

QUAPAW TRIBE OF OKLAHOMA

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February 18, 2011

TO: Tracie L. Stevens, Chairwoman
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FROM: John L. Berrey, Chairman
Tribal Business Committee
Quapaw Tribe of Oklahoma (O-Gah-Pah)

Barbara Kyser-Collier, Director
Quapaw Tribal Gaming Agency
Quapaw Tribe of Oklahoma (O-Gah-Pah)

RE: "Notice of Inquiry and Request for Information; Notice of Consultation," dated
November 12, 2010

Joint Comments of the Quapaw Tribe of Oklahoma (O-Gah-Pah) and the Quapaw
Tribal Gaming Commission

The Quapaw Tribe of Oklahoma (O-Gah-Pah) and the Quapaw Tribal Gaming Agency (the "QTGA") appreciates having the opportunity to provide the following comments in response to the National Indian Gaming Commission's (the "NIGC's") "Notice of Inquiry and Request for Information."¹ The Tribe and the QTGA commends the NIGC's efforts to consult with tribes and hopes that the comments below will be helpful to the NIGC as it considers revisions or amendments to existing and proposed regulations.

As a preliminary matter, we urge the NIGC to use as a guiding principle Congress' explicit finding that "Indian Tribes have the exclusive right to regulate gaming activity on Indian lands."² Tribal regulatory agencies such as the QTGA should have the primary responsibility of implementing regulatory duties under the Indian Gaming Regulatory Act the "(IGRA)". In the past, the NIGC has usurped regulatory powers belonging to tribal governments by imposing day-to-day operational requirements and by taking punitive enforcement measures against tribes. It is our hope that the NIGC's current review of its regulations will result in a less intrusive regulatory role for the NIGC vis-à-vis tribal regulators and greater deference to tribal governments in regulatory and enforcement matters.

Below we have addressed specific regulations that we feel should be revised or amended

¹ See 75 Fed. Reg. 70,680-70,686 (Nov. 18, 2010).

² 25 U.S.C. § 2701(5).

or otherwise addressed during the NIGC's regulatory review process.

Part 556: Background Investigations for Licensing

The development of licensing and background procedures is one of the QTGA's primary functions. The IGRA recognizes the licensing process as a function specifically reserved to tribal governments.³ Although the IGRA provides that tribes must notify the NIGC prior to the issuance of a gaming license, it is the QTGA—not the NIGC—to whom an applicant must apply for licensure. It is therefore unreasonable that the NIGC would require tribal governments and regulatory agencies to include Privacy Act and Federal False Statement Act notices on tribal licensing application forms. Such a requirement is an extraordinary intrusion upon tribal sovereignty that is neither justified nor authorized by the IGRA.

Although tribal governments are subject to the lawmaking authority of the Congress, tribal governments are not subject to all federal laws enacted by the Congress, and certainly not to laws such as the Privacy Act, which, like the Freedom of Information Act, applies only to federal agencies. As stated in the one tribal case on point, *Stevens v. Skenandore*, “[the plaintiff] also has no private right of action against tribe officials for violations of the Privacy Act, which applies only to federal government agencies.”⁴ In addition, the Federal False Statement Act notice requirement in § 556 contains a statement that “you may be punished by fine or imprisonment,” notwithstanding the fact that the tribe has no power to enforce the federal criminal code or imprison non-Indians. The Federal False Statement Act applies to any person “in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States,”⁵ and was not intended to cover statements made to an Indian tribe, or for that matter, to states, private organizations, or private individuals. Given the *ultra vires* nature of these regulations, the NIGC should consider amendments to Part 556 a high priority.

Part 559: Facility License Notifications, Renewals, and Submissions

The Quapaw Tribe remains committed to maintaining full compliance with the law. In complying with the IGRA, the QTGA has issued a separate license for each place, facility, or location on Quapaw tribal lands where Class II or Class III gaming is conducted. In addition, as primary regulators of Quapaw Tribal gaming, and the entity with the most significant stake in the reputation and public trust of Quapaw tribal gaming, the health of the Quapaw environment, and the well-being of our citizens and employees, the Quapaw Tribe and the QTGA have fully complied with the environment, public health, and safety requirements under 25 U.S.C. § 2710(b)(2)(E) and subsequent regulations.

³ 25 U.S.C. § 2710(b)(F)(ii)(II).

⁴ *Stevens v. Skenandore*, 234 F.3d 1274, 1274 (7th Cir. 2000) (WL 1069404).

⁵ 18 U.S.C. § 1001(a).

Nonetheless, the QTGA views the revision of the NIGC's facility licensing regulations as a high priority and urges the NIGC to convert these regulations into a performance-based rule or a series of Bulletins to cover best practices for tribes. The NIGC's prescriptive approach to facility licensing is unfounded and exceeds the scope of its rulemaking authority under the IGRA. As a fundamental principle of administrative law, agencies must be granted specific statutory authority to promulgate regulations.⁶ While the IGRA does require each facility to be licensed, it expressly gives that authority to tribes in § 2710(b)(1) rather than require that the licensing requirement be in the ordinance approved by the NIGC under § 2710(b)(2). Also, the IGRA has no requirement for annual licenses for each facility and the NIGC has no legal basis for requiring it in its regulations. The only affirmative duty in the IGRA is the *tribal* licensure of facilities.

All federal agencies must remain cognizant of the practical costs and burdens of their regulations. These costs and burdens can have a particularly acute impact on tribes because most tribes remain the most economically needy communities in the United States. Federal regulatory burdens can divert essential funding away from tribal government activities and social services as the costs of regulatory compliance increase. Tribal education, health care, infrastructure, and tribal self-governance can suffer as a result. The additional and unnecessary federal regulation can also sidetrack tribal regulators like the QTGA from their larger and more pressing regulatory duties and ultimately sacrifice the integrity of tribal gaming.

Part 542: Class III Minimum Internal Control Standards

The right to promulgate regulations and be ruled by them is inherent in the exercise of tribal sovereignty. Absent federal laws preventing a tribe from exercising this inherent right, there are no limitations to a tribe's sovereign authority to govern. The Class III Minimum Internal Control Standards (MICS) severely limit the inherent tribal right to "make their own laws and be ruled by them"⁷ and undermine Congress' stated purpose of encouraging tribal self-sufficiency and self-government. Amending the NIGC's regulations to exclude Class III MICS should be a high priority for the NIGC. The NIGC should convert the Class III MICS into advisory guidelines that assist tribes in developing and strengthening their own internal controls. Federal regulation of Class III gaming must be consistent with the IGRA and flexible in recognition of the tribal right to develop comparable tribal standards on MICS issues.

Part 543: Class II Minimum Internal Control Standards

We urge the NIGC to suspend enforcement of the Class II MICS until the regulations are revised in a manner that is consistent with the distinction in the IGRA between the classes of gaming. Among other things, the Tribe and the QTGA are concerned with the inherent conflicts

⁶ *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988).

⁷ *Williams v. Lee*, 358 U.S. 217, 220 (1959).

and inconsistencies created by overlapping regulations in Parts 542 and 543.⁸ During its regulatory review, the NIGC should incorporate the findings of the Tribal Gaming Working Group that is currently working on preparing a replacement draft to be adopted by the tribes and recommended to the NIGC.

Part 547: Minimum Technical Standards for Gaming Equipment Used with the Play of Class II Games

We believe the current version of Part 547 is in need of revisions and clarifications. For instance, the regulations should draw a distinction between “bingo” and “games similar to bingo.” Had Congress intended to treat them similarly, it would not have used two separate terms—at least this is how federal courts would view it under the canons of construction. The regulations should also be amended to remove the “alternative display” requirement, which has no legal significance to the outcome of a game of bingo. The NIGC does not appear to appreciate that an entertaining display, like any electronic apparatus, is susceptible to malfunction in which case recall might not be possible. In such event, a regulatory requirement for recall of an immaterial feature can foster patron disputes and place tribes in an awkward and untenable position of having to convince a patron that the bingo card, and not the entertaining display, determines the outcome of the game. The NIGC should remove this requirement from this Section.

The Part 547 requirements also have many features that depend on proper functioning of gaming hardware and software. As we read in the Part 547 regulations, a machine or software malfunction that results in a technical standard not being met—even if momentarily—would create a violation of the Technical Standards regulations such as §§547.7-547.9. Yet, we all know that electronic equipment sometimes malfunctions and, as the NIGC is aware, the Minimum Technical Standards require that the machine system must “continuously display” that “Malfunctions void all prizes and plays” or equivalent language. The fact that the NIGC established this display requirement in § 547.16(b)(1) signifies that the NIGC recognized when it crafted the regulation that electronic games could sometimes malfunction, notwithstanding the fact that the regulations at § 547.5(e) require that the gaming equipment and software is required to “perform according to the manufacturer’s design and operating specifications.” In fact, a malfunction would be a violation of the regulations. We recommend that the regulations be modified to make clear that a game malfunction does not create a legal violation subject to citation, civil penalties, and closure orders.”

⁸ For instance, Part 543 contains a different definition of “random number generator” than Part 542. Part 542 defines “random number generator” as “a device that generates numbers in the absence of a pattern, and that may be used to determine numbers selected in various games such as keno and bingo, and also commonly used in gaming machines to generate game outcome. Part 543 defines “random number generator” as “a software module, hardware component or combination of these designed to produce outputs that are effectively random.”

§ 502.16: Net Revenues

The Indian Gaming Regulatory Act (the “IGRA”) contains a concise definition of the term “net revenue,” which is applicable to all provisions of the act. *See* 25 U.S.C. § 2703(9). The NIGC should thus ensure that its regulatory definitions are consistent with the definitions contained in the IGRA. The IGRA defines “net revenue” as gross gaming revenues of an Indian gaming activity.⁹ The current regulatory definition replaces “Indian gaming activity” with “Indian gaming operation.”¹⁰ Congress clearly intended the calculation to include only the revenue from actual gaming activities and to exclude ancillary income of the operation, such as food and beverage sales, retail, lodging, ATMS, and so on. In defining “net revenue” in the IGRA, Congress spoke directly to the term by leaving no ambiguity for the NIGC to fill. When statutory language is plain and clear on its face, as in the case of IGRA, there is no void in the law warranting regulatory clarification. Federal agencies are not authorized to amend federal statutes through rulemaking. We thus recommend that the NIGC correct its definition of “net revenue” to bring it into conformance with Congress’ definition of the term.

§ 502.17(d): Person Having a Direct or Indirect Financial Interest in a Management Contract

Section 502.17(d) of the NIGC’s regulations provides that when a corporation is a party to a management contract, any person who holds at least 5% of the issued and outstanding stock will be a person having a direct or indirect financial interest in a management contract. The NIGC lowered the percentage interest from 10% to 5% in July 2009 when it published its Final Rule on amendments to various NIGC regulations.¹¹ The QTGA objects to the lowered percentage interest because it operates to increase the time needed to complete the approval process as more background investigations become necessary and more expensive to administer. The increased expenses come not only in the tribes’ costs in gathering information and conducting background investigations for persons with small stakes in a corporation, but also in compliance costs. We recommend that the NIGC analyze the impact of lowering the percentage interest and make a determination as to whether the benefit will justify the additional cost and added delay that the revision will entail. Presumably, the rational basis for an NIGC decision to increase the burden on tribal regulators and the corporations they regulate should be based on evidence that persons with holdings within the range of 5% to 10% of the outstanding stock have adversely affected the integrity of Indian gaming. We doubt the NIGC can make such a demonstration.

⁹ 25 U.S.C. § 2703(9).

¹⁰ 25 C.F.R. § 502.16.

¹¹ *See* Amendments to Various National Indian Gaming Commission Regulations, 74 Fed. Reg. 36,926-36,940 (July 27, 2009).

§ 502.15: Management Contracts

The Tribe and the QTGA believes that 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. While 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, the QTGA does not believe review of such agreements should be mandatory.

§ 502.17(f): Management Contract

Section 502.17(f) provides that that “[a]ny person or entity who will receive a portion of the direct or indirect interest of any person or entity listed above through attribution, grant, pledge, or gift” will be considered a person having a direct or indirect financial interest in a management contract.¹² We are concerned that this subsection may be construed to exclude tribal governments from entering into a management contract with another tribal government by making it impossible for such tribal entity to meet the background requirement. Taken together with the approval process for management contracts in § 2711 of the IGRA, if a tribal government were to enter into a management contract with another tribal government, § 502.17(f) could be read to require background investigations of every tribal member, and the expense in doing so would prove prohibitive. Conversely, since § 502.17(f) does not provide specifically for tribal governments, the question remains as to whether the regulation could be construed to exclude tribal governments from becoming management contractors since the regulations are silent in this regard. If the NIGC intends to exclude tribal governments from being subject to § 502.17(f), the regulation should be amended to reflect this exclusion. Although amendment to this regulation is not a high priority, the NIGC should reconsider the merits of this regulation as part of its regulatory review.

In general, the NIGC should not expand its authority in reviewing management contracts beyond what authority is expressly granted by the IGRA. This would include agreements that are collateral to management contracts. Tribes should have flexibility in their ability to negotiate contracts with vendors and contractors, and should be allowed some creativity in reaching agreements, including through the use of collateral agreements. Regulations should not be enacted that would encroach on the use of collateral agreements in negotiating contracts. The Commission should not use recent decisions of the federal courts concerning the “sole proprietary interest” requirement of the IGRA as an avenue to increase regulation in this area. This would foster a paternalistic attitude toward tribal gaming operations, which is inconsistent with the stated goals of the IGRA to foster self-determination and self-regulation by Tribes. Any advice the NIGC deems necessary in this area should be by a separate publication and not by regulation.

¹²

25 C.F.R. § 502.17(f).

The trustee standard for disapproval of a management contract gives too much discretion to the NIGC, which conceivably can disapprove on almost any ground by merely citing to such standard. If the trustee standard is to remain a part of the regulations, it should be significantly limited and restated to expressly state what grounds the NIGC can disapprove of a management contract within the context of the trustee standards.

Further, management contracts should not be disapproved for minor deficiencies in complying with the requirements of Parts 533 and/or 531. If a submission is deficient, the submitting entity should be notified and given an opportunity to cure the deficiency before the NIGC issues a disapproval.

Part 514: Fees

We do not object to the NIGC's proposal to base fees on the gaming operation's fiscal year rather than its calendar year as it may be useful to tribes that have established accounting policies based on the fiscal year. Tribes should, however, be allowed to elect either method based on their business practices.

The issuance of an NOV for missed payments is unnecessarily punitive, especially when late payment is inadvertent or due to circumstances beyond control. A late payment system should be implemented, with appropriate grace periods, for tribes that are generally compliant. The NIGC's enforcement policies should be consistent with the civil nature of the NIGC's regulatory functions. Enforcement mechanisms such as NOVs should be reserved as a final measure for more substantive and egregious violations of the IGRA, not for minor infractions such as the delinquent payment of fees. We encourage the development of a late payment system so long as the ticket or other notice serves as a warning and provides an opportunity for tribes to cure before real enforcement action is taken. The late payment system should also include a grace period before late penalties are assessed against the tribe.

Tribes should be allowed flexibility in choosing the calendar year *or* the fiscal year in calculating fees. Thus, the word "calendar" should not be replaced with "fiscal," but the option to choose the fiscal year should be added to the current use of the calendar year, which tribes should be allowed to choose. In the event this change is implemented, tribes should not be required to make an election of fiscal or calendar year up front, or within any limited time frame, but a process should be put into place to allow changes in the election at any time. An orderly procedure for changing from calendar year to fiscal year or for changing what a tribe uses as its fiscal year should be a part of any change in this regard. A change from calendar to fiscal year, or a change in the fiscal year, should be allowed at any time a tribe feels it to be beneficial.

The NIGC should not change the definition of "gross gaming revenue," because this term is already defined in the IGRA and tribes are sophisticated enough, with assistance of their accountants and attorneys, to interpret and apply this definition without necessity of any additional and/or modified definitions.

The regulations should not be made any more complex by adding provisions on fingerprint processing fees. These fees can be addressed and adjusted outside of the regulations through separate publications.

Part 518: Self-Regulation of Class II

In the spirit of self-determination and the IGRA's stated purpose of promoting self-regulation, the burden imposed on tribes for obtaining a self-regulation certificate should be reduced as much as the law will allow. The current regulations are more burdensome than what is required by the IGRA. The burdens imposed in the process for obtaining a self-regulation certificate should be reduced and the avenue to self-regulation made clearer, easier, and more efficient.

Proposed Regulation: Sole Proprietary Interest

We view the issue of the proper interpretation of "sole proprietary interest" as a high priority for the NIGC. We are concerned with the NIGC's prior expansive and paternalistic interpretations of "sole proprietary interest," as reflected in advisory letters from the NIGC's former Acting General Counsel. We believe that the proper interpretation of the sole proprietary interest provision is a narrow one, limited solely to the issue of ownership within the simplest, most straightforward meaning of the term.

Attempts to expand the meaning of the term beyond "ownership" threaten to undermine the IGRA and erode the legitimate exercise of tribal self-governance. It simply is not possible to extend the meaning of the term to some "level of control" or some concept of an "ownership interest in the profits of the gaming activity" without it being directly counter to the management contracts provisions in the IGRA. When Congress enacted the IGRA, it was well aware of the tribal right to enter into contracts and authorized tribes to enter into management contracts, which can involve turning over the operation and management of a Class II or Class III gaming facility to a management contractor.¹³ Congress thus clearly anticipated and allowed for the circumstance that some tribes would outsource the daily gaming operations and could not have intended for the sole proprietary interest provision to operate so as to obviate the authority of tribal governments to enter into management contracts.

The construction of a statutory term cannot be undertaken in isolation, but rather, must be approached contextually in light of the overall statutory scheme. Read in context, the sole proprietary interest provision cannot relate to shares of gaming revenues, level of control over gaming activities, or the compensation level of contractors without rendering the management and other contracting provisions in the IGRA meaningless. If the NIGC considers taking action on the interpretation of "sole proprietary interest," we request that it be in the form of a guidance

¹³

See 25 U.S.C. § 2711.

document and not a regulatory definition, and that it narrowly interpret the provision to mean ownership.

Part 523: Review and Approval of Existing Ordinances or Resolutions

The Commission should verify that no ordinances currently exist that would be subject to this part of the regulations. On verification that the regulation is obsolete, it should be stricken.

Sections 571.1-571.7: Inspection and Access

The regulations should be revised to include access at off-site locations and should include some due process rights. At a minimum, the gaming operation should be given some preliminary notice of intent to inspect, and the Commission should discuss production procedures, such as the possibility of producing documents at an off-site location.

Part 573: Enforcement

A process should be put in place for the withdrawal of an NOV. If the Commission and/or the Chairperson have the ability to issue NOVs, it should follow that the Commission and/or Chairperson have the ability to withdraw them. This would be most appropriate for relatively minor violations, where the violator should have an opportunity to cure and to have the NOV withdrawn.

Proceedings Before the Commission

The regulations should provide more comprehensive and detailed procedural rules for proceedings before the Commission and the rights and avenues of appeal. Any regulations promulgated should provide, at a minimum, the same procedural devices and due process rights provided a litigant in the federal courts. This should include discovery to the extent necessary for a thorough review of a decision by the Commission. The regulations should also advise of the availability of judicial review of a decision by the Commission in the United States Federal District Courts, as provided by 25 U.S.C. § 2714, and should address application of the Administrative Procedure Act (the "Act"), 5 U.S.C. § 701 et seq.

Federal agencies within the Department of the Interior have in the past used the structure of the Administrative Procedure Act to limit the scope of judicial review, especially as it relates to discovery. The regulations should either provide for discovery within the administrative process, or the regulations should clearly state that the Commission will agree to allow discovery if judicial review is sought in the federal courts, subject only to discovery limitations found in the Federal Rules of Civil Procedure. Access to the federal courts is a significant protection for tribes and judicial review should be as broad as the federal courts allow, without limitations being imposed by way of the administrative appeals process.

Consultation

The Quapaw Tribe and the QTGA are hopeful that the advent of new NIGC leadership will usher in a new era of improved communications and collaboration between the agency and tribal governments and their representatives. In the past, the NIGC has demonstrated a lack of respect for the consultative process by ignoring tribal input and unilaterally imposing its regulatory agenda on tribal governments. We appreciate the NIGC's current efforts to seek tribal input *before* determining which regulations to change and hopes that the new Commissioners will give meaningful consideration to the views and opinions proffered by tribes during the regulatory review process. Moving forward, we also hope the NIGC will continue soliciting tribal input before developing a position on an issue or a proposed solution to a problem. Early development of a position by the NIGC almost inevitably results in defensive reactions from tribes, reduces opportunity for useful discussion of the problem, and limits the opportunity to develop best solutions. A truly meaningful consultation approach should allow tribes and the federal government to fully consider the issues to determine whether a problem exists, jointly develop proposed solutions, and, hopefully, reach a consensus on the best approach to take regarding the matter.

Thank you for your consideration.

Quapaw Tribe of Oklahoma (O-Gah-Pah)



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