



TRIBAL GAMING AGENCY

February 11, 2011

VIA ELECTRONIC MAIL

Tracie Stevens
Chairwoman
National Indian Gaming Commission
1441 L St. N.W., Suite 9100
Washington, D.C. 20005

RE: Yocha Dehe Written Comments On Regulatory Review

Dear Ms. Stevens:

I write to provide you the response from the Yocha Dehe Wintun Nation (the "Tribe") to the NIGC's Notice of Inquiry regarding its review of the regulations implementing the Indian Gaming Regulatory Act.

To be concise, we do not comment on all the regulations the Notice of Inquiry addressed. Rather, we comment only on those regulations as to which the Tribe has interest or concerns. For clarity, we follow the Notice of Inquiry's format and order.

1. **REGULATIONS WHICH MAY REQUIRE AMENDMENT OR REVISION**

A. **Part 502 – Definitions Of This Chapter**

i. Net revenues – allowable uses

The Tribe believes the NIGC should not change the definition of "net revenues" with respect to allowable uses. The Tribe recognizes the merit of considering the gaming operation's cash flow and financial integrity when addressing distributable income. Doing so in the form of a regulation, however, would impose additional accounting burdens on tribes and could potentially reduce distributable revenues. Moreover, we do not believe the definition of net revenue must necessarily match that of the Generally Accepted Accounting Principles. Finally, the proposed change would arrogate to the NIGC authority over tribal finances to which it is not entitled. This would mean an unacceptable intrusion into sovereign immunity.

ii. Management contracts

We believe expanding the definition of “Management Contract” to include slot leases, loan agreements, non-gaming contracts or development agreements is ill advised. Such an expanded definition would require significant new oversight by the NIGC and make it more difficult for tribes to replace their gaming machines on a business-like timetable. In addition, we question, whether the IGRA would support such an expanded definition, considering that it explicitly limits the NIGC’s review and approval authority to gaming management contracts.

Should the NIGC nevertheless decide to pursue revisions to the definitions, the Tribe views this as an issue of low priority, but which should be handled through a tribal advisory committee (“TAC”) comprised of tribal representatives well-versed in casino operations and accounting.

B. Part 514 – Fees

The Tribe does not believe there is a need to revise the NIGC’s fee assessment calculation from calendar to fiscal year. Calculating the fees on a calendar basis is not problematic.

The Tribe, however, does believe the NIGC should devise a system by which it imposes fines for late fee payment, rather than issue Notices Of Violation. NOV’s are harsh measures that do not match the wrong associated with a late payment. In addition, the process of assessing fines is procedurally preferable to the issuance of NOV’s which are cumbersome and time consuming. We recommend that such an approach include an escalating fee that would be commensurate with the tardiness of the fee payment.

This is an issue of low priority the NIGC should address via standard notice and comment rulemaking.

C. Proceedings Before the Commission

We support revision of the NIGC’s appeals procedures. Currently, appeals before the NIGC are time-consuming and expensive. Adopting procedures specifically designed for the various kinds of appeals before the NIGC would expedite matters, improve due process and make NIGC final agency actions less vulnerable to challenge in the course of federal court appeals.

For example, appeals under Part 524 (gaming ordinances) are best handled as informal reviews where decisions are made on the written record. Appeals regarding disapproved management contracts under Part 539, however, require

additional due process protections. As currently written, Part 539 appeals procedures are largely *ad hoc* and undefined which has led to confusion and undermined the finality of NIGC decisions in that area. Part 577 appeals, on the other hand, are currently cumbersome and time consuming and in some respects provide excessive and unnecessary due process protections. We recommend simplifying the procedures for such appeals. In particular, we urge the NIGC to consider eliminating the role of the Presiding Official and authorizing appeals directly to the full Commission.

In addition, having the appeals procedures in different sections of the regulations creates confusion and uncertainty. We recommend the NIGC move all appeals procedures into single regulatory section. In addition, the NIGC should rewrite the intervention rules, because as they currently operate, third-parties with no direct interests can intervene and assert positions adverse to tribes.

This is an issue of relatively high priority which the NIGC should address through a TAC.

D. Part 542 – Class III MICS

We recognize there is a significant problem here. The *Colorado Indian Tribes vs. NIGC* decision eliminated the NIGC's authority to promulgate and enforce Class III minimum internal control standards. Conversely, there are important reasons why the NIGC must continue to maintain, update (and in certain cases enforce) Class III MICS. First, after an exceedingly protracted and difficult period of negotiation, the California Gambling Control Commission (the "CGCC"), the California Bureau of Gambling Control, and California's gaming tribes recently arrived at a compromise regarding the CGCC's scope of internal control oversight at Indian casinos. That compromise is reflected in Regulation CGCC-8. That regulation, however, uses the NIGC MICS as a baseline standard for internal control compliance. Specifically, the regulation requires that all California tribes engaging in Class III gaming adopt minimum internal controls which meet or exceed the NIGC MICS standards. That is hardly surprising, considering that most California gaming tribes have used the NIGC MICS to formulate their internal controls. If the NIGC abandons the MICS, it will undermine the negotiated regulatory structure and in all likelihood create needless disputes between tribes and state regulators.

In addition, the Yocha Dehe Tribe, among several others, amended its tribal gaming ordinance to adopt the NIGC Class III MICS and authorize the NIGC to enforce these MICS. Similarly, many California tribes have entered into tribal-state compacts which adopt the NIGC MICS as the required internal control standard. Should the NIGC abandon the MICS as a oversight standard, the

validity of these provisions will be called into question, raising the prospect of tribes being out of compliance with their own ordinances and compacts. This will inevitably lead to a regulatory landscape marked by confusion, uncertainty and contention.

Moreover, we believe it is necessary to update rather than simply maintain the Class III MICS. As gaming technologies continue to evolve, the current MICS will inevitably become obsolete (and in some aspects, they already have). Common sense dictates that compliance with outdated standards could affect the ability of some tribal casinos to adequately protect the integrity of their games.

We therefore recommend that the NIGC maintain and regularly update the MICS to ensure they remain current and useful. Such updates could come in the form of bulletins, guidelines, or advisory regulations. We consider this an issue of very high priority.

E. Backgrounds and Licensing

i. Part 556 – Background Investigations

Most tribes now participate in the NIGC's pilot program for background investigations. We therefore believe the NIGC should formalize the program into a regulation in Part 556, as the system works well.

This is a low priority issue, and can probably be handled via standard notice and comment rulemaking.

ii. Fingerprinting for Non-Primary Management Officials and Non-Key Employees

The NIGC regulations require that it perform fingerprint checks on Primary Management Officials and Key Employees. The NIGC also currently allows tribes to submit background information for all other tribal gaming employees. This process works well and we encourage the NIGC to not alter it.

This is a low priority issue, and can be handled through standard notice and comment rulemaking.

F. Sections 571.1 - 571.7 – Inspection and Access

Providing the NIGC authority to review casino records maintained in offsite locations would expand the NIGC's right to access and impose new compliance obligations on tribes. We question whether under the IGRA, the NIGC can extend its inspection authority to locations that are not directly adjacent to, and

part of, the gaming operation. We believe that a better approach would be to modify Section 571.6 (b) to make it clear that tribes are required to maintain all gaming-related documents on-site. This would strengthen the current regulatory scheme rather than extend NIGC's oversight activities beyond their allowable scope.

This is an issue of medium priority, which the Tribe believes can be addressed via standard notice and comment rulemaking.

G. Part 573 – Enforcement

We support the proposal to potentially withdraw NOV's after a tribe has rectified the issue giving rise to the NOV. The potential for NOV withdrawal should have the salutary effect of promoting voluntary regulatory compliance, and make it possible for tribes to expunge their record of a violation.

Part 573 neither mandates the issuance of NOV's nor does it prohibit their withdrawal. Therefore, the NIGC may be able to authorize NOV withdrawal under certain conditions through an internal policy rather than a regulation. Obviously, the potential to withdraw an NOV should depend on the nature of the violation and the subject tribe's remedial efforts.

2. POTENTIAL NEW REGULATIONS

A. Tribal Advisory Committee

The Tribe believes TACs are valuable tools to efficiently produce workable regulations and should be encouraged. The problems with TACs are that participation can be expensive and necessarily limited, and the method of selecting participants can be skewed. An NIGC regulation regarding the formulation and operation of TACs would eliminate concerns about favoritism, broaden the number of tribes seeking to participate on TACs, and provide predictability and consistency to the TAC process. At the same time, it is important that any regulation formulated does not make bureaucratic and cumbersome the process of forming a TAC.

B. Sole Proprietary Interest Regulation

Adopting a regulation defining "sole proprietary interest" would improve regulatory guidance but would also create additional submission requirements on tribes and would (at least in the short term) result in greater uncertainty in the already volatile tribal finance markets. The challenge is finding a definition

which prohibits the transfer of an ownership interest to a non-tribal party without limiting tribal opportunities to obtaining financing for tribal gaming operations.

This is a very complex issue which the NIGC should address only through a TAC, in consultation with attorneys experienced in securing financing for tribal gaming operations

C. Buy Indian Act Regulation

Adopting such a regulation would expand the opportunities for tribes attempting to provide goods and services to the NIGC. It is possible the NIGC could create similar opportunities through the adoption of an internal policy rather than a regulation and we encourage the NIGC to consider such an alternative approach.

3. OTHER REGULATIONS

Parts 515, 517 and 571 – Privacy/FOIA

We feel very strongly that the NIGC must clarify its Freedom of Information Act regulations to establish beyond doubt that the NIGC is prohibited from releasing material protected under FOIA exemptions 4 and 7. Such a clarification could help prevent the release of unredacted Revenue Allocations Plans and other sensitive financial records.

Though not a regulatory issue, the NIGC should also revise its records retention policies to ensure audited financial statements of tribes maintain their confidentiality and are never made public. We understand that is currently not the case. While we have previously raised this issue with the NIGC, we are unaware of any resolution.

We appreciate your consideration of these comments and commend the NIGC's commitment to reexamining these important policy and regulatory issues.

Sincerely,



Leland Kinter
Chairman
Yocha Dehe Tribal Gaming Agency