

Delaware Nation

P.O. Box 825
Anadarko, OK 73005
405 / 247-2448
Fax: 405 / 247-9393

February 10, 2011

Tracie Stevens, Chairwoman
National Indian Gaming Commission
1441 L Street, NW, Suite 9100
Washington, DC 20005

Re: NIGC Notice of Inquiry

Dear Chairwoman Stevens:

On behalf of the Delaware Nation the following is our comments to the National Indian Gaming Commission's ("NIGC") Notice of Inquiry and Request for Information ("NOI"). As you aware, the goals and purposes of the Indian Gaming Regulatory Act ("IGRA" or "the Act") are to strengthen tribal governments, tribal economic self-sufficiency, and to provide a statutory basis for the regulation. The Act also acknowledges that tribal regulatory agencies are the primary day-to-day regulators of Indian gaming. These goals should guide the NIGC as it conducts its regulatory review agenda.

Consultation and Technical Assistance

Previous NIGC administrations moved forward on new regulatory proposals without adequate Tribal consultation and adherence to Presidential Executive Orders. NIGC Budgets were developed for outlying years, key personnel were hired, and regional offices were reorganized, all in contravention of Presidential Executive Orders, the NIGC's statutory authority granted under IGRA, and without any meaningful input by tribal leaders.

It is encouraging that the current NIGC, in its published Notice of Inquiry, acknowledges that Executive Order 13175 entitled "Consultation and Coordination with Indian Tribal Governments," applies to the Commission and requires the NIGC to engage in meaningful consultation with tribal governments prior to taking an action that impacts tribal governments. Meaningful consultation must be the benchmark for all actions taken by NIGC.

In addition, the Commission must carry-out its own strategic plan that emphasizes training and technical assistance for tribal governments and tribal regulatory agencies. Given the increasingly complex and detailed nature of the NIGC's regulations and the frequency of its regulatory revisions, tribal governments and tribal regulators have requested an increase in NIGC-provided technical assistance for some years now. While steps have been taken in this direction, the NIGC has yet to make meaningful progress in this area. In 2009, the NIGC submitted a technical assistance plan as contained in Public Law 109-221, Title III, §301(a). Under the strategic plan submitted to the OMB, the NIGC moved to establish and implement effective training programs focused on "expressed or perceived tribal needs." The strategic plan

noted that a technical assistance “strategy will require the dedication of significant resources, and will consequently require adequate budgetary planning.” The NIGC has yet to finalize or commit resources to implement a technical assistance strategy. The NIGC should immediately comply with P.L. 109-221 and provide a robust technical assistance plan in conjunction with its mission under IGRA.

Class III Minimum Internal Control Standards

The NIGC adopted and implemented its Minimum Internal Control Standards (“MICS”) regulations (25 C.F.R. Part 543) in 1999 over the objection of many tribal governments. The Indian Gaming Regulatory Act set forth a regulatory scheme that balanced the interests and responsibilities of tribal, federal, and state governments among the various classes of Indian gaming. Tribes correctly argued, most notably in the D.C. Circuit Court of Appeals ruling on *Colorado River Indian Tribes (CRIT) v. NIGC*, that IGRA vested the NIGC with an oversight role in the regulation of Class III gaming. Class III gaming is primarily regulated by provisions included in carefully negotiated tribal-state gaming compacts that were approved by the Secretary of the Interior.

The Commission’s NOI acknowledges the *CRIT* decision, and also acknowledges that care must be taken when amending any regulation. Some tribes reference the NIGC’s MICS in their tribal-state compacts, and have raised some concerns about the effect on their compacts if the NIGC does not maintain any Class III MICS regulations or bulletins. As a result, we do agree that caution should be taken when making a decision on how to restructure the Class III MICS. The NIGC should acknowledge that the MICS reflect existing industry standards and are advisory. The MICS are given the force of law through inclusion in Tribal-State compacts or tribal ordinances enacted by Tribal Governments.

Tribes have always agreed that internal controls play an essential role in protecting tribal governmental revenues generated by gaming. The National Indian Gaming Association and its Member Tribes initiated the formation of tribal MICS in the 1990’s. The NIGC’s role in developing and establishing the Class III MICS did help to galvanize tribal resources by pulling together a comprehensive list of regulations based on industry standards. However, tribal governments and tribal gaming regulators remain the most informed parties to determine what standards are needed in their particular establishment. Tribes and tribal gaming regulators have a significant vested interest in protecting revenue generated by Indian gaming.

Class II Gaming

Class II gaming is the original foundation of Indian Gaming and continues to play a vital role for Indian Country economic development.

Part 543: Class II Minimum Internal Control Standards

Many provisions of the existing Class III MICS are incorporated by reference in Section 543.1 of the Class II MICS. In 2008, the NIGC convened a tribal working group to assist in the revision of Part 542 and the promulgation of Part 543, but late in the process, now concluded, the

NIGC announced its intent to simply paste the Part 542 revisions into Part 543 without an adequate examination of whether such a wholesale approach was appropriate in light of the differences between Class II and III gaming. Moreover, the NIGC did not achieve a consensus draft in relation to its proposed Part 542 revisions and Part 543 Class II regulations, nor did the MICS tribal advisory committee have a significant representation of members from Class II gaming tribes, a fact noted by the Committee.

The NIGC should work with Tribes in ensuring that all Part 542 regulations are properly deemed advisory as applicable to Class III Tribal gaming and not applicable to Part 543. Accordingly, the NIGC should also take into account work currently being done by a tribal gaming working group (“TGWG”) comprised of tribal leaders, gaming regulators, and industry operators and manufacturers, with regard to review and revision of Part 543. These MICS must remain consistent with IGRA, properly recognize the difference between the classes of gaming, and adhere to the policy that Tribes are the primary regulators of their gaming operations.

Part 547: Minimum Technical Standards for Class II Games

The TGWG, as noted above, is also currently engaged in review and revisions to Part 547 Technical Standards along with other proposed regulations. However, there are immediate concerns with Part 547 that the NIGC should address.

Part 547 contains game recall provisions that require the player interface to display results of any alternate display. The ability of the player interface to recall alternate displays has no legal relevance and does not belong in the regulations. This requirement not only confuses the reality of the game, but threatens to obscure the distinction between the legal relevance of a bingo game and any alternate entertaining display.

There should also be a distinction between bingo and “games similar to bingo.” IGRA acknowledges that for the purposes of Class II Technical Standards, these are different games. That distinction must be acknowledged by the NIGC as well.

Self-Regulation of Class II Gaming

The self-regulation certification process set forth at Part 518, promulgated in 1998, needs updated. Section 2710(c)(3)-(5) of IGRA sets forth a framework under which the NIGC must issue a certificate of self-regulation for Class II gaming.

Regulatory review and revision of the self-regulation process should be accorded a high priority. The current application process for self-regulation is unreasonably burdensome and provides limited actual benefit to a tribe that receives self-regulation certification. The current process results in tribes facing an increased regulatory burden in that they must file annual reports on their usage of net gaming revenues among many other items.

At a minimum, the NIGC should remove the current self-regulation regulations, and, in consultation with tribal governments and tribal regulators, replace them with objective standards that go no further than those requirements set forth in IGRA. In addition, the revised regulations should grant a certified self-regulation tribe with a clear benefit that includes a lower regulatory burden and reduced federal oversight.

Part 559: Facilities Licensing Regulations

The NIGC should closely review whether these regulations are authorized under IGRA, and whether they are necessary given that tribal governments have their own processes and procedures that are more than sufficient to meet the concerns underlying facility licensing on their reservation. In addition, Tribes should be able to issue their own licensing certificates for new facilities without having to comply with additional requirements from the NIGC. For instance, Part 559 requires Tribes to submit paperwork on the trust status of the land to the NIGC to demonstrate that all new gaming operations are located on eligible Indian lands. The NIGC should consider whether such additional requirements are necessary.

The NIGC finalized this regulation with a short comment period and no opportunity for meaningful tribal consultation. The NIGC should re-open these regulations and meaningfully consult with Tribes to ensure that the regulations are consistent with the purpose of the IGRA.

Buy Indian / Indian Preference Policy

As noted above, one of the primary purposes of IGRA is to foster tribal government economic self-sufficiency. To help foster tribal economic self-sufficiency, the NIGC should adopt a regulation to implement the Buy Indian Act. The Buy Indian Act, states simply: "so far as may be practicable Indian labor shall be employed, and purchases of the products of Indian industry may be made in open market in the discretion of the Secretary of the Interior." (25 U.S.C. 47). Such a regulation should give preference to qualified tribal government-owned and individual Indian-owned businesses when the NIGC procures goods or services.

ADDITIONAL COMMENTS ON THE NIGC'S REGULATORY REVIEW

Part 502: Definitions

Management Contracts: The Notice of Inquiry asks whether the definition of management contracts should be expanded to include any contract, such as slot lease agreements, that pays a fee based on a percentage of gaming revenues. The NIGC should not expand the definition of "management contract" to include any contract that pays a fee based on a percentage of gaming revenue because not all "participation agreements" constitute management contracts. It is laudable that the NIGC permits tribes to request its review of agreements when a tribe is uncertain whether a particular agreement constitutes a management contract, but such review should not be mandatory.

Part 514: Fees

Revising Part 514 to base fees on the gaming operation's fiscal year rather than its calendar year may be useful to Tribes that have established accounting policies based on the fiscal year. The most ideal situation would be to allow each tribe to elect based on whether they operate under a fiscal or calendar year.

Revising the definition of "gross gaming revenues" to conform to the GAAP definition of the term would be consistent with good business practices.

The NIGC should consider a late payment system in lieu of a Notice of Violation (NOV) for submitting fees late as it would be preferred over the NIGC's current practice of issuing NOV's. The current use of NOV's overly penalizes a tribe for failure to submit even one payment on time. This can occur innocently after a change in government leadership or employee turnover. Treating an easily-fixable oversight with the same level of severity as operating gaming without a facility license, defrauding a customer, or allowing individuals without approved management contracts to manage the gaming is overly punitive. An NOV can degrade a tribal facility's bond ratings, loan percentage rates, and business reputation. New regulations should allow a warning notice to the Tribe, followed by assessment of a minimal late fee. Only in cases where multiple fee payments have gone completely unpaid or the tribal governing body has officially resolved or publicly stated its intention not to pay NIGC any fees for an TGRA facility, should a NOV be considered, and then only after negotiations with the Tribe, on a leader-to-leader government consultation basis, have failed.

Proposed Regulation: Sole Proprietary Interest

The NIGC should take a cautious approach in interpreting the "sole proprietary interest" provision of the IGRA. Tribal governments have the right to exercise their independent judgment in relation to the operation of their gaming enterprises. Rather than issuing a legislative rule or strict regulatory definition of sole proprietary interest, the NIGC should consider publishing an interpretive rule or a guidance document so as to grant Tribes maximum independence in operating their gaming facilities.

The NIGC should avoid taking an expansionist approach of the phrase "sole proprietary interest and responsibility." An expansionist reading may be used by the NIGC to identify a contract that does not provide for the best financial arrangement, but doing so may come at the cost of eroding the legitimate exercise of that Tribe's powers of self-governance.

Congress anticipated and allowed for the circumstance that some Tribes would outsource the daily gaming operation and further, the IGRA authorizes Tribes to convey a significant measure of control over gaming activities to a third-party operator by means of a management contract. Legislative history also demonstrates that Congress intended for sole proprietary interest to mean that Tribes should be the "sole owner" of the gaming enterprise. Attempting to stretch the meaning of sole proprietary interest to more than "owning" the gaming activity is not compatible with the balance of the IGRA and the obvious intent of Congress in enacting it. The construction

of sole proprietary interest should not be taken in isolation, but must be approached contextually in light of the overall statutory scheme of the IGRA.

Other points

- Rulemaking

NIGC should strive to ensure that its rules are fair, reasonable, and consistent with the goals and purposes of IGRA.

NIGC should employ negotiated rulemaking to the maximum extent possible.

While tribal advisory committees are a practical means of developing draft regulations, additional consultative mechanisms should be employed prior to the publication of proposed rules or regulations.

NIGC should take into consideration all tribal interests when engaging in rulemaking activities, including, without limit the following:

Establishing a reasonable timeframe for accepting comments. Tribal governments, like state and federal governments, have internal processes that must be followed, which often entail multiple clearance levels. Abbreviated deadlines may make it impossible for a tribal government to submit cleared comments.

Establishing a reasonable timeframe for implementation, mindful of the fact that tribal governments operate on an annual funding cycle and sufficient time to budget for the implementation of new regulations is essential to compliance.

Adopting a more cost conscious approach, including the preparation of a cost benefit and economic impact analysis prior to the promulgation of rules and regulations.

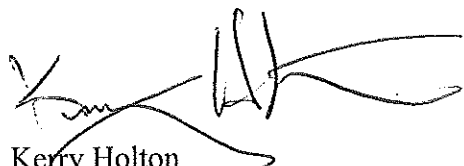
- Enforcement

NIGC should adopt an enforcement policy reflective of a civil regulatory regime rather than a punitive criminal enforcement regime consistent with the overall purposes and goals of the statute and the civil nature of NIGC's function.

NIGC should defer to tribal regulatory agencies on enforcement matters in the first instance.

NIGC should adopt a voluntary compliance model, which provides for notice and opportunity for cure prior to the institution of an enforcement action.

In closing, we respectfully request that the above recommendations and changes be made under your new leadership. We have included additional comments addressing some other topics raised in the Commission's NOI. Thank you for your consideration.



Kerry Holton
President

Cc: Delaware Nation Gaming Commission