



June 30, 2022

E. Sequoyah Simermeyer, Chair  
National Indian Gaming Commission  
United States Department of the Interior  
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Re: Comments on NIGC's proposed amendments to 25 C.F.R. Part 571

## I. Introduction

These comments are made in response to the notice of proposed rulemaking published by the NIGC in the Federal Register on June 1, 2022. This proposed rule was drafted after the NIGC held a series of consultations with tribal governments on proposed revisions to its regulations, including potential revisions to the regulations governing NIGC audit standards.

The Indian Gaming Agency ("IGA") therefore submits the following comments, which are included under headings of the subsections of 25 C.F.R. Part 571 below. We are pleased to provide input on these proposed changes.

## II. Comments

### A. Submissions of the Annual Audit (25 C.F.R. Part 571)

- a. Part 571.12(b)(3)(i)-(ii) states "The independent certified public accountant expresses an opinion on the financial statements. An adverse opinion must be submitted, but does not satisfy this requirement unless:
  - i. It is the result of the gaming operation meeting the definition of a state or local government and the gaming operation prepared its financial statements in accordance with generally accepted accounting principles (GAAP) as promulgated by Financial Accounting Standards Board (FASB), or;

- ii. the adverse opinion pertains to a consolidated audit pursuant to paragraph (d) of this section and the operations not attributable to the adverse opinion are clearly identified.”

Respectfully, we believe that this topic warrants further consideration. While we greatly appreciate the NIGC’s willingness to clarify its proposed language following the last comment period, we believe there is more work to be done on this topic. Certainly, an adverse opinion raises concerns, but the effect of this revision would be to create a new basis for an enforcement action without an intermediate investigative step. A tribal government, now compelled to submit an adverse opinion, appears to be open to the same penalty as if it forwent any submission whatsoever. We suggest that in these circumstances, the more appropriate first step would be to send a letter of concern and an offer of technical assistance. Accordingly, as currently written, we remain deeply troubled by this proposed revision.

Additionally, it is unclear to us how the NIGC will treat disclaimed opinions. During the consultation period last year, disclaimed and adverse opinions were lumped together in terms of treatment. Now, adverse opinions are addressed, but we are unable to find any mention of disclaimed opinions. Are they required to be submitted, like adverse opinions, or does the NIGC plan to allow tribal governments to choose whether to submit disclaimed opinions? If a tribal government does submit a disclaimed opinion, are there any instances in which a disclaimed opinion can satisfy the financial reporting requirements? We would greatly appreciate more explanation on how the NIGC plans to treat disclaimed opinions.

- a. Part 571.12(d) states “If a *gaming operation* has multiple gaming places, *facilities* or locations on the tribe's Indian lands, the annual audit requirement of paragraph (b) of this section is satisfied if:...” (emphasis added)

Prior to the 2021 Series B consultation period, the NIGC released a summary of proposed changes to 571, which included explanations behind the intent of some of the changes. In regard to the definition of “gaming operation” and “gaming facility,” it was stated that the Audit Department saw these terms as being synonymous and it was the intent of the NIGC to relay that through its proposed changes. It is not clear to us that the terms “gaming operation” and “gaming facility” are synonymous. We view an operation as the ownership structure operating one or more gaming facilities, which is where the gaming activity takes place. We do understand that the terms are often used interchangeably in the vernacular, but technically, we see each term as representing a related, but distinct concept. In fact, some tribal governments may create multiple gaming operations to operate one or more gaming facilities while the second operation may operate one or more other facilities.

#### **B. Small and Charitable Gaming (25 C.F.R. Part 571)**

While not necessarily bound solely to small and charitable gaming, due to the disproportionate potential impact, we question the proposed elimination of a “waiver requirement.” We do appreciate that there seems to be a more uniform approach to this waiver, though we also question

whether there was a “requirement” in the first place. However, the new proposed language still provides a lot of ambiguity that small operations will have to navigate. First, per § 571.12 (c)(2), these small operations may submit reviewed financial statements, rather than audited ones, only if the TGRA has given them permission and the NIGC is notified of said permission. But it is currently unclear of how the NIGC should be notified and when it should be notified if permission is given. We would greatly appreciate more clarity on that issue. Second, per § 571.12 (c)(3), the Chair has sole, and rather undefined, discretion to request additional information “if the Chair of the NIGC has reason to believe that the assets of a gaming operation are not being appropriately safeguarded or the revenues are being misused under IGRA....” Based on our reading of this provision, it appears that the Chair is not bound by any standard in these provisions outside an ambiguous and overbroad “reason to believe.” We strongly urge the NIGC to either strike this provision or, at the minimum, provide a clear standard on how such a standard would be decided.

We are generally in favor the creation of a third tier of financial reporting for charitable gaming operations. However, we urge the NIGC to consider raising its \$50,000 gross revenues threshold in its proposal. We would recommend at least a threshold of \$100,000.

During the first round of consultations on this issue, two options were pitched to tribal governments. At that time, we favored Option 1, particularly for new charitable games, and it appears that the NIGC selected said option. Option 1 enables new charitable gaming operations to receive the benefits from this third tier of financial reporting since there is no requirement for strict compliance with § 571.13 for the previous three years. Charitable gaming assists Tribal Governments to provide meaningful relief to tribal members through general welfare, economic development, funding tribal government operations or to donate to tribal charitable organizations. We appreciate the Commission’s approach to limit audit requirements for tribal charitable gaming and we believe that it should be completely exempt from auditing under \$2 Million annual revenue. It’s not feasible for Tribal Charitable Gaming Organizations to operate under existing regulations, and they should be exempt from regulation if it is bringing in less than \$100,000 per annum. The Tribal Gaming Regulatory Commission should have discretion to establish that threshold.

However, the proposed subsection (f)(4) in § 571.12 which states that “[i]f the Chair of the NIGC has reason to believe that the assets of a charitable operation are not being appropriately safeguarded or the revenues are being misused under IGRA, the Chair may, at his or her discretion, require any gaming operation subject to this paragraph (f) to submit additional information or comply with the annual audit requirement of paragraph (b) of this section,” is still objectionable. This language, which is eerily identical to the equally objectionable § 571.12(c)(3), appears to open the door for patchworked enforcement of this regulatory provision and would permit a future Chair to eliminate this third tier of financial reporting altogether without going through notice and comment rulemaking. Accordingly, we oppose the continued inclusion of this provision.

### **C. Limited Submission Window for Comments**

To close out our comments, we would like to address the limited window tribal governments and organizations had to respond to the proposed rule. Simply put, we believe that thirty (30) days was not enough time, especially as the NIGC has permitted sixty (60) days for responses in the recent past, such as the solicitation of comments on self-regulation. We recommend that the NIGC, for future comment periods, allow interest parties, but especially directly impacted tribal governments, sufficient time to carefully and thoughtfully provide their comments. To do so, we suggest keeping the comment windows open for a minimum of sixty (60) days, as well as ensure that all listed methods of submission are in working order.

### **III. Conclusion**

We hope that these comments will be accepted in the collegial spirit with which they are submitted. We appreciate your consideration and hope these comments prove useful to the Commission in determining whether and to what extent revisions to the regulatory provisions discussed herein are warranted.

Respectfully,



Charles Bailey, Chairman/Executive Secretary  
Standing Rock Tribal Gaming Commission