process. Again, as primary regulators, the Crow Tribal Gaming Commission will have absolutely no control over game classification. A review of IGRA shows absolutely no statutory right or support for this result. The NIGC will now select and authorize what games the Crow Tribe can operate. Certainly if Congress intended to empower NIGC in this arena, it would have specifically provided NIGC such power in IGRA. Congress did not.

In summary, the Crow Gaming Commission is the primary regulating entity on the Crow Reservation. The proposed Class II classification standards remove our primary authority and replace it with NIGC authority. Again, the results are clearly contrary to IGRA and appear unlawful. The Crow Tribe properly adopted a Gaming Ordinance that has been approved by the NIGC in accordance with IGRA at 25 U.S.C.

2710(b)(1)(b). The Crow Tribe created the Crow Gaming Commission and empowered it to primarily regulate Class II gaming on the Crow Reservation. The proposed regulations shift the Crow Gaming Commission's duties directly to the NIGC. Again, the Crow Gaming Commission objects to this unlawful shift of authority since it appears to be contrary to the spirit and intent of IGRA.

Facility Licensing Requirements

The NIGC's publication of the facility regulations without a pre-consultation with Tribes appears to violate the clear mandate that requires all federal agencies to initially consider Tribal Law approaches to resolving regulatory issues on Reservations. Again, the Crow Gaming Commission will be the entity charged with enforcing the facility license requirements. However, none of the Tribes were consulted prior to the release of the proposed requirements. Therefore, there is absolutely no way NIGC has investigated the potential impacts the requirements may have on Tribes and the Tribes' regulating entities.

First, the Crow Gaming Commission is concerned with the draft facilities regulations because it appears the regulations ignore the intent of Congress when it passed the Indian Gaming Regulatory Act (IGRA). Further, it appears NIGC is assuming authority not provided the NIGC under IGRA. As the Commission understands it, the background of Indian gaming is and was to encourage tribal sovereignty. The primary purpose of IGRA was clearly to "provide a statutory basis for the operation of gaming by Indian Tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." Congress carefully and respectfully allocated shared regulatory authority between Tribes, the NIGC, and States. Clearly, IGRA provides that a "separate license issued by the Indian tribe shall be required for each place, facility, or location on Indian lands." (25 U.S.C. 2710(b)(1)(B)). There is no further language in IGRA providing the NIGC authority to replace existing Tribal rules, regulations and requirements with the NIGC's rules, regulations and requirements in this arena. Absent specific authority, it appears the NIGC has overstepped its authority provided by IGRA.

The Crow Gaming Commission is well aware of the requirements under IGRA and has worked hard to comply with such requirements under the Crow Gaming Ordinance. However, it appears that the draft NIGC facility requirements regulation contains an exhaustive list of items the Crow Tribe would have to provide the NIGC to issue the Tribal Facility License. In short, the NIGC proposes to completely replace the Tribe's requirements with its own NIGC requirements. A cursory review of the NIGC proposed requirements clearly shows an undue burden will be imposed upon the Crow Gaming Commission with a complete disregard for the Tribe's existing licensing requirements.

As primary regulators of Class II Gaming on the Crow Reservation, the Commission additionally objects to the burdensome requirements imposed by the NIGC

for the Commission's Indian land eligibility determination. The requirements proposed completely replace the Crow Tribe's governmental regulation of its facilities. As a sovereign nation, the Crow Tribe possesses the sovereign right to manage its own affairs, including where and how it licenses its gaming facilities. NIGC has already reviewed and approved the Crow Gaming Ordinance. Quite frankly, NIGC has no authority to demand a change in Tribal Law. Nowhere in IGRA is the NIGC empowered to unilaterally change, alter or replace Tribal Laws with Federal Agency rules and regulations. Again, the NIGC approved Crow Gaming Ordinance already contains a facility license requirement which the Gaming Commission and Crow Tribe have complied with to date. Imposing an additional layer of federal regulation on an area left to the Tribe is completely beyond IGRA and not acceptable to the Crow Gaming Commission. Again, for whatever reason, the NIGC appears to be replacing the Tribal Regulating Commissions without any authority to do so.

Finally, by providing these comments, the Crow Gaming Commission is in no way conceding the fact that NIGC appears to lack the jurisdiction to promulgate the facility licensing requirements. In fact, the Crow Gaming Commission would like it noted that it specifically objects to the NIGC's assertion that "IGRA does not specify what a facility license must contain, nor how the NIGC is to readily ascertain that gaming facilities are in compliance with these provisions." That assertion is without merit. IGRA is quite clear that the *Tribe* must issue a license for each facility. IGRA does not provide the NIGC any authority to actually write the facility licensing requirements for the Tribe. Again, the NIGC appears to be attempting to assume control over an area reserved for Tribes by IGRA. Clearly this act is contrary to federal law and not acceptable.

Conclusion

The Crow Gaming Commission thanks you in advance for considering its comments. As the primary regulators on the Crow Reservation, the Crow Gaming Commission has worked hard over the years to comply with tribal, state and federal rules and regulations. The Crow gaming operations are free of corruption and are controlled directly by the Crow Tribe not outside elements or entities. It appears that working with the Tribal Regulators and not against Tribal Regulation is paramount for our success. In closing, we would request the NIGC to provide tribal governments better opportunities for meaningful government-to-government consultation in the future with the knowledge and understanding that the Tribe's are the primary regulators under IGRA on their respective Reservations.

Sincerely,



Robert Rides Horse, Sr.
Chairman, Crow Gaming Commission