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May 31, 2017

SUBMITTED VIA EMAIL: Vannice_Doulou@nigc.gov

NIGC

Attn: Vannice Doulou
1849 C. St. NW
Mailstop #1621
Washington, DC 20240

Re: Comment on 25 C.F.R. Part 547 Grandfathered Class II Gaming Systems

Dear Ms. Doulou:

The Wyandotte Nation currently operates three gaming facilities in two states—Oklahoma and Kansas. The RiverBend Casino in Oklahoma offers Class III gaming consistent with a compact between the Wyandotte Nation and the State of Oklahoma. Currently, the mix of games in this facility breaks down as approximately 60% Class III and 40% Class II games. The Wyandotte Nation's other Oklahoma casino, Lucky Turtle, and the Seventh Street Casino in Kansas City, Kansas offer only Class II gaming. The Wyandotte Nation had attempted to negotiate a Class III gaming compact with the State of Kansas several years ago but was not successful. The Nation does not reasonably anticipate entering into a compact with Kansas in the foreseeable future.

On March 7, 2008, the Wyandotte Nation responded to the first solicitation for comments on a set of proposed regulations that included a proposed grandfather provision for Class II gaming systems. The Wyandotte Nation's response to the initial proposal was as follows:

The Nation believes the grandfather provision contained in the Technical Standards should have no time limitation. All current Class II games in the Nation's casinos, as now approved by the Nation's Office of Public Gaming, should forever be recognized as permissible games under IGRA.

Public Submission to NIGC on 03/12/2008. ID: NIGC-2007-0009-0131

Other than the passage time, nothing has transpired that would cause the Wyandotte Nation to change its original passage. In fact, as will be addressed hereafter, the passage of time has provided greater support for the Wyandotte Nation position that the NIGC should

permanently grandfather Class II games existing in the Nation's casinos in 2008 that were approved by the Nation's gaming commission.

1. Application of the Grandfather provision usurps Tribal regulatory authority.

Under IGRA, Congress found that tribal governments "*have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming.*" 25 U.S.C. §2701(5) (emphasis added). Congress also provided through a "statutory basis for the *operation of gaming by Indian tribes*" and a "statutory basis for the *regulation of gaming by an Indian tribe.*" 25 U.S.C. §2702(1) and (2) (emphasis added) IGRA is premised on a strong foundation and presumption of primary tribal operation and regulation of tribal gaming activities.

Within this stated framework, Congress created the National Indian Gaming Commission and conferred limited powers to the NIGC. Under IGRA, the NIGC's role is primarily one of oversight to see that a tribal government implements the "federal standards" set out in the tribe's gaming ordinance. There is no question that the Commission has a "regulatory role" with respect to class II gaming, but the legislative history of IGRA makes clear that the role of the NIGC is not one of usurping the authority of the Tribe's to regulate their own gaming but rather one of limited "oversight" of a tribal government's own regulatory efforts under its tribal gaming ordinance and the provisions contained in the IGRA. While the NIGC is empowered to approve tribal gaming ordinances that meet the statutorily required "federal standards" in the IGRA, [25 U.S.C. §2710(b)(2) and §2710(d)(2)(B)] and is granted the authority to monitor and inspect class II gaming activities [25 U.S.C. §2701(b), the NIGC does not have the authority to veto decisions of the tribal gaming commissions. Yet, the grandfathering provision of Part 547 does exactly that by forcing the tribal gaming facilities to remove Class II machines approved by the tribal gaming commissions based upon the laws and regulations in existence in 2008.

The sunset provision should be removed from the Part 547 regulations and language added that will authorize the continued use of any Class II games previously certified by tribal gaming commissions in recognition that the grandfather provision exceeded the regulatory authority of the NIGC.

2. Part 547 regulations should be applied prospectively. The Wyandotte Nation agrees with the views expressed by many Tribes and their regulatory agencies that the regulations set forth in Part 547 should be applied prospectively and the sunset provision for grandfathered games should be removed. Not only is it unfair and inappropriate for the NIGC to promulgate a rule that has retroactive application to gaming machines in tribal casinos, but it is also prohibited by law. As the Supreme Court has ruled, "federal regulations do not, indeed cannot, apply retroactively unless Congress has authorized that step explicitly." *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988).

A rule is retroactive if its “takes away or impairs vested rights acquired under existing law, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past.” *Covey v. Hollydale Mobile-home Estates*, 116 F.3d 830 (9th Cir. 1997). An agency may only promulgate a rule that has a retroactive result where there is statutory authorization. *Id.* As the Supreme Court held in *Bowen*, rulemaking authority will not, as general matter, be understood to encompass power to promulgate retroactive rules unless that power is conveyed by Congress in express terms. IGRA cannot properly be read to authorize the NIGC to promulgate regulations of retroactive effect, or even to promulgate product standards.

Nothing in the Indian Gaming Regulatory Act indicates that Congress intended for the NIGC to promulgate retroactive regulations with respect to these gaming devices. Prospective application would preserve the Class II gaming systems certified prior to 2008 by the NIGC as well as those that were judicially determined to be permissible Class II gaming systems. Among the grandfathered systems that would potentially be impacted by the Grandfather provision are Class II gaming devices that have been judicially determined to be Class II games under IGRA. *See United States v. 103 Electronic Gambling Devices*, 223 F.3d 1091 (9th Cir. 2000); *United States v. 162 MegaMania Gambling Devices*, 231 F.3d 713 (10th Cir. 2000).

As stated above, in its 2008 comments to the NIGC’s proposed regulations the Wyandotte Nation asserted that the games then currently approved by its gaming commission should forever be recognized as permissible games under IGRA. The Wyandotte Nation reasserts that same position now. The sunset provision should be removed from the Part 547 regulations and language added that will authorize the continued use of any Class II games previously certified by tribal gaming commissions in recognition that the NIGC may not apply the Part 547 regulations retroactively but, if at all, only prospectively.

3. No Rational basis exists for not removing the sunset provision, thereby extending the Grandfather provision indefinitely. When extending the grandfather provision for an additional five years in 2012, the NIGC stated that “The Commission acknowledges 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.” 77 Fed. Reg. 58473, 58475. Now, almost five years later, the NIGC has to again acknowledge that the grandfathered machines have continued to operate without problems to the patron or the gaming operations.

Even if the NIGC had the authority to apply Part 547 regulations retroactively (which it does not), such application cannot be arbitrary and capricious. An agency’s factual findings are not arbitrary and capricious if they are “supported by substantial evidence” and there is a rational connection between the facts found and the choices made. *See Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1368 (D.C. Cir. 2004). The Wyandotte Nation contends that the NIGC’s inclusion of a sunset provision in the grandfather provision is alone sufficient to

render that provision arbitrary and capricious. Not only does it unreasonably interfere with settled expectations as found in the language of IGRA and subsequent regulatory provisions, but, as set out above, it renders heretofore lawful Class II gaming systems unlawful in direct contravention of settled case law. The retroactive application of the Part 547 regulations to technology that was perfectly acceptable at its inception is improper given that it serves no legitimate purpose. The only acceptable grandfather provision is one that is indefinite without strings or conditions.

It was apparent to the Wyandotte Nation, as reflected in its 2008 comments, that the rules enacted in 2008 were not promulgated to advance serious regulatory objectives but were designed to eliminate Class II gaming as a viable means for tribal economic development. The grandfather provision, with its sunset clause, was the most clear evidence of this. No responsible federal agency would establish new product standards and then apply them retroactively to products that have been in the marketplace for years absent a compelling need, and even in that case the factual basis would be supported by objective, credible, and verifiable data. No factual basis was present in support for the implementation of the grandfather provision and its sunset clause.

As the Oklahoma Tribal Gaming Regulator's Association stated in its comments to the grandfather provision in 2012:

these grandfathered games are valid, legal games, which have never presented, nor do they now present a risk of any kind to either the tribes or the patrons. Rather, these legal Class II systems are highly successful and lucrative gaming systems that sovereign tribal governments should have the right to provide to patrons if they choose to do so. In addition, the unilateral decision by the NIGC to limit and ultimately eliminate these legal games is completely inconsistent with the manner in which federal agencies address manufactured products in a rule making process. In essence, the grandfather sunset clause represents an industry-wide recall of a type of product which has posed no threat, and does not now pose a threat to the public.

OTGRA Letter to NIGC, April 10, 2012.

And five years after the OTGRA statement, it remains true. The Class II games impacted by the grandfather provision still has posed no threat to the public. The sunset provision should be removed from the Part 547 regulations and language added that will authorize the continued use of any Class II games previously certified by tribal gaming commissions in recognition that the Class II games impacted by the grandfather provision have not and still do not pose any threat to the public.

The Wyandotte Nation has a very limited number of Class II games that are subject to this grandfather provision. However, whether the Nation is negatively impacted to any great degree is not material in this matter. The Wyandotte Nation is a sovereign Indian tribe. For the

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reasons state above, the grandfather provision found at 25 C.F.R. 547.5 with its sunset provision is an affront to the Nation's sovereignty and the sovereignty of every other Tribe operating its gaming facilities consistent with IGRA. The Wyandotte Nation requests that the NIGC remove the sunset provision from the Part 547 regulations and add language that will authorize the continued use of any Class II games previously certified by tribal gaming commissions.

Sincerely,

A handwritten signature in cursive script that reads "Norman Hildebrand".

Norman Hildebrand
Second Chief
Wyandotte Nation