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February 8, 2011

Tracie Stevens, Chairwoman  
National Indian Gaming Commission  
1441 L Street, NW, Suite 9100  
Washington, DC 20005  
E-mail: [reg.review@nigc.gov](mailto:reg.review@nigc.gov)

**Re: NIGC Notice of Inquiry**

Dear Chairwoman Stevens:

I write on behalf of the Pueblo of Tesuque to comment on the National Indian Gaming Commission's (NIGC or "Commission") Notice of Inquiry and Request for Information. As you know, 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 of Indian gaming. The Act acknowledges that tribal regulatory agencies are the primary day-to-day regulators of Indian gaming. These goals and factors should guide the NIGC as it prepares its regulatory review agenda.

**Consultation and Technical Assistance**

The overall regulatory strategy of the NIGC is in need of an overhaul. Past NIGC administrations operated under a punitive philosophy that viewed penalties and fines as the only effective means for securing compliance with IGRA and NIGC regulations. This strategy ignores the above-stated goals of IGRA and the fact that tribal regulatory agencies are the primary day-to-day regulators of Indian gaming.

The prior administration moved forward on new regulatory proposals, developed budgets for outlying years, hired key personnel and reorganized regional offices, and took other actions affecting Indian gaming, all without meaningful input by tribal leaders. As a result, we hope that the current NIGC will treat this regulatory review as an opportunity to revisit regulations with true input from tribal governments in mind.

It is encouraging that the 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 require the NIGC to engage in meaningful consultation with tribal governments prior to taking an action that has tribal implications. Meaningful consultation must be the benchmark for all actions taken by NIGC.



In addition, the Commission must emphasize the provision of training and technical assistance to 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 a longstanding request to increase NIGC-provided technical assistance. While steps have been taken in this direction, the NIGC has yet to make 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 Commission has yet to finalize or commit resources to implement a technical assistance strategy. The NIGC should immediately comply with P.L. 109-221 and finalize and implement 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. Congress, through 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 that IGRA vested the NIGC with a limited oversight role in the regulation of class III gaming, which was primarily regulated by provisions included in carefully negotiated tribal-state gaming compacts that were approved by the Secretary of the Interior. Tribes thus contended that the NIGC did not have authority to promulgate the MICS. Federal courts, most notably the D.C. Circuit Court of Appeals in *Colorado River Indian Tribes (CRIT) v. NIGC*, have unanimously agreed with the tribes, finding that IGRA did not authorize the NIGC to promulgate the MICS for class III gaming.

The Commission's NOI acknowledges the *CRIT* decision, and also acknowledges that care must be taken when amending any regulation. Many tribes believe that the class III MICS should be struck and replaced with a recommended guideline. However, some tribes acknowledge that the NIGC's MICS are referenced in their tribal-state compacts, and have raised some concerns about the effect of striking the regulations on those compacts. As a result, we do agree that caution should be taken when making a decision on how to strike and restructure the class III MICS.

Tribes have always agreed that minimum internal controls play an essential role in protecting precious 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 MICS, while flawed, in some sense maximized tribal resources by pulling together a comprehensive list of regulations based on industry standards. However, tribal governments and tribal gaming regulators, the local day-to-day overseers of Indian gaming, know best what standards are needed in their particular establishment. Tribes and tribal regulators have a significant vested interest in protecting revenue generated by Indian gaming.



## **Class II Gaming**

As noted above, Congress, in enacting IGRA, struck a careful balance among the respective interests of three sovereigns: tribal, federal, and state governments. That balance was critically upset by the Supreme Court's 1996 decision in *Seminole Tribe v. Florida*, which found that a state could refuse to negotiate class III tribal-state gaming compacts in good faith. This decision has resulted in a number of state houses (many of which condone and regulate other forms of gaming) exercising veto authority over class III Indian gaming. As a result, Indian tribes in these states rely solely on class II gaming to generate governmental revenue to provide essential services to meet the many needs of their communities.

For most of the past decade, the NIGC has created great uncertainty in the area of class II Indian gaming. With little tribal input, the NIGC in past years developed unworkable gaming classification standards that went beyond the statutory authority granted in IGRA and that threatened the economic viability of class II gaming. Many of these proposed regulations sought to limit class II games to only those in play in 1988. This view stands in direct conflict with congressional intent when enacting IGRA. The Senate Committee Report to IGRA states the following:

The Committee specifically rejects any inference that tribes should restrict Class II games to existing game sizes, levels of participation, or current technology. The Committee intends that tribes be given the opportunity to take advantage of modern methods of conducting Class II games and the language regarding technology is designed to provide maximum flexibility.

The NIGC should make it a priority to revisit regulations that affect class II Indian gaming in consultation with all tribal governments and tribal regulatory agencies.

### ***Part 543: Class II Minimum Internal Control Standards***

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, but late in the process, 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 distinctions between class II and III gaming. Moreover, the NIGC did not achieve a consensus draft in relation to the proposed Part 542 revisions, nor did it seek meaningful input from tribes that significantly rely on class II gaming.

During the rulemaking process for the class II MICS, tribes raised a concern that the regulations contained inherent conflicts and inconsistencies created by overlapping regulations spanning two parts of the Code of Federal Regulations. For instance, Part 543 contains a different definition of "random number generator" than Part 542. At the time, the NIGC responded that it recognized the different definitions could cause confusion, but the need to act was apparently considered urgent enough to let the confusion stand. There are a number of other issues with the class II MICS that were raised by tribes in their comments that went ignored without adequate reasoning provided.



The NIGC should revisit the Part 542 regulations referenced in Part 543 to ensure that: the regulations are consistent with IGRA; the regulations reflect a distinction between the classes of gaming and types of games listed in IGRA; and other concerns that have been and will be raised by tribes and tribal regulators once they are fully consulted. The NIGC should undertake a full regulatory review of Parts 542 and 543 through a broad consultation process.

### ***Part 547: Technical Standards for Class II Games***

The NIGC should also revisit the class II Technical Standards to address issues raised during the past rulemaking that were never resolved. For example, 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 also threatens to obscure the distinction between the legal relevance of a bingo game and any alternate entertaining display. In addition, the standards for bingo were simply adopted for games similar to bingo, but those games, while “similar” to bingo, are also different and require differences in their regulation. There should be a distinction between bingo and “games similar to bingo” for the purposes of class II Technical Standards as IGRA acknowledges that these are different games.

The NIGC should undertake a full regulatory review of Part 547 to address these and other issues with the Technical Standards for class II games.

### ***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. The current application process for self-regulation is unreasonably burdensome and provides limited actual benefit to a tribe that receives self-regulation certification. In fact, the current process actually 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.

Regulatory review and revision of the self-regulation process should be accorded a high priority. At a minimum, the NIGC should strike 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. The NIGC should simplify the requirements for submitting a petition, eliminating any requirements for submission of information already in the possession of the federal government, eliminating the submission of information not related to gaming (including data on its expenditures for governmental operations and services, increasing the benefits of becoming a self-regulating tribe by reducing federal oversight over Class II gaming operations in accordance with §2710(c)(5)(A), and significantly limiting reporting requirements for tribes holding a certificate of self-regulation.

### **Part 559: Facilities Licensing Regulations**



The facility licensing regulations were promulgated with a short comment period and no opportunity for meaningful consultation. The result is an unnecessary and duplicative federal mandate that arguably goes far beyond the framework set forth in IGRA and violates the Paperwork Reduction Act and other federal laws and executive orders. Tribal governments have tribal laws and regulations 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. The NIGC should re-open these regulations and meaningfully consult with Tribes to ensure that the regulations are authorized under and consistent with the purpose of the IGRA.

### **Buy Indian**

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.

In closing, I want to thank the Commission for undertaking this regulatory review and the significant consultation that has been conducted with tribes and tribal regulatory agencies to date. We look forward to rebuilding and strengthening the partnership with the Commission. Thank you in advance for your consideration of the recommendations made in this comment.

Sincerely,



Mark Mitchell, Governor  
Pueblo of Tesuque



## 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**

#### ***Fee Schedule – Calendar Year or Fiscal Year***

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

#### ***Penalties for Late Payment of Fees***

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 not to pay NIGC fees, should an NOV be considered, and then only after negotiation with the tribe.

### **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.

### **Rulemaking**

NIGC should employ negotiated rulemaking with tribal governments 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. The NIGC’s enforcement regulations reflect a punitive approach to enforcement rather than one founded on the civil regulatory regime intended by IGRA. NIGC’s enforcement authority under the IGRA, which includes the authority to levy and collect fines and order temporary and permanent closures, can and should be interpreted in light of Congress’ stated intent for “tribes to have the exclusive right to regulate gaming activity on Indian lands” and to advance the “principal goal[s] of... tribal self-sufficiency and strong tribal government.” We encourage the NIGC to adopt a voluntary compliance model that would defer to tribal regulatory agencies on enforcement and provide a notice and opportunity to cure before the NIGC steps in. This would be consistent with the general practice of other federal agencies with similar oversight regulatory roles.