FORMAL COMMENTS OF THE SPOKANE TRIBE TO THE NIGC REGARDING ITS NOTICE OF INQUIRY (NOI) CONCERNING ITS COMPREHENSIVE REVIEW OF ALL REGULATIONS PROMULGATED TO IMPLEMENT IGRA

PRELIMINARY COMMENTS PRESENTED AT THE FORMAL CONSULTATION ON SQUAXIN ISLAND INDIAN LANDS, JANUARY 14, 2011

The Spokane Tribe presented four overarching priorities during the Formal Consultation of January 14, 2011. Those are restated below as the Tribe’s formal written submission. Following those four priorities, the Spokane Tribe submits responses to each of the questions raised in the formal Notice of Inquiry.

PRIORITY #1: Adhere to the Limits of NIGC’s Statutory Authority as set out in IGRA and as articulated by the several court decisions in CRIT vs. NIGC.

Historical Context: The Tribes had their issues with original NIGC Chairman Anthony Hope. He was certainly hostile to the Tribes and the present opportunity to revisit the definition regulations promulgated by the Hope Commission is welcome and overdue, but Anthony Hope got one key principal correct, which all subsequent Commissions (except possibly the Monteau Commission) got wrong, and which the Hogen Commissions got seriously wrong.¹ The regulation of Class III gaming is to be governed by the compact agreements reached between Tribal and State governments at the negotiation table. Regulation of Class III Gaming is NOT the province of the NIGC. The Hogen Commissions took a product of the NIGA/NCAI Task Force, which was inspired by the Tribes’ self-governing desire to pursue the goal of self-regulation and to share resources and information amongst tribes, and converted those into NIGC mandatory regulations, with the ever-present threat of severe enforcement action in the form of large fines and closure orders. Tribes warned Chairman Hogen at the time that he was exceeding his statutory authority. He did it anyway. While imploring tribes to refrain from suing over the regulations, Hogen stated that this would be the outer boundaries of NIGC’s encroachment into Class III gaming. C.R.I.T. sued the NIGC and Spokane weighed in as amicus beginning

¹ We refer to the Commissions by the last name of the individual who served as the Chairman of the Commission. Tony Hope’s tenure as Chairman was January 1990 to October 1994. Harold Monteau served from October 1994 to January 1997 and Phil Hogen was Chairman from December 2002 to October 2009.

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with the initial decision of the Administrative Law Judge, along with a growing number of Tribes at the District Court and ultimately NIGA weighed in before the D.C. Appeals Court. Our counsel, Scott Crowell, co-authored the NIGA amicus brief along with Frank Lawrence of the Holland & Knight law firm.

The Hogen Commissions: At every level of the litigation, the ALJ, the federal District Court and ultimately the D.C. Court of Appeals concluded that IGRA was straightforward in defining the parameters of the NIGC’s authority; and that did NOT include regulation of Class III gaming. The Hogen Commission was so frustrated with the bright line drawn by the Appeals Court that it filed a motion for reconsideration, alleging that the NIGC could still assume the authority through other means, such as approval of gaming ordinances and incorporation of NIGC MICS into tribal state compacts, and possibly other avenues. That motion was summarily denied. Despite that clear decision, the Hogen Commissions continued to circumvent the decisions and direction of the federal courts. This includes the present practice of promulgating Class III MICS - albeit as a voluntary ‘suggestion’, approving ordinances that grant regulatory authority to NIGC by fiat, which is not based in the IGRA, and using tribal fees paid to NIGC for unauthorized and improper purposes related to the NIGC oversight of ‘voluntary’ Class III MICS. Hogen promised tribes that his intrusion into Class III regulation would end with the MICS, only to take two unsuccessful stabs, and then a third successful encroachment with a new regulation that places NIGC in the position to second-guess tribal governmental decisions regarding health, safety and welfare and empowers the NIGC to compel tribes to change their laws to meet NIGC’s unqualified, paternalistic and arbitrary standards. These regulations vault the NIGC from its well-defined limited regulation of Indian gaming into an expansive regulation of tribal governance; far beyond NIGC’s authority under IGRA and far beyond the direction and decisions of the federal courts.

Former Chairman Hogen dismissed the Tribes’ fears suggesting that, except in extreme circumstances, the NIGC would not actually use the self-appointed authority to compel tribes to adopt or amend laws in a long laundry list of areas: emergency preparedness (accidents, injuries, and medical emergencies, natural and other disasters, fire, and security threats); construction, maintenance and operations; drinking water and food; hazardous materials; and sanitation and waste disposal. IGRA does allow the NIGC limited authority to require facility licenses; but that authority does not empower the NIGC to impose its paternalistic governance preferences upon tribes.

It is refreshing that the NOI references the CRIT decision in its introductory statements. It is disappointing that the environment health and safety regulations (framed as a subset of facility licensing regulations) are not included in the list of issues to review. The Spokane Tribe believes these regulations not only should be added to the list, but that the issue of establishing parameters for NIGC authority into Class III gaming should be placed as the highest priority and addressed by the NIGC first.

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The NOI properly notes that the NIGC Class III MICS have taken on a life of their own. NIGC has approved ordinances expressly empowering the NIGC to promulgate and enforce them. Several compacts refer to the NIGC MICS as a base line for compact standards. The Hogen Commissions pursued a deliberate and zealous agenda to circumvent and riddle the bright line drawn by IGRA and the federal courts such that the NIGC is the overlord of Class III MICS. This Commission should run away from the agenda of the Hogen Commissions and stay clearly within the parameters of authority set by Congress. Spokane proposes that NIGC establish a clear date to withdraw Class III MICS from its body of regulations with notices and bulletins providing those tribes with defective ordinances or compacts sufficient time to take corrective measures.

Spokane poses this question: If the NIGC is to take on the role as chief watchdog of the regulation of Class III gaming, then why do tribes need to negotiate compacts with states? Regulation of the games was intended by Congress to be the very crux of compact negotiations. That States have embraced the Seminole decision and used that leverage to extract gaming taxes and unreasonable encroachment on tribal self-governance instead of seriously negotiating the manner in which Class III games should be regulated, created their own problems by doing so. The bad behavior of those states does not justify NIGC to fill what Chairman Hogen perceived as a void in the compacts. If this Commission in any way intends to follow its predecessors and go to Congress with an agenda of amending IGRA to empower the NIGC to regulate Class III games, it should at the same time advocate for removing states from the process altogether. Perhaps that suggestion is unrealistic or unreasonable, but no more so than subjecting Tribes to heavy paternalistic oversight by both the State Compact and the NIGC.

As the NIGC reviews the existing regulations, a question that it must address each and every time is to identify the express authority in IGRA for the regulation in question. The Class III MICS and the paternalistic “back-door” facility licensing regulations are only the most heinous examples of the over-reaching of prior Commissions. Spokane applauds the current NOI and consultation because it provides an opportunity to put Pandora back into its box.

**PRIORITY #2: DEERENCE AND SUPPORT OF TGA's AS PRIMARY REGULATORS**

The TGA is the primary regulator of tribal gaming. The tens of millions of dollars in authorized Tribal Commission budgets, the sheer manpower numbers, and the common presence of the most experienced regulators in the industry, quantify this basic fact. The Tribe itself has the highest incentive to ensure that the games are fair and honest. In the vast majority of circumstances, any Tribe out of compliance has the highest incentive to come in to compliance. Spokane encourages the NIGC to embrace a formal policy that ensures that the NIGC will make every effort to identify the problem for the TGA and/or Tribal Council, work with the Tribe to come in to compliance and only if those steps have been taken and have

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Amendment immunity, such state should not look to the NIGC to carry its water. The NIGC’s trust responsibility to tribes in these circumstances should be of paramount concern to the NIGC.

**PRIORITY # 4: SOLE PROPRIETARY INTEREST**

The body of authority on this issue is primarily a series of NIGC opinion letters issued between 2004 and 2007, and some low level dicta in a few reported court cases. “Sole Proprietary Interest” has been discussed in the context of management, development and finance agreements, but the issue is germane to assessing the legality of gaming compacts and county “MOU’s” as well. All of these collectively or singularly could, and quite likely often do, violate the “sole proprietary interest” restriction in IGRA. Many also likely violate the requirement that the Tribe be the “primary beneficiary” of the gaming operation as well. Defining “primary beneficiary” is not in your published NOI and it seems that if you are to address one, you should address both.

Our preliminary view is that this issue is best left for the courts to resolve on a case-by-case basis. The circumstances of whether these two rules are violated are going to be very fact specific such that generalized regulations will not be helpful. The Tribe’s view on this may change as we hear from other tribes.

**SPOKANE TRIBE RESPONSES TO SPECIFIC MATTERS IDENTIFIED IN THE NIGC NOTICE OF INQUIRY**

**RESPONSES TO SPECIFIC INQUIRIES:**

Rather than repeat the NIGC’s comments and questions, these answers and comments simply track the organization set forth in the NOI, beginning with Section IV.

**General comments:**

On each matter, the NOI seeks input as to the process for amending regulations, suggesting negotiated rule-making or advisory groups. The problem with both is that Tribes not selected in the process or unable to participate, are excluded. The Tribe suggests circulating drafts for formal consultation sessions, then proceed with publishing the proposed rule and having further consultation during the formal comment period. This allows tribes to participate as they deem appropriate for the particular change or changes being considered.
failed, then take action in the form of an NOV with the attendant threat of fines and closures. While the Hogen Commissions enforcement actions often were resolved with nominal fines, the heavy-handed threat has no place in proper government to government dialogue. In this vein, Spokane supports the idea suggested in the NOI to clarify the NIGC’s authority to withdraw an NOV.

Additionally, Spokane supports the idea suggested in the NOI to replace the NOVs and fines associated with late financial audits with a more routine late fee. One gets the impression that the NIGC in the recent past used the ability to penalize a tribe for a late audit in order to rack up numbers for enforcement actions because they could submit a scorecard to Congress that showed they are out there “regulating” tribes. The news media then use those same numbers to justify sensational headlines that Tribes are doing a poor job in regulating tribal gaming. In many of these instances, the audit was only a few days or weeks late, and in many, if not most of those, the outside accounting firm poorly managed its own time allocation, which is the fault of the accounting firm, and not the Tribe. Replacing the status quo with late fees would clearly place the issue of late audits in a more proper context.

**PRIORITY #3: MAINTAIN THE VIABILITY OF A CLASS II GAMING INDUSTRY**

The Spokane Tribe encourages the NIGC to maintain a vigorous position that ensures viable Class II games are available to tribes. The NIGC cannot look at this issue in isolation. Many Tribes, like Jena Choctaw of Louisiana and the Kickapoo Tribe of Texas cannot get viable compacts because States hide behind 11th Amendment immunity per the Seminole decision. Other tribes, including Spokane, are forced to accept only a very limited number of Class III machines and thus commonly offer Class II games within their facilities. For Tribes in many states, a viable Class II game is the only real leverage the Tribe has to compel the State to negotiate in good faith over Class III games.

In this regard, Spokane applauds the effort of the “TGWG” or Class II Working Group and Spokane looks forward to the Group’s testimony. To date, the Group has provided intelligent and thoughtful advice to the NIGC consistent with Spokane’s view that Class II devices must be maintained as a viable alternative for the many tribes confronted by recalcitrant states hiding behind 11th Amendment immunity. Fortunately Spokane and the other Washington Tribes have the luxury of a state statutory waiver in IGRA lawsuits, but most tribes are in states where an effective waiver is not available. In this vein, even if the NIGC does conclude that games played by a non-compacted Tribe are not Class II, it should refrain from both threatening and taking enforcement action against such tribes. The Hogen Commissions made such threats, playing in to states’ bad faith negotiations. Fortunately, the Hogen Commissions did not carry through with those threats, but the threats alone play into the states’ hands at that negotiation table. This NIGC should revert to the sound policy of the Monteau Commission where the message was clear that if a state was negotiating in bad faith and hiding behind 11th

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IV. Regulations Which May Require Amendment or Revision

A: Definitions:

1. Definition of “net revenue”

The definition of “net revenue” should be clarified to include as an allowable operating expense in the calculation of net revenue machine lease payments, participation fees, and contributions to wide area progressives.

The current definition better reflects the reality that management fees are a cost of doing business even though not recognized as an expense under GAAP.

Both of these category of expenses should not be included as part of net revenue consistent with GAAP. The only reason to use GAAP is for convenience. GAAP’s function is to establish uniformity and consistency for purposes of financial audits. Those considerations do not overcome the policy reasons for the NIGC for using definitions that more accurately reflect the costs of business regarding Indian gaming.

A separate definition of “allowable uses” is not needed. The concerns about adequate reserves and cash flow can be satisfied by the Tribe in exercising its self governance under IGRA’s allowable use “to promote tribal economic development.” Any new definition carries the risk of unduly impeding on the Tribe’s self-governance.

2. Definition of Management Contract

The definition of management agreement should be revised to make clear that collateral agreements can be made and are binding upon the parties before NIGC approval of the management agreement. No entity should be allowed to perform day-to-day decision making of a tribal gaming facility prior to NIGC approval, but other agreements should be valid. Many times, tribes are hindered from entering into finance and consulting agreements with desired contractual parties because of the collateral agreement rule. All that accomplishes is to restrict the Tribe’s ability to enter into contracts. It is an arbitrary restriction of the Tribe’s exercise of self governance. Collateral agreements should be required to be submitted with proposed management contracts to ensure full disclosure of all aspects of the relationship between the Tribe and the contracting entity, but that can be accomplished without the current rule that voids collateral agreements unless and until the management agreement is approved.

Additionally, formal regulations regarding declination letters would provide the Tribes and contracting parties greater confidence that declination letters are meaningful and correct.

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The suggestion of expanding the definition to include any percentage-based fee is not based in IGRA. If Congress wanted to provide NIGC with that authority, they would not have used the term “management contract.” If NIGC is inclined to flat such authority, it should expect litigation and it should expect to lose. Further, if it pursues such approval authority, NIGC should be fully staffed in this regard so that it does not cause delay in tribal business decisionmaking.

The stated concerns in the NOI regarding aggregate fees (loans/expenses/development fees, etc.) is valid, but that discussion is more appropriate in the context of “sole proprietary interests” and “primary beneficiary,” and not in the context of defining “management agreement.”

3. What of other definitions in need of change?

The definition of Class II gaming should be revised to mirror the definition in IGRA. Specifically 25 CFR 502.3(b) equates “Lotto” with “Bingo” when Congress clearly identified them as separate games. The current definition is an unauthorized amendment to IGRA and should be revised to reflect the language set forth in 2703(7)(A)(i)(III) “... including ... pull-tabs, lotto, punch boards, tip jars, instant bingo and games similar to bingo.

B. NIGC Fees

Basing fees on fiscal year rather than calendar year is appropriate and simplifies matters for Tribes. A two year transition should be practical for all tribes to adjust accordingly.

The Tribe has no position at this time on the issue of whether “gross revenue” should be redefined or whether fingerprinting fees should be included.

As stated in our Priorities, listed above, replacing the NOV and fines now used for late payment with a late fee makes sense by making the penalty more commensurate with the offense. Such an approach would be appropriate for late financial and compliance audits, as well. On all matters of NIGC enforcement an NOV should only be issued in instances of gross negligence or wanton behavior.

C. Self-Regulation Certification

The Tribe has no comment on this issue at this time, except that it should not be identified as a high priority issue.

D. Approval of Existing Gaming Ordinances.

Part 523 is obsolete and should be eliminated, but it also is not a priority.

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E. Management Contracts

1. Collateral Agreements

The Comments regarding collateral agreements are addressed in the context of the definitions, above and the priority discussion regarding sole proprietary interests. The Tribe cautions NIGC not to compartmentalize just the management agreement and agreements collateral thereto. Over-reaching States taxing tribes in compact negotiations and over-reaching cities and counties in MOUs gouging tribes for services and mitigation also should be considered in determining whether the Tribe no longer has sole proprietary interests or is the primary beneficiary.

2. Approval of Management Contracts

The Spokane Tribe has no objection to the proposed additions for grounds of disapproval, but questions whether they are necessary and should not be considered a matter of priority.

3. Background Investigations of Management Contractors

The issue is likely moot in that most gaming facilities offer both Class II and Class III gaming. It would be a concern that a contract is structured to separate that line in order to avoid any NIGC background check. In most such circumstances, however, the State would then have the back grounding authority, or oversight authority, per the compact such that the NIGC could/should coordinate with the State in question so that an unsuitable entity is not allowed to provide management services. To assert back grounding authority over Class III only compacts also likely triggers litigation over the parameters of the CRIT v. NIGC litigation. Accordingly, the Tribe believes this issue is not a priority and encourages NIGC to address this issue through cooperation with the licensing authority of the State at issue.

F. Proceedings Before The Commission

Given the potentially grave consequences of an adverse decision by NIGC, refinement and development of rules that are designed to provide fairness and due process are welcomed and encouraged. This matter is worthy of priority because it allows this Commission to establish precedent for due process for future Commissions. The current structure of the NIGC renders tribes too vulnerable to future Commissioners who may be hostile to tribal interests. As indicated in the Tribe’s priority discussions above, enforcement should only come as a last resort after attempts to work with the Tribe have failed, and in such event, the Tribe should have the ability to make its case in a fair and impartial forum.
G. MICS and Technical Standards

1. Class III MICS

This is perhaps the most important issue addressed in the NOI and the Tribe’s view is set forth in Priority #1 above. Since we provided our comments on January 14, we have heard a small but vocal group of tribes insists they want to see the Class III MICS continue in some form because they made some deal in a compact or state regulation. They made those agreements at their own peril knowing the NIGC did not have such authority, or at best, that the question was in serious dispute. This Commission should not perpetuate the problem. NIGC Class III MICS are illegal and have always been illegal.

Additionally, we challenge the allegation that some are at peril if the NIGC no longer promulgates Class III MICS. A number of tribal-state gaming compacts in North Dakota, Arizona, Oklahoma, Wisconsin, and Florida refer to the Class III MICS. That being said, the reference within those Compacts is not impacted by whether the Class III MICS exist or do not exist on a prospective basis. Many of these Compacts only refer to MICS as they existed at a date certain, thus if the Class III MICS were repealed today, they still would have existed on the date certain previously referenced. For example, the Arizona Form Compact refers to “minimum internal control standards of the Commission as set forth in 25 C.F.R. part 542 as published in 64 Fed. Reg. 590 (Jan. 5, 1999) as may be amended from time to time.” For those Compacts, or other agreements with individual states, which refer to the Class III MICS as they existed on a date certain, a repeal would have no impact as such an action does not undo the fact that the Class III MICS were published and found in the CFR on a date certain.

Other Compacts refer to compliance with the Class III MICS that are found in the NIGC regulations (without a reference to a date). Our position is that even if the Class III MICS were to be repealed, it would not result in a violation of any of those “incorporation by reference” Compacts unless those individual Compact require the Class III MICS to continue to be published. We are not aware of any Compact which has such a publication requirement.

The Spokane Tribe supports a short phase out period to allow those impacted tribes to reach amendments or other means to proceed in an environment of no NIGC Class III MICS. But the Spokane Tribe strongly opposes the perpetuation of illegal MICS simply because it conveniences some tribes that have built a house of cards on a faulty foundation. They can transition into some other type of default MICS through a regulators organization, or amend their compacts, or defer to some other industry entity, or perhaps some other resolution outside of NIGC. Bottom line is that there are other ways to skin that cat rather than have NIGC continue to violate the clear orders of the federal courts.
Calling them guidelines rather than regulations does not work either. NIGC has a limited budget based on fees paid by the Tribes. The Spokane Tribe certainly objects in the strongest terms to having its fees be used by this NIGC for an improper and illegal purpose that should never have been pursued by former Chairman Hogan to begin with.

2. **Class II MICS and Gaming Equipment Standards**

The Spokane Tribe addresses this issue in the Priorities discussion above. This is the one area where a Tribal Advisory Group will likely be beneficial, but any work product that comes out of such a group and NIGC should be open to consultation and comment by all interested tribes through the routine process of publishing a proposed rule, consult and seek comment, before publishing any final rule.

**H. Backgrounds and Licensing**

1. **Background Investigations for Licensing**

Make the “pilot” program permanent. Do not delay or make it complicated with process. It is a farce to call it a pilot when it older than most tribal gaming facilities.

2. **Fingerprinting**

Being able to turn to the NIGC to process fingerprint cards beyond primary management officials and key employees can only be a good thing that enables tribes to make better informed and faster decisions. This is particularly important because many states deny or severely restrict tribes from the State’s resources. The costs, however, should be borne by the participating tribes and not paid out of fees paid by other tribes.

**J. Facility Licensing**

As discussed in Priority # 1, the current regulation should be revoked before it is struck down in what will be the progeny of the *CRIT v. NIGC* decision. It is paternalistic and illegal.

**J. Inspection and Access**

The Tribe acknowledges that effective regulation requires access to needed documents so long as chain of custody is maintained, access is limited to those who truly require access and confidentiality is strictly enforced.
K. Enforcement

Enforcement is discussed in the Priority's section above. A regulation clarifying that an NOV can be withdrawn is a reasonable proposal that should be implemented without delay.

V. Potential New Regulations

A. Tribal Advisory Committee

The Spokane Tribe opposes the concept as it will likely result in limiting access of tribes that wish to participate on issues of importance to that tribes.

B. Sole Proprietary Interest

This issue is discussed at length in the priority section above.

C. Communication Policy

It should be up to the Tribe, as a matter of self-governance, to establish communication protocol with NIGC, and the NIGC should honor the wishes and direction of the Tribe’s government.

Thank you for the opportunity to review the status of the current regulations and submit our recommendations to clarify and improve them. We hope you will take Spokane’s comments today into serious consideration. Spokane applauds your efforts to take on hard issues and the Tribe looks forward to consulting with the NIGC on a government to government basis and commenting further as this process unfolds.

[Signature]

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