



OFFICE OF THE GOVERNOR

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BILL ANOATUBBY
GOVERNOR

Mr. Jonodev Chaudhuri, Chairman
National Indian Gaming Commission
1849 C Street NW
Mail Stop #1621
Washington, DC 20240

Dear Chairman Chaudhuri:

Included with this letter are the Chickasaw Nation's comments regarding the National Indian Gaming Commission's 2017 Tribal Consultation relating to grandfathered Class II gaming systems. We respectfully urge the Commission to consider our request for the withdrawal of the sunset provision for grandfathered Class II gaming systems under 25 CFR § 547.5(b)(1).

Thank you for your consideration of our comments.

Sincerely,

Bill Anoatubby
Bill Anoatubby, Governor
The Chickasaw Nation

**Comments from the Chickasaw Nation
Regarding 25 CFR § 547.5(b)(1).**

The Chickasaw Nation (“Nation”) welcomes the opportunity to provide its comments to the National Indian Gaming Commission pertaining to the sunset provision of the grandfathering clause found in 25 C.F.R. Part 547 – Minimum Technical Standards for Gaming Equipment Used With the Play of Class II Games (Class II Technical Standards). The National Indian Gaming Commission (NIGC) has earned high marks for its continuous efforts to reach out to tribal governments and solicit tribal input during this important regulatory review process. We applaud the NIGC for engaging with tribal governments during the early planning stages of the rulemaking process. Early tribal involvement is a key step towards developing a final rule that will be at least minimally acceptable to tribal governments. We continue to be encouraged by the NIGC’s commitment to accommodate tribal concerns and propose revisions that will bring the regulations closest to the purposes and goals of the Indian Gaming Regulatory Act (IGRA).

Likewise, the Nation applauds the National Indian Gaming Association’s Class II Subcommittee and the work the members have completed relating to this topic. The Nation has reviewed the subcommittee’s interim report, and believes the report and the subcommittee’s investigation will be very helpful to the NIGC’s review and consideration of this important issue.

As we have stated in the past, the Nation is concerned that the NIGC may not fully appreciate the extent of the harm that is being threatened by the sunset clause of the grandfather provisions. In short, the clause threatens the continued success and viability of the Class II gaming industry by requiring the forced removal of certain game products and systems from the marketplace on an arbitrary date without any evidence of past or present harm. The economic impact of such removal will be disastrous for the tribal gaming industry and will have a devastating effect on a vitally important portion of tribal gaming. Significant human and economic capital has been invested by tribal governments in constructing gaming systems based on the lawfulness of certain products and their availability in the marketplace. In addition to creating a substantial hardship on tribal gaming operations, the enforcement of the “sunset” provisions of the Standards will invalidate Class II components previously validated by federal court decisions. Many millions of dollars have been spent by tribal governments in litigation to vindicate the lawfulness of certain systems. If allowed to stay, the regulation will directly defeat IGRA’s goal “to promote tribal economic development, tribal self-sufficiency, and strong tribal governments.”¹

The Nation also remains unconvinced that the NIGC has the statutory authority to promulgate and enforce the grandfather provision of the Part 547 Technical Standards,

¹ 25 U.S.C. § 2702(1).

and views attempts to enforce the grandfather provision as a usurpation of the role of tribal regulatory bodies in overseeing tribal gaming operations.

Finally, it is unclear what enforcement of the sunset provision would accomplish. The NIGC has stated the purpose for the promulgation and enforcement of the Technical Standards is to protect the security and integrity of tribal gaming operations. Again, the NIGC has provided no evidence that grandfathered games pose any such risks.

Economic Impact on Tribal Gaming

Tribal leaders, regulators, attorneys, manufacturers, and other tribal gaming industry representatives agree virtually unanimously that the sunset clause will cause severe economic harm to tribal governments. The Nation is disappointed that, despite this overwhelming opposition, the agency has not adequately addressed the principal objection that has been raised by the tribal gaming community by requiring the removal of all grandfathered Class II gaming systems at the end of the sunset period. The requirement that all previously manufactured products be removed from the marketplace is notably inconsistent with fundamental principles of administrative law. We can think of no administrative agency, including those with specific statutory authority to promulgate product standards that would require a general recall of products in the marketplace without a showing of a defect or flaw that poses an imminent threat.

The substantial economic harm to Class II gaming if the grandfathered games are removed has been well documented. An early economic study sponsored by the NIGC concluded that the economic impact of the regulations would result in a loss of tribal gaming revenue ranging from \$1.4 to \$2.2 billion dollars.² Current estimates of lost revenues appear to be consistent with the earlier projected losses and have not diminished over time.

NIGC Statutory Authority for Promulgation of Technical Standards

It is questionable whether the NIGC has the appropriate statutory authority to promulgate the Technical Standards under the Indian Gaming Regulatory Act (“IGRA”); it is a well-settled tenet of administrative law that an agency may only exercise power pursuant to its organic statute.³ Section 2706(b) of the Act defines the powers of the NIGC relating to Class II gaming.⁴ Specifically, the NIGC is tasked with monitoring Class II gaming on

² Alan Meister, *The Potential Impacts of the October 2007 Proposed Class II Gaming Regulations* (2008).

³ See e.g. *BMW of North America, Inc. v. New Motor Vehicle Bd.* (1984) 162 Cal.App.3d 980, 994, 209 Cal. Rptr. 50 [“It is fundamental that an administrative agency has only such power as has been conferred upon it by the constitution or statute and an act in excess of the power conferred upon the agency is void.”]

⁴ The NIGC’s powers relating to class II gaming are codified at 25 U.S.C. § 2706:

(b) The Commission—

- (1) shall monitor class II gaming conducted on Indian lands on a continuing basis;
- (2) shall inspect and examine all premises located on Indian lands on which class II gaming is conducted;
- (3) shall conduct or cause to be conducted such background investigations as may be necessary;

Indian lands and inspecting Indian lands on which Class II gaming is conducted. The IGRA's grant of rulemaking authority is limited to regulations necessary to implement the express provisions of IGRA. The Technical Standards, in effect, create new product standards, which is an exercise of authority beyond what is expressly conferred upon the NIGC by the IGRA.

The NIGC previously relied on the statement of purpose included in the IGRA, which stated that the purpose of the Act was to ensure that tribal gaming be "conducted fairly and honestly by both operator and players" and "to ensure that the Indian tribe is the primary beneficiary of the gaming operation."⁵ This general policy statement should not be construed broadly to authorize the Commission's enactment of regulations that create product standards for Class II gaming systems. While federal courts are highly deferential to administrative agency interpretations under the *Chevron*⁶ decision, they are not bound by agency interpretations of federal statutes when the statute is not ambiguous. There is no ambiguity in the IGRA provisions that specify the NIGC's enumerated regulatory powers, which are primarily investigative.

Primary Regulatory Authority of Tribal Governments

While it is questionable whether the IGRA provides the NIGC with a statutory basis for the promulgation and enforcement of Technical Standards, it is unquestionably clear that the Act recognizes significant tribal regulatory authority over gaming operations. Specifically, the IGRA's express language vests tribal governments with primary regulatory authority over their gaming operations, subject only to the NIGC's oversight responsibilities as specified in the Act.⁷ We note that the weight of the regulatory responsibility falls most heavily on TGRAs that are responsible for carrying out the day-to-day activities essential to the effective regulation of gaming. In the Nation's view, this is precisely as it should be given that the highest governmental interest in the regulation of gaming belongs to tribal governments. In fifteen of the sixteen sections of Part 547,

(4) may demand access to and inspect, examine, photocopy, and audit all papers, books, and records respecting gross revenues of class II gaming conducted on Indian lands and any other matters necessary to carry out the duties of the Commission under this chapter;

(5) may use the United States mail in the same manner and under the same conditions as any department or agency of the United States;

(6) may procure supplies, services, and property by contract in accordance with applicable Federal laws and regulations;

(7) may enter into contracts with Federal, State, tribal and private entities for activities necessary to the discharge of the duties of the Commission and, to the extent feasible, contract the enforcement of the Commission's regulations with the Indian tribes;

(8) may hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as the Commission deems appropriate;

(9) may administer oaths or affirmations to witnesses appearing before the Commission; and

(10) shall promulgate such regulations and guidelines as it deems appropriate to implement the provisions of this chapter.

⁵ 25 U.S.C. § 2702(2).

⁶ *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), in which the Supreme Court held that courts must defer to agency interpretations of organic statutes where Congressional intent is ambiguous and the agency interpretation is reasonable.

⁷ 25 U.S.C. § 2710(a)(2).

tribal government's primary regulatory authority is recognized. We ask that the NIGC make this recognition in all 16 sections of the regulations and remove the sunset provision to clearly and unequivocally state that tribal governments are the *primary* regulators of their gaming operations consistent with IGRA and the functions of the TGRA.

Impact on Federal Court Decisions

An additional impact of the "sunset" provision is the nullification of federal court decisions upholding the grandfathered gaming systems as Class II games within the definition of the IGRA. The NIGC lacks the authority to overrule Congressional legislation and federal court decisions through its rule-making powers. The IGRA specifically defines Class II games,⁸ and federal courts have been tasked with applying the IGRA definition of Class II games to specific games at tribal gaming facilities.^{9,10} The grandfathered systems that will be phased out from Class II gaming comply with the Congressional definition of Class II games and have been judicially determined to be Class II games under the IGRA. The perpetuation of the "sunset" provision is thus an example of executive overreach through rule-making.

Grandfathered Gaming Systems Do Not Threaten the Integrity of Class II Gaming

In addition to the absence of clear authority to promulgate Technical standards, it appears that most, if not all, grandfathered Class II gaming systems have been operating without any safety or integrity issues for many years. Therefore, it seems arbitrary and capricious for the NIGC to recall such products from the market. Such recall does not appear to be based on reasoned explanations. In general, a recall of products in operation before the

⁸ See 25 U.S.C. § 2703(7):

(A) The term "class II gaming" means—

(i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith)—

(I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations, (II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined, and

(III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards, including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo. . .

⁹ *U.S. v. 103 Electronic Gambling Devices*, 223 F.3d 1091 (9th Cir. 2000). In this case, the 9th Circuit rejected the federal government's arguments that MegaMania, an electronic game, was an illegal gambling device under the Johnson Act. The government focused on the game's ante-up feature, the fact that earnings were not contingent on other players, and that the manic pace and high stakes of the game were not associated with traditional bingo games. The Court found that MegaMania was a valid class II gaming machine under IGRA, and that the government's attempts to re-define bingo based on traditional characteristics of the game undermined the definition of bingo drafted by Congress.

¹⁰ *U.S. v. 162 MegaMania Gambling Devices*, 231 F.3d 713 (10th Cir. 2000). In this action, the 10th Circuit was faced with addressing MegaMania's status as a class II game. The federal government once again made the argument that MegaMania was banned under the Johnson Act. Like the 9th Circuit, the 10th Circuit rejected the government's arguments, finding that because MegaMania linked up players across multiple terminals and allowed for competition amongst the players rather than "the house," MegaMania should be designated as a technologic aid for use in bingo.

regulation is usually triggered by a defect or flaw that poses an imminent threat to human life. The Nation is unaware of any defects, flaws, or threats in relation to grandfathered Class II gaming systems that would warrant a product recall.

The prior NIGC administration acknowledged the absence of evidence of defects in these gaming systems; justification for implementation of the sunset provision relied solely on the basis of a perceived risk of harm. In response to the numerous comments and challenges to the regulation, the former Commission stated that “grandfathered machines have, for the most part, continued to operate with relatively few problems to the patron or the gaming operations. Nevertheless, lack of a major incident in the past does not mean that the grandfathered Class II gaming systems pose no risk to patrons and the gaming operation.”¹¹ As of this date the concerns of the prior NIGC administration have not materialized. The Nation requests that the current NIGC administration revisit the rationale proffered by the previous Commission and find that it is an insufficient basis to support the wholesale removal of Class II gaming systems from operation.

Conclusion

In closing, we again urge the NIGC to reconsider its approach to the grandfather provisions and implement changes that will preserve the honesty and integrity of tribal gaming without destroying its economic stability and future viability. We also ask that you give careful consideration of our comments in your deliberations as you consider revisions that will improve the overall regulatory environment within which Class II gaming is conducted.

For the reasons identified above, we ask the NIGC to consider removing the sunset clause and adding language that will authorize the continued use of any Class II gaming component that was previously certified under current or any pre-existing Technical Standards or approved by judicial ruling. Doing so will recognize the primary regulatory authority that tribal governments have over gaming in their respective jurisdictions, which is what the IGRA intended.

¹¹ 77 Fed. Reg. 58473, 58475.