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

Re: NIGC Notice of Inquiry

Dear Chairwoman Stevens:

I write on behalf of Habematolel Pomo of Upper Lake to comment on the National Indian Gaming Commission's ("NIGC" or "Commission") 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

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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.

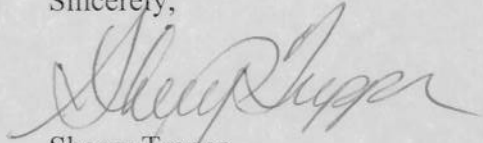
The NIGC finalized this regulation with a short comment period and no opportunity for meaningful tribal consultation. The NIGC should re-open these regulations and meaningfully consult with Tribes to ensure that the regulations are consistent with the purpose of the IGRA.

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.

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

Sincerely,

A handwritten signature in cursive script, appearing to read "Sherry Treppa".

Sherry Treppa
Chairperson
Habematolel Pomo of Upper Lake