

June 1, 2017

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 Fort Belknap Gaming Commission's comments regarding the National Indian Gaming Commission's 2017 Consultation on the Technical Standards. The Commission thanks the NIGC for the opportunity to provide comments on this topic. As a small tribe with roughly 7,000 enrollees, our tribe faces severe obstacles to the continued viability of our gaming operations should the grandfather provisions take effect in 2018. As a result, we respectfully urge the Commission to consider our request for the withdrawal of the sunset provision for grandfathered Class II gaming systems.

Thank you for your consideration of our comments.

Sincerely,

Julie Schwenke, Commissioner
Fort Belknap Gaming Commission

**Comments from the Fort Belknap Gaming Commission Regarding the National
Indian Gaming Commission's
Part 547 Grandfather Sunset Provision**

The Fort Belknap Gaming Commission welcome the opportunity to provide its comments to the National Indian Gaming Commission (“NIGC”) on the “sunset” provision of the Technical Standards found in 25 C.F.R. Part 547 (“Class II Technical Standards”) on behalf of the Fort Belknap Indian Community of the Fort Belknap Reservation of Montana (“Fort Belknap Community”) We hope that by engaging in a meaningful dialogue with tribal representatives, the NIGC will modify its regulatory framework to better comport with the purposes and goals of the Indian Gaming Regulatory Act (“IGRA”).

The Fort Belknap Community is a small tribe of roughly 7,000 members, and operates only one gaming location. The small size and limited resources of the Fort Belknap Community makes enforcement of the “sunset” provision especially impactful. 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 particularly for those tribes which lack sufficient resources to bring their Class II gaming systems into compliance with the Part 547 Technical Standards. The economic harm wrought by enforcement of the Part 547 grandfather “sunset” provision² will have disastrous consequences for tribes such as the Fort Belknap Community, directly impairing the ability of our tribe to provide essential services to our members.

Economic Impact

When the previous NIGC administration proposed the Part 547 Technical Standards, there was virtual unanimity amongst tribal gaming stakeholders that such standards would be inimical to tribal gaming. At the time, the NIGC never satisfactorily addressed these tribal concerns, and we remain dissatisfied with the NIGC’s solution to continuously extend the effective date of these provisions rather than simply withdraw them.

All data points to the necessity of withdrawal of the “sunset” provision of the Technical Standards. In an NIGC commissioned economic study, the anticipated impact of the regulation was a loss of tribal gaming revenue of approximately \$1.4 to \$2.2 billion dollars.³

¹ 25 U.S.C. § 2702(1).

² 25 C.F.R. § 547.5(b).

³ Alan Meister, The Potential Impacts of the October 2007 Proposed Class II Gaming Regulations (2008).

In addition to the impact of the sunset provision on tribal gaming revenue, the Fort Belknap Community also faces another unique challenge as a tribe located in Montana. Unlike many other states, our state does not have a model or uniform Class III gaming compact. The state currently has Class III compacts with five of the seven reservations in the state, including the Fort Belknap Community, and each tribe's Class III gaming operations are subject to different terms.⁴ Because of the uncertainty associated with Class III gaming in Montana, Class II gaming is important to the state's tribes as both a source of revenue and an important bargaining chip in compact negotiations.

Statutory Authority

The enactment of these regulations represents an exercise of rulemaking and enforcement powers beyond those given to the agency under the IGRA. An agency may only exercise powers granted to it in its authorizing statute.⁵ The Act defines the powers of the NIGC relating to Class II gaming.⁶ Specifically, the NIGC is tasked with monitoring Class II gaming on 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 NIGC cannot rely on the auspices of the IGRA as authority for the promulgation of the Technical Standards. The IGRA's stated purpose is 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."⁷ This general policy

⁴ <https://dojmt.gov/gaming/state-tribal-gaming-compacts/>

⁵ 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."]

⁶ (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;
- (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.

⁷ 25 U.S.C. § 2702(2).

statement should not be construed broadly to authorize the Commission's removal of grandfathered Class II gaming systems.

TGRA Authority

The IGRA's express language vests tribal governments with exclusive regulatory authority over their gaming operations, subject to NIGC oversight.⁸ As mandated by the IGRA, Tribal Gaming Regulatory Authorities ("TGRA") exercise significant regulatory authority over tribal gaming operations, particularly in regards to day-to-day gaming activities. Tribes have a heightened interest in ensuring the integrity of their gaming operations, so it is appropriate that TGRAs exercise a primary role in regulating tribal gaming operations. We ask that the NIGC remove the sunset provision and allow TRGAs the ability to fulfill their role as primary regulator as assigned by Congress.

Grandfathered Gaming Systems-Integrity

Since the implementation of the Technical Standards, no documented failure of the grandfathered gaming machines or equipment has been published by the NIGC. In fact, historical data evidences success of the grandfathered machines. Therefore, the mandated removal of the machines at the "sunset" date is clearly arbitrary and capricious.

The 2008 Commission openly acknowledged that there were no known threats to the integrity of Class II gaming posed by these gaming systems; justification for these regulations relied solely on a possibility that the integrity may be jeopardized in the future. The 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."⁹ The concerns of the NIGC have yet to arise. The Fort Belknap Gaming Commission requests that the current NIGC administration review the evidence and remove the "sunset" provision from the current regulation.

Conclusion

In closing, the Fort Belknap Gaming Commission again urges the NIGC to remove the sunset provisions from the Part 547 Technical Standards as a means of restoring the primary regulatory role in Class II gaming to the tribes. The economic impact on small tribes such as ours are too great to justify the unwarranted removal or modification of these Class II systems. Again, we thank you for the consideration of our comments on this critical gaming matter.

⁸ 25 U.S.C. § 2710(a)(2).

⁹ 77 Fed. Reg. 58473, 58475.