

BIG SANDY RANCHERIA BAND OF WESTERN MONO INDIANS, TESTIMONY AND COMMENT IN REGARD TO THE NOTICE OF INQUIRY ISSUED BY THE NATIONAL INDIAN GAMING COMMISSION, OFFERED BY THE HONORABLE, CHAIRPERSON ELISABETH KIPP

Many of the issues that were specified in the Federal Register are of concern to our Tribe, but the following comments are based upon our Tribe's experiences and its familiarity with said issues. Hopefully our Tribe's experiences will assist with the formulation of revised and/or amendment to the NIGC's Regulations and will encourage an enhanced review of the Regulations from a day to day regulatory perspective:

REG 502.15 MANAGEMENT CONTRACT THIS IS NOT A PRIORITY

- (1) Should the definition be expanded to include any contract that pays a fee based on a % of gaming revenue?
 - a. NO. This would be an improper and unauthorized expansion of the NIGC's approval powers. Further, fees paid, as a % of gaming revenue does not by itself constitute a management contract. The NIGC should not unilaterally expand its role in this area.

- (2) Should the calculation include reimbursement of expenses and development and other nongaming management fees – "acceptable compensation"?
 - a. NO. This proposal makes no sense because the reimbursement of expenses would not qualify as compensation under GAAP and general business principles. The jurisdiction of the NIGC to approve agreements does not extend to agreements that are not collateral to a management contract. The NIGC should not arbitrarily change existing business practices.

SHOULD THIS SECTION BE REVISED , RECOMMEND TO BE REVIEWED BY A TRIBAL ADVISORY GROUP BECAUSE OF NEED FOR MANY TRIBES TO INCLUDE THEIR EXPERIENCES IN DEALING WITH MANAGEMENT CONTRACTS.

REG. 502.16 NET REVENUES THIS IS NOT A PRIORITY

- (1) Should the definition of "Net Revenues" be revised to be consistent with GAAP?

- a. While it might be good practice to the extent consistent with §2703 (9) to conform calculations to GAAP, the statue defines Net Revenue and the NIGC does not have authority to change the definition.
- (2) Should there be a separate definition for “allowable uses”?
 - a. There is no statutory authority to expand the definitions under IGRA. The NIGC should not arbitrarily create a new definition.
 - b. The existing Bulletin (05-1) defining Net Revenue should be withdrawn because it is overreaching and outside the authority of the NIGC.

REG. 514 FEES THIS IS NOT A PRIORITY

- (1) Fiscal vs. Calendar year for fee calculation?
 - a. Tribes should be allowed to elect either method. Fiscal year calculations should accommodate Tribal business practices.
- (2) Implementation timeframes?
 - a. An implementation plan should be adopted and documented to all Tribes via a Bulletin. This ought to include all calculations, explanations of how to make the election, and examples.
- (3) Should the definition of “Gross Gaming Revenues” be revised to be consistent with GAAP?
 - a. The statue defines Gross Revenue and the NIGC does not have authority to change the definition.
- (4) Fingerprint fees?
 - a. This is a useful service provided to the Tribes. It would be good practice to publish all charges as far in advance as possible. This would facilitate budgeting by Tribes and also give adequate time for comments.
 - b. There is no need to do this by regulation; rather a Bulletin that sets out the process, procedures, and fees is all that is needed. The Bulletin can be updated and revised as needed.
- (5) Late payment system vs. NOV?
 - a. A late payment system is preferable over the current practice of issuing an NOV. The NOV should be retained as a final action if necessary. The late payment system should include a grace period before assessing late penalties etc. A revised regulation must clearly state with supporting guidance given via Bulletins.

REG. 518 SELF REGULATION OF CLASS II THIS IS A PRIORITY

- (1) How can this section be made to be less burdensome to comply with and should it be revised?

- a. The NIGC should revise these regulations so as to make certain the steps to Self Regulation as clear as possible and not punitive in nature. The current §518 is not consistent with the Statute §2710(c)(4).
- b. The factors should be those contained in §2710(c)(4) and be weighted to take into consideration years of operating with integrity, honesty, and the implementation of a comprehensive Tribal regulatory regime. The independent audit conducted by the Tribes CPA should serve as the basis for the accounting/process review and determination of financial soundness. Self-regulation is a hallmark of sovereignty and ought to be supported and encouraged by this §518 not suppressed.
- c. it is suggested that the NIGC adopt a negotiated rule making process for amending these provisions so as to give Tribes a full voice and to create a transparent process and record.

REG. 519 SERVICE See 539 below

REG. 523 REVIEW AND APPROVAL OF EXISITNG ORDINANCES OR RESOLUTIONS

THIS IS NOT A PRIORITY

- (1) Should this section be eliminated because it only applied to ordinances enacted prior to January 1993?
 - a. If there are no ordinances in force that were approved before 1993, then this should be eliminated. Otherwise, the NIGC should use a Bulletin to encourage the updating and resubmission for approval of pre-1993 ordinances.

PLEASE PLACE IN BULLETIN FORMAT IF IT IS DECIDED A MODEL OF ORDINANCE IS TO BE ADVANCED

REG 524 APPEALS See 539 BELOW

REG. 531 COLLATERAL AGREEMENTS THIS IS NOT A PRIORITY

- (1) Should the NIGC consider whether or not it has the power to approve collateral agreements to determine if the cumulative effect of such agreements violates the sole proprietary provisions of IGRA?
 - a. The NIGC currently has the authority to require submission and review of all documents that are collateral agreements to a Management Contract. It is unlikely that a regulatory definition will anticipate all of the possible circumstances and conditions under which future management contracts might be negotiated. It may be a better practice to eliminate or

revise current bulletins dealing with topic taking into account the effect of the submissions already acted upon by the NIGC and the practice and body of law that has developed as a result.

- (2) Sole Proprietary Interest has historically been a lightning rod for both Tribes and non-tribal interests when attempting to form business relationships. The Ad Hoc nature of the historical NIGC approach has not brought clarity, thus leaving the field open and subject to uncertainty. The most visible result to date is the decision and fallout from the Lac du Flambeau case.
- a. The NIGC has taken on a burden since this case of issuing declination letters specific to each set of agreements presented. Unfortunately, these decisions are not available to the public, so guidance is again lacking and the void continues.
 - b. Having a definition would in some ways help the market place, but also runs the risk of shutting the door on many business deals that, given specific risks and other business factors, will likely not fit into the definition or exceptions. A regulation by its nature must be definite, even with exceptions, and as such cannot take into account the limitless permutations business risk and reward can come up with. Therefore, the desire for a definition comes with a cost, one that Tribes and the market likely will not find acceptable.
 - c. Given the above the following suggestions may form the basis for a solution that will address both long and short term needs:
 - i. Make all declination or rejection letters available to the public (with appropriate redactions).
 - ii. Make all declination and rejection letters final Agency Action so that the parties have recourse and so that a body of jurisprudence may develop.
 - iii. Begin a process of comprehensive review of the topic, conducted in conjunction with Tribes. The review would take into account Tribal experience, experts in the evaluation of risk/reward and economics, business experience, and the NIGC history of advisory opinions, among other factors. The goal should be to develop guidelines to be published in a Bulletin.
 - d. One last observation - the development of strict criteria for sole proprietary interests published, as a regulation would be a continuation of the paternalistic policies of the federal government toward Tribes. Regardless, if the NIGC wants to pursue this it must be done in conjunction with Tribes.

REG. 533

APPROVAL OF MANAGEMENT CONTRACTS

THIS IS NOT A PRIORITY

- (1) Should this section add standards for the trustee standard as a basis for disapproving management contracts?
- a. The trustee standard within the federal government has proven to be at best a moving standard cloaked in the sole discretion of the delegated administrator. At worst, the trustee standard has been used as a shield for misuse, misappropriation, misanthropy, and out and out thievery toward Tribes. As such, any attempts to codify this standard are fraught with dangers and may be viewed through a less than welcome perspective.

- b. If the desire to give notice to Tribes and the market that a trustee standard will henceforth be an additional factor in the approval of a management contract, it would be preferable to do so by issuing a Bulletin.
 - i. Set forth factors that make up the trustee standard for the NIGC Chair
 - ii. Give examples of how these factors may be applied
 - iii. This is necessary for Tribes and business to apply the standard to future transactions.
 - c. This would be a continuation of the paternalistic policies of the federal government toward Tribes
- (2) Suggest that 2 grounds for disapproval be added – (a) not submitted in accordance with the requirements of §533 and (b) submission does not contain requirements of §531.
- a. If the submission does not fully meet the requirements of §533 or §531 then it should be held and no work be done for a specified period of time, with notice to the submitting parties. If the time period expires with no action by the submitters then disapproval can be the result.
 - b. This should be clarified via a Bulletin.

REG. 537 BACKGROUND INVESTIGATIONS FOR PERSONS OR ENTITIES WITH A FINANCIAL INTEREST IN, OR HAVING MANAGEMENT RESPONSIBILITY FOR A MANAGEMENT CONTRACT.

THIS IS NOT A PRIORITY

- (1) Should changes be made to clarify the submission requirements for Class II and Class III background investigations?
- a. Yes.

Any changes to §537 it should be to make definitions and disclosures as consistent with other agency's rules as possible. For example, the SEC and other financial regulatory agencies have disclosure thresholds and requirements; NIGC should to the extent possible and consistent with IGRA mirror those other agency requirements.

REG. 539 APPEALS THIS IS A PRIORITY

- (1) Should the NIGC consider more comprehensive and detailed procedural rules addressing (a) service of process and computation of time - §519; (b) intervention by 3rd parties; (c) motion practice and briefings; and (d) the nature of written submission in enforcement appeals.
- a. Yes. It would be good practice to formally adopt procedural rules. The underlying principle should be the guarantee of due process. The NIGC should adopt process and procedures that require it to conduct regular periodic meetings where a record is made and final agency action is taken.
 - b. The NIGC should also adopt rules and procedures that require a written record be maintained of all meetings and available to the affected parties. This record would also be available for formal proceeding and litigation.

- c. Experience has shown that Tribes with similar violations in the past are treated differently. Need more standardization.

REG. 542 CLASS III MICS THIS IS A PRIORITY

- (1) Should this section be struck and replaced with recommended guidelines?
 - a. There is a diversity of opinion on this issue. Some Tribal-state compacts make reference to §542 and as such are part of regulatory framework approved in the compact. This is where the argument has most strongly been made that §542 must be updated.
 - b. There is a view that §542 can be updated by
 - i. Stating clearly that the provisions are advisory only but that specific Tribes may choose to adopt the regulations along with NIGC oversight by written agreement. This would require continual updating and revision of §542.
 - ii. Another view is that §542 state the above with the addition that the provisions will be issued as guidelines in a Bulletin. The Bulletin will be regularly updated based on input from Tribes and other affected parties.

(2) What are the implications?

This process envisioned in (1)(b)(ii) above would more closely resemble the way that Nevada works with the industry to keep rules current and relevant.

THIS SHOULD BE ISSUED AS A BULLETIN.

REG. 543 CLASS II MICS THIS IS A PRIORITY

- (1) How should these regulations be reviewed and revised?
 - a. Yes.
 - b. A first step in the process should be to withdraw the current §543 regulations and/or suspend any enforcement of the regulations. The current §543 is in need of total replacement.
 - c. Tribes have formed a working group that is preparing a replacement draft to be adopted by Tribes and to be recommended to the NIGC.
- (2) What is the appropriate starting point for this review (which document/draft should be used)?
 - a. The Tribal Gaming Working Group has identified the last published NIGC draft used by the last Tribal Advisory Committee as the starting point.

REG. 547 CLASS II MTS FOR GAMING EQUIPMENT THIS IS A PRIORITY

- (1) Should these regulations be revised and if so, what process should be used?
- a. Yes
 - b. The current §547 is in need of revisions and clarifications.

Tribes have formed a working group that is preparing a revised §547 to be adopted by Tribes and to be recommended to the NIGC.

REG. 556 BACKGROUND INVESTIGATIONS FOR LICENSING THIS IS NOT A PRIORITY

- (1) Should the pilot program for submission and processing of fingerprints through the NIGC be formalized with regulations?
- a. Yes
 - b. The pilot program has been a success in Tribal and NIGC cooperation. It is also a necessary and vital enforcement tool used by Tribal Gaming Regulators.

The NIGC continued facilitation of fingerprinting resources of the FBI is vital and should be made a part of the regulatory framework of the NIGC.

NEW FINGERPRINTING FOR NON-PRIMARY MANAGEMENT OFFICIALS OR KEY EMPLOYEES
THIS IS NOT A PRIORITY

- (1) Should the fingerprinting process be expanded to include vendors, consultants, and other non-employees that have access to the gaming operations?
- a. Yes, if requested by Tribes. This cannot be a mandate from the NIGC; Tribes must request such fingerprint requests on a case-by-case basis and consistent with Tribal regulations.
 - b. This will require close cooperation between the NIGC and Tribes in order to be certain the procedural requirements of the FBI are adhered to as well as the NIGC and Tribal regulations.

REG. 559 FACILITY LICENSE NOTIFICATIONS, RENEWALS, AND SUBMISSIONS

THIS IS A PRIORITY

- (1) Should the section be revised and if so, what process should be utilized?
- a. Yes.
 - b. There is a view that the current §559 is outside the authority of the NIGC and has great potential to create another CRIT like situation if and when enforcement actions are taken.

- c. It is the view of some that §559 should be withdrawn and/or enforcement suspended until such time as substantial revisions or replacement can be agreed upon with Tribes.
- d. Any revisions or replacement should not required elected governments to take any actions, etc. A comprehensive review and rewrite is required so as to address the limits of the NIGC's authority to order Tribal governments to act.
- e. It would be preferable, after review, that the regulation be substantially revised and the issuance of a series of Bulletins to cover best practices would result.

RECOMMEND THAT THIS BE ISSUED AS BULLETIN.

REG. 571 INSPECTION AND ACCESS THIS IS NOT A PRIORITY

- (1) Should this section be revised to clarify access to papers, books, and records, including at sites maintained or owned by 3rd parties?
 - a. Yes. The CRIT case has established some limits that must be recognized.
 - b. Other types of enforcement actions and requests for information under for example, §2715 require a clear set of criteria and procedural rules so as to protect Due Process.

REG. 573 ENFORFCEMENT THIS IS A PRIORITY

- (1) Should there be a process for withdrawing a NOV after issuance?
 - a. Yes
 - b. It is the view of some that the Chair possesses the power under the various provisions of IGRA that authorize the issuance of an NOV. If the Chair has the discretion to authorize, then it follows that the Chair may withdrawal using that same discretion. This would be analogous to the power to enter into a settlement agreement.
- (2) Under what conditions and circumstances is it appropriate to withdraw an NOV?
 - a. Recommend guidelines for when withdrawal is Appropriate.

NEW TRIBAL ADVISORY COMMITTEE THIS IS NOT A PRIORITY

- (1) When should a Tribal Advisory Committee (TAC) be formed?
 - a. When requested by Tribes and when the Chair needs comprehensive advice on a given topic and experience from the Tribe is key to the issue..
- (2) Should a regulation be adopted or a policy statement made?
 - a. Policy statement along with plans for complying or exempting from FACA.
- (3) Is financial cost a relevant factor in determining whether or not to form a TAC?

- a. Yes, but a minor factor

(4) The Executive Order – Improving Regulations and Regulatory Review – issued on January 18th and the Presidential Memoranda issued on the same topic on the same day should be used in the development of any policy relating to TAC formation and utilization.

NEW SOLE PROPRIETARY INTEREST

THIS IS NOT A PRIORITY

- a. See comments above

NEW COMMUNICATION POLICY OR REGULATION IDENTIFYING WHEN AND HOW THE NIGC COMMUNICATES WITH TRIBES

THIS IS NOT A PRIORITY

(1) Should there be a regulation that sets a process for determining how and with whom the NIGC communicates at a Tribe?

- a. After extensive consultation with Tribes, the NIGC should use policy statements and bulletins
- b. It is likely that there will not be a one fits all answer. Tribes and Tribal governance process are varied based on culture and practical considerations. The NIGC must be prepared to adapt to Tribes not vice versa

(2) What types of communication, and what protocols should be included?

- a. Decide after consultation with the Tribes

(3) If so, what process should be used?

- a. Decide after consultation with the Tribes

NEW BUY INDIAN ACT

THIS IS NOT A PRIORITY

(1) Should the NIGC adopt a “Buy Indian” regulation consistent with 25 U.S.C. 47?

Yes – simple and straightforward