



November 1, 2021

Via Electronic Mail

Mr. E. Sequoyah Simermeyer, Chair National Indian Gaming Commission
1849 C Street, N.W. Mail Stop # 1621 Washington, D.C. 20040
Email: NIGC.Outreach@nigc.gov

Re: Comments on the NIGC Request on Series B

On behalf of the Spirit Lake Nation Gaming Commission, I share this Memorandum to set forth our Comments on the NIGC's Request on Series B.

Class I Gaming: Traditional Games, Social Games and Sports Contests

IGRA defines "class I gaming" to mean "social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations." Class I gaming is regulated exclusively by the tribes and is not subject to the provisions of IGRA.

At the Spirit Lake Nation, our Dakota People have traditions of athletic sports contests, including horse racing, foot racing, contests of athletic skill such as ball gaming, archery, target shooting, fishing, hunting, wrestling, competitive dancing, and in the past 150 years, rodeo, basketball, football, and baseball, and similar games. To promote funding for students to attend games, other education related and civic purposes, our promotional clubs often conduct raffles for traditional prizes, such as quilts, hand-made goods, traditional items, such as fishing rods and reels, hunting rifles, etc., and cash prizes of minimal value. Today, these games are essential "social games" engaged in by our people in connection with traditional celebrations and ceremonies, such as pow-wows, rodeos, and school sports contests. Tribal games such as these are Class I and subject to the regulation of the Tribe, pursuant to the plain language of the statute. This is an essential aspect of Indian Self-Determination and the NIGC must not interfere with our Class I Gaming.

Small and Charitable Gaming and Self-Regulation.

The IGRA identifies small and charitable gaming and self-regulation. In our view, the NIGC should establish a program for self-regulation of small and charitable gaming:

- The Tribal Gaming Regulatory Agency Should Have the Primary Authority to Self-Regulate Small and Charitable Gaming;
- TGRA Should Issue License per Tribal Ordinance and/or Regulations; and



- TGRA Should Develop A Reasonable System for Small and Charitable Gaming Oversight, including Financial Accountability Pursuant to Tribal Law and Regulations.

More specifically:

a. Audit Standards for Small and Charitable Gaming Operations – Part 571

1. *Elimination of NIGC Waiver Requirement for Reviewed Financial Statements in 25 C.F.R. § 571.12*

While initially presented as doing away with the “waiver requirement” in the information provided by the NIGC for this consultation series, we have a difficult time reading the NIGC’s proposed revision to 25 C.F.R. § 571.12 (c) as alleviating a bureaucratic burden to the benefit of tribal governments. Instead, it appears that this provision is actually making it more difficult for small gaming operations to qualify under § 571.12 (c) by decreasing regulatory flexibility. Accordingly, the SPIRIT LAKE NATION GAMING COMMISSION believes that the elimination of the NIGC’s authority to waive the requirement that financial statements must have been properly submitted for the previous three years by smaller gaming operations in § 571.12 (c) actually amounts to the elimination of a potential lifeline for smaller gaming operations rather than the elimination of a regulatory “requirement.” Therefore, the SPIRIT LAKE NATION GAMING COMMISSION cannot support this proposed revision.

In the currently un-revised 25 C.F.R. § 571.12 (c), a gaming operation that has gross gaming revenues of less than \$2 million during the prior fiscal year will satisfy the annual audit requirement of § 571.12 (b) if two conditions are met. The first condition is not at issue here, but the second condition states, “[u]nless waived in writing by the Commission, the gaming operation’s financial statements for the three previous years were sent to the Commission in accordance with § 571.13.” (Emphasis added).

As currently written, it appears that the regulation contemplates circumstances where the NIGC may waive the requirement that a gaming operation’s financial statements must be sent to the NIGC for the three previous years in accordance with § 571.13. The proposed regulatory changes here do not eliminate a “Commission waiver requirement” because there is no requirement that the NIGC waive anything before small gaming operations are authorized to submit reviewed (rather than audited) financial statements. Instead, the NIGC is proposing to do away with a tool that could be used by smaller gaming operations that have just commenced business operations within the past three years or have otherwise been impacted by some disaster outside of their control that rendered them unable to meet all necessary regulatory requirements within the past three years (i.e., a global pandemic). In other words, we do not view this proposed regulatory change as necessarily beneficial to smaller tribal gaming operations and prefer to keep the current language which maintains some semblance of flexibility in the financial reporting process. We have the same opinion to the proposed revision to § 571.12 (e)(4).



Moreover, before § 571.12 (c) was promulgated and was still in the rulemaking phase, the NIGC proposed an additional requirement to this section mandating that a tribal government “submit a statement to the Commission supporting the decision to use reviewed financial statements in place of audited financial statements.”¹ However, this requirement was removed from the final rule after the NIGC agreed with several commenters’ objections to this requirement as being “unnecessary” and “vaguely worded.”² Further, the commenters stated, and the NIGC agreed, that “the requirement could cause further non-compliance as tribal governments attempt to understand the scope of what is required[.]”³ We believe that any new requirement that a TGRA inform the NIGC of “permission” to submit a review of the financial statements may encounter similar issues.

Lastly, the SPIRIT LAKE NATION GAMING COMMISSION is concerned with how the proposed § 571.12 (c) would interact with § 571.12 (d) and (e). Subsections (d) and (e) deal with the submission of consolidated financial statements of multiple gaming locations if particular conditions are met. We are trying to understand how these sections can be navigated if a tribal government has multiple gaming operations, some generating more than \$2 million per year, while some are small and/or charitable gaming operations. We would appreciate clarification how the NIGC proposes to mesh these sections if the proposed revision to § 571 (c) is adopted. Would tribal governments be able to put their gaming operations into different baskets, so to speak, or if a tribal government chooses to consolidate small gaming operations under 571.12 (e), will they still be able utilize the proposed § 571 (c) or (f) for any other applicable small/charitable gaming operation? Essentially, does the NIGC envision a scenario where a tribal government can pick and choose how it submits financial information to the NIGC from any combination of § 571 (b) – (f)?

2. Options For Financial Reporting by Charitable Gaming Operations

The SPIRIT LAKE NATION GAMING COMMISSION is generally supportive of the NIGC in its efforts to create a third tier of financial reporting for charitable gaming operations under its regulations. Promulgating standards for charitable gaming operations that are less burdensome than those for tribal gaming (generally), or those for qualifying small gaming operations could facilitate an increase of charitable gaming in Indian country. We believe that encouraging charitable gaming as a way of raising money for certain tribal or community-based causes is aligned with the central purposes of IGRA. However, we are concerned that the NIGC’s proposals here may not go far enough to promote widespread utilization of this third tier of financial reporting.

¹ See Amendments to Various National Indian Gaming Commission Regulations, Proposed Rule, 73 Fed Reg. 75242, 78251 (Dec. 22, 2008).

² Amendments to Various National Indian Gaming Commission Regulations, Final Rule, 74 Fed. Reg. 36926, 36932 (July 27, 2009).

³ *Id.*



First, the SPIRIT LAKE NATION GAMING COMMISSION believes that the \$50,000 gross revenues threshold may be unnecessarily low. In the NIGC's October 21, 2021, virtual consultation, Chairman Simmermeyer and NIGC attorney Steve Iverson stated that this number was reached after reviewing financial reporting waiver requests, and finding that many fell below this \$50,000 amount. It was also stated that in the formulation of this threshold, that the size of a gaming operation was an important factor in assessing the risks present with that operation's gaming activity. While this certainly helps provide context for why the proposed \$50,000 gross revenues threshold was chosen, we still believe that increasing this number, even to just \$100,000, will have positive effects for tribal governments, tribal members, and communities and causes outside of Indian country. In short, if the NIGC can better promote charitable gaming through its regulatory scheme, then the SPIRIT LAKE NATION GAMING COMMISSION considers it a win for all involved, and we believe that increasing the proposed \$50,000 threshold does just that.

Second, we do not believe that there should just be an Option 1 or an Option 2. We believe that, as discussed below, charitable gaming operations that have been in operation for less than three years will automatically benefit more from Option 1, while those that have been in operation, and compliant with § 571.13, for three years would benefit more from Option 2. Accordingly, we believe that in order to encourage new charitable gaming operations and their continued existence, and to encourage already established charitable gaming operations, that both options should be available to tribal governments. The NIGC seemingly has some level of comfort with both options, and while some form of communication between a tribal government or TGRA and NIGC would be required so the NIGC would be aware of which option a charitable gaming operation is taking, we believe that having both tools available would create more positive outcomes for a wider variety of tribal governments.

A. Option 1 –

The first option proposed by the NIGC provides that the annual audit requirement in § 571.12 (b) will be satisfied if a charitable gaming operation delivers detailed information regarding its activities to its TGRA monthly. Subsequently, the TGRA would be required to provide the NIGC with a yearly certification that the financial information from the charitable gaming operation has been reviewed, gaming has been conducted in an appropriate manner, and net gaming revenues have been appropriately expended. The SPIRIT LAKE NATION GAMING COMMISSION is particularly supportive of this Option, as it permits new charitable gaming operations to be subjected to less rigorous requirements than submitting audited financials per § 571.12 (b), but without the requirement that they have complied with § 571.13 for the previous three years.

However, the SPIRIT LAKE NATION GAMING COMMISSION is concerned with the level of authority the NIGC Chair has in determining that this less-onerous standard is no longer available to an otherwise compliant charitable gaming operation. Under Option 1's proposed § 571.12 (f)(4), it states that "[t]he Chair of the NIGC may, at his or her discretion, require any gaming operation subject to this paragraph (f) to comply with the annual audit requirement of paragraph (b)." The SPIRIT LAKE NATION GAMING COMMISSION is concerned that this proposed



revision gives unilateral authority to the NIGC Chair to revoke the status of a charitable gaming operation that otherwise meets the requirements for this third tier of financial reporting without any standards to base his or her decision on. Without any such standards written into the regulatory provision for when subsection (f) would not be available, charitable gaming operations would be at the total mercy of how an NIGC Chair feels about a charitable operation at any given time. Without any standards to base its decision on, this would also place the NIGC at risk of assertions of arbitrary and capricious decision-making. In fact, the proposed subsection (f) in Option 1 could essentially be written out of the NIGC's regulations for *all* prospective and otherwise qualified charitable gaming operations by a future NIGC Chair if he or she so chooses. Therefore, while the SPIRIT LAKE NATION GAMING COMMISSION prefers Option 1 (if we *must* pick between 1 and 2), this proposed regulatory change seemingly contains an on/off switch provision that we simply cannot support.

B. Option 2

The SPIRIT LAKE NATION GAMING COMMISSION appreciates how the NIGC has drafted its proposed Option 2 due to it being concise and relatively straightforward, admittedly an extremely difficult thing to do when drafting regulations. However, we read this provision as being an impossible threshold to meet unless a charitable gaming operation has been operating for at least three years. We are also concerned that the language in Option 2 – section (f)(2) may lead to inadvertent noncompliance with this section due to the vagueness of the requirement that “the tribe or TGRA informs the NIGC of such permission [to submit review of financial statements].”

We could be more supportive of this Option if it operated with the use of a double-negative (i.e., no non-compliance), such as the gaming operation has received no notice of violation from the NIGC concerning non-compliance with § 571.13 for the previous three years. Accordingly, we believe that Option 2 works best if it is an alternative available concurrently with Option 1, so that the establishment or continuation of charitable gaming operations are encouraged no matter how recently those operations have commenced gaming activities.

b. Audits – Parts 571.12 and 571.13

1. Adverse and Disclaimed Opinions

The SPIRIT LAKE NATION GAMING COMMISSION is deeply concerned with the proposed amendments to 25 C.F.R. §§ 571.12 (b)(3), (d)(5), and (e)(5) that specify that either a disclaimed opinion or adverse opinion does not satisfy the audit submission requirements. This is especially so when considering how this proposed revision, coupled with the clarification that an audit report and opinion would be required in proposed §§ 571.12 (b) and 571.13 (a)-(c), would change the NIGC's current practices. It appears to us that these proposed revisions are really just creating another potential avenue of non-compliance, as we do not believe that this is simply a clarifying edit to reflect the NIGC's current practices. In other words, before we can get behind this proposed revision, we request additional clarification regarding how the NIGC currently handles the



submission of adverse and/or disclaimed opinions, and what the consequences would be – especially for consolidated audits – under the NIGC’s proposed revisions to these provisions.

2. Clarification that Audit Report and Opinion Are Required Submissions

As stated above, the SPIRIT LAKE NATION GAMING COMMISSION is concerned with the proposed amendments to 25 C.F.R. §§ 571.12 (b) and 571.13 (a)-(c), as it seems to increase a tribal government’s exposure to an enforcement action in an area in which a tribal government does not exert total control. Accordingly, the SPIRIT LAKE NATION GAMING COMMISSION requests that the Commission provide information regarding how it currently handles these regulatory sections, and whether an enforcement action would currently be initiated against a tribal government if an auditor does not express an opinion on a tribal government’s financial statements.

3. Prerequisites for Consolidated Audits

A. Only Operations with the Same Owner May Be Consolidated

The SPIRIT LAKE NATION GAMING COMMISSION does not object to the proposed revision here clarifying that consolidated audits under 25 C.F.R. § 571.12 (d) and (e) may only occur if the gaming operations share a common owner.

B. Clarifying “Facilities” and “Operations” Are Synonymous

While the SPIRIT LAKE NATION GAMING COMMISSION agrees with the Commission’s intent in clarifying that gaming facilities and gaming operations are synonymous in the proposed 25 C.F.R. § 571.12 (d), we disagree with how the Commission is communicating this. The proposed 25 C.F.R. § 571.12 (d) seems to indicate that the terms are not synonymous, but instead have two distinct meanings. This is inferred from the Commission’s proposed language because both terms are still included in the proposed revision.⁴

We believe that the intention of the Commission would be better served by amending the definitions section of the Commission’s regulations to flatly state that gaming operations and facilities are synonymous with each other. This would provide greater clarity throughout the Commission’s regulations, and the Commission would not have to include both terms in § 571.12 (d) as currently proposed. On the other hand, it is not apparent that the terms are, in fact, synonymous. In our view, a gaming facility is the location where gaming activities take place while a gaming operation encompasses the overall management structure that operates the gaming facility. A gaming operation may operate one gaming facility or it may operate multiple gaming facilities. It is nonetheless a single operation.

⁴ Proposed 25 C.F.R. § 571.12 states, “If a tribe has multiple *gaming facilities, or operations* on the tribe’s Indian lands . . .”



4. Delegation of Waiver Granting Authority

While the SPIRIT LAKE NATION GAMING COMMISSION is in favor of streamlining waiver requests under 25 C.F.R. § 571.12 (d)(4) and (e)(3) by permitting the Commission to delegate waiver authority to another department, the SPIRIT LAKE NATION GAMING COMMISSION feels it necessary to clarify which entity or entities may serve as the Commission's designee(s). Without knowing the realm of possibilities regarding who this designee may be, we are uncomfortable supporting this proposed revision. Will there be any possibility of appealing the designee's decision in denying a waiver request? Will there be any specific standards the designee must follow in deciding whether to grant a waiver? At the very least, there is quite a lot of communication between tribal governments and the NIGC through consultations, etc., so how will we be sure that the designated entity can be held accountable for its decisions, or at least be receptive to tribal input where appropriate? These are only some of the questions that immediately arise when an agency is granting itself Spirit Lake Nation Gaming Commissioner authority to delegate important functions to an infinite number of potential designees.

Accordingly, the SPIRIT LAKE NATION GAMING COMMISSION believes that greater specificity is needed to clarify which entities may be delegated the authority to approve or deny waiver requests under § 571.12 (d)(4) and (e)(3). It is presumed that the designee would be "designated Commission staff," but we believe it is critical that the NIGC identify the potential designee in these regulations so that tribal governments may understand who may exert waiver granting authority over its gaming operations.

Respectfully,

Collette Brown, Spirit Lake Gaming Commission Executive Director