



OFFICE OF THE GOVERNOR

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BILL ANOATUBBY  
GOVERNOR

February 8, 2011

Ms. Tracie Stevens, Chairwoman  
National Indian Gaming Commission  
1441 L Street N.W., Suite 9100  
Washington, DC 20005

Dear Chairwoman Stevens:

The National Indian Gaming Commission's effort to engage tribal governments in its regulatory review process is appreciated. The Chickasaw Nation strongly believes that cooperative engagement and constructive dialogue are essential in ensuring a strong regulatory framework for tribal gaming. We are pleased to assist the NIGC in identifying those regulations that are in need of revision or amendment.

In the spirit of cooperation and pursuant to the Notice of Inquiry published on November 18, 2010, in the Federal Register, 75 Fed. Reg. 70680-70686, the Chickasaw Nation respectfully submits the attached comments for the NIGC's review and consideration. It is our sincere hope that the attached comments are helpful to the NIGC as it considers modifying the existing regulations to more closely comport with the purposes and goals of the Indian Gaming Regulatory Act.

Again, thank you for this opportunity to comment on both the NIGC's existing and proposed regulations. We look forward to continued cooperation and coordination with the NIGC in addressing these important matters.

Sincerely,

A handwritten signature in cursive script that reads "Bill Anoatubby".

Bill Anoatubby, Governor  
The Chickasaw Nation

Enclosures

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**Comments from the Chickasaw Nation  
Regarding the National Indian Gaming Commission  
Regulations Implementing the Indian Gaming Regulatory Act**

The Chickasaw Nation (Nation) is pleased to submit the following comments to the National Indian Gaming Commission (NIGC) in response to the Notice of Inquiry and Request for Information published on November 18, 2010, in the Federal Register, 75 Fed. Reg. 70680-70686, requesting comments on the NIGC's upcoming regulatory review. Before providing specific comments to the regulations listed in the Notice of Inquiry, we believe it is important to first revisit the history and foundation of the Indian Gaming Regulatory Act (IGRA or Act) and then briefly discuss our view of the NIGC's role in the regulatory scheme created under the Act. It is our hope that the following discussion can play some part in reshaping the NIGC's regulatory role to be more consistent with the legislative history and text of the IGRA.

**1. PROTECTING TRIBAL SOVEREIGNTY**

Tribal sovereignty, in the federal Indian law context, connotes political autonomy, or the right of Indian tribes "to make their own laws and be ruled by them."<sup>1</sup> The conduct of gaming on Indian lands is an exercise of tribal sovereignty that was upheld by the Supreme Court in *California v. Cabazon Band of Mission Indians*<sup>2</sup> and affirmed by Congress in the IGRA. As sovereign entities, the powers of tribes are not delegated powers granted by express acts of Congress, but rather, "inherent powers of a limited sovereignty which ha[ve] never been extinguished."<sup>3</sup> This concept of inherent tribal sovereignty not only grants tribes the right and authority to make their own choices in exercising their governmental powers, but it also serves as "a backdrop against which the applicable federal . . . statutes must be read."<sup>4</sup> Absent federal laws preventing the tribe from acting within the sphere of its sovereignty, there are no limitations to a tribe's sovereign authority to govern. As such, when a federal agency seeks to exert itself into an arena routinely controlled by tribal authority, the relevant inquiry is whether a statute, treaty, or judicial decision authorizes federal activity in the particular area.

The text and legislative history of the IGRA both underscore the importance placed by Congress in protecting tribal sovereignty and related tribal rights to the fullest extent possible.<sup>5</sup> Section 2701 of the IGRA memorializes Congress' intent to protect and preserve tribal sovereignty by providing that "tribes have the exclusive right to regulate gaming activity on Indian lands," so long as it is lawfully conducted.<sup>6</sup> Despite Congress' clearly expressed wording and intent in the IGRA, however, the NIGC has established certain extra-statutory terms in its regulations that exceed the scope of the IGRA and violate the principles of tribal sovereignty and self-governance on which IGRA is based. The Nation urges the NIGC to remain fully attuned to

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<sup>1</sup> *Williams v. Lee*, 358 U.S. 217, 220 (1959).

<sup>2</sup> 480 U.S. 202 (1987).

<sup>3</sup> *See United States v. Wheeler*, 435 U.S. 313, 322 (1978).

<sup>4</sup> *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164, 168, 172 (1973).

<sup>5</sup> "[T]he Committee has attempted to balance the need for sound enforcement of gaming laws and regulations, with the strong Federal interest in preserving the sovereign rights of tribal governments to regulate activities and enforce laws on Indian land." 134 Cong. Rec. S12,649 (daily ed. Sept. 15, 1988).

<sup>6</sup> 25 U.S.C. § 2701(5).

the fundamental principles of tribal sovereignty as its guiding principle while undertaking its regulatory review. Any proposed or final changes must be carried out in a manner that recognizes the right to tribal self-government that Congress sought to protect when it enacted the IGRA.

## 2. REEVALUATING THE NIGC'S REGULATORY ROLE

The NIGC was established by Congress to serve as the federal component of IGRA's regulatory scheme. At its inception, the NIGC was not intended to be a massive bureaucratic regulatory body.<sup>7</sup> In fact, Congress' initial appropriation to cover NIGC's operational costs during the first fiscal year following IGRA's enactment was a mere \$2 million.<sup>8</sup> The NIGC now employs over 120 employees, up from 34 employees in 1996, and has a \$17 million budget. As the NIGC expanded in size, so did its regulatory presence in both Class II and Class III tribal gaming activities. The increased reach and extent of the NIGC's authority in the past decade have resulted in the promulgation of overbroad regulations that undermine the intent and spirit of the IGRA.<sup>9</sup> Such regulations are neither necessary to effectuate IGRA's goals nor are they consistent with the IGRA's stated purpose of promoting tribal economic development, self-sufficiency, and strong tribal governments.

The Nation is mindful of the fact that under the IGRA, the NIGC's regulatory authority may be greater with respect to Class II gaming than with Class III gaming. However, the Nation firmly believes that Congress intended for the NIGC's role to be limited with respect to both classes of gaming. The legislative history and text of the IGRA both firmly support the view that Congress intended to confer only a limited, oversight regulatory power on the NIGC over tribal gaming. When enacting S. 555, the bill that became the IGRA, Congress made clear its view of the NIGC's limited, oversight role by stating that it "recognizes primary tribal jurisdiction over bingo and card parlor operations, although oversight and certain other powers are vested in a federally established National Indian Gaming Commission."<sup>10</sup> Those certain other powers" are specifically identified in various provisions of the IGRA, which confer specific powers on the NIGC, including the power to approve all tribal gaming ordinances and resolutions, to close gaming activities, to levy and collect fines, and to approve gaming management contracts. Additionally, Congress delegated the NIGC authority to monitor Class II gaming including inspecting gaming premises, conducting background investigations, and inspecting and auditing books and records.

The Nation does not question the NIGC's general rulemaking authority but instead views it as directed to the establishment of standards and procedures governing the NIGC's performance of its statutory functions. Nothing in the IGRA or the legislative history of the IGRA enables the NIGC to develop and impose detailed, operational regulations on tribes. Section 2706(b)(10) of the IGRA provides that the NIGC "shall promulgate such regulations

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<sup>7</sup> See 134 Cong. Rec. 133 at H 8154 (Sept. 26, 1988) ("In fact, the bill we have here today provides for only minimal Federal regulation of bingo and certain card games. It even allows most of that Federal regulation to be waived for reservation bingo and card games that are well run.").

<sup>8</sup> S. Rep. No. 100-446 (1988), reprinted in 1988 U.S.C.C.A.N. 3071.

<sup>9</sup> See, e.g., 25 C.F.R. Parts 542, 543, 547, 559.

<sup>10</sup> S. Rep. 100-446 at 2.

and guidelines as it deems appropriate to *implement the provisions of this chapter*”<sup>11</sup> (emphasis added). In drafting this provision, Congress intended for the NIGC’s rulemaking authority to be limited to the implementation of only those powers expressly granted to the NIGC through IGRA.<sup>12</sup> The NIGC has on numerous occasions misconstrued this provision as a substantive grant of authority to engage in the day-to-day regulatory activities of tribal gaming facilities. The IGRA, however, contains no express directive for the NIGC to adopt operational regulations, and there is no basis for inferring such authority from any provision in the statute.

As an oversight regulatory body with enforcement authority, the NIGC is primarily responsible for ensuring that tribal regulation of gaming activities remain in compliance with federal standards. As primary regulators of tribal gaming, tribal governments should, in the first instance, be responsible for developing internal control standards. These standards should not be imposed on tribes by a federal agency with limited oversight and enforcement powers. Tribes should be allowed flexibility in developing a regulatory system with minimal federal intrusion, leaving the NIGC responsible for oversight of tribal regulatory processes and enforcement as required under the IGRA.

### **3. RETHINKING THE NIGC’S RULEMAKING APPROACH**

Generally speaking, regulatory agencies such as the NIGC can direct those they govern to improve their performance by adopting either a prescriptive or performance-based approach. Under the prescriptive approach, an agency prescribes the type of actions regulated entities must adopt in order to improve their performance. Under the performance-based approach, agencies incorporate the goal of their regulation into the language of their rule, specify the level of performance they are looking for, and allow regulated entities to decide for themselves how to achieve that level of performance. In this way, the regulated entity has discretion in determining the specific means by which it will achieve a required outcome. In the recent Executive Order titled “Improving Regulation and Regulatory Review,” President Obama voiced his support of the performance-based approach by directing all federal agencies to “specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt,” whenever possible.<sup>13</sup>

The NIGC has traditionally favored a more prescriptive approach to rulemaking. The MICS, for instance, which direct the behavior of tribes in their day-to-day gaming operations, is a clear example of prescriptive rulemaking. In light of the unique status of Indian tribes as sovereign entities and IGRA’s stated purpose of promoting tribal self-governance and self-sufficiency, the Nation believes the NIGC should embrace a more performance-based approach to rulemaking. By moving away from the prescriptive approach, the NIGC could utilize guidance documents, bulletins, guiding principles, and best practices as a means of promulgating their rules and specifying performance objectives. This would provide tribes the flexibility needed to address diverse operational needs and circumstances, and would be particularly beneficial for those smaller tribes with fewer resources that may need more guidance in improving their own regulatory systems. It would also enable the NIGC to continue carrying out

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<sup>11</sup> 25 U.S.C. § 2706(10).

<sup>12</sup> See, e.g., 25 U.S.C. §§ 2705, 2706, 2710, 2711, 2713

<sup>13</sup> Exec. Order No. 13563, 3 C.F.R. 3821 (2011).

its statutory oversight and enforcement functions without compromising or infringing upon tribal sovereignty. The Nation thus encourages the NIGC to incorporate this performance-based approach in its regulatory review and in all future rulemakings and agency actions.

In developing performance objectives and regulatory requirements, it is critical that the NIGC engage tribal governments in meaningful consultation prior to taking any action or committing to a decision. By consultation, the Nation is not referring to a single act of communication, but rather a process involving multiple steps that culminates in a mutually acceptable outcome that reflects and accommodates the views, needs, and objectives of both parties.

Carrying out an effective consultation process with sovereign governments is a difficult, but by no means an impossible task. Historically, the NIGC's approach to consultation has been inconsistent with the open, transparent, and collaborative process that the term consultation entails. The Nation believes a new approach is necessary to improve communications and collaboration between the NIGC and tribal governments. The Nation would like to offer an alternative approach to the consultation policy than that currently employed by the NIGC. This approach involves ten principles that we have outlined below:

1. The tribal consultation process is approached on a government-to-government basis with due regard, respect, and deference for the sovereign powers, rights, and authority of tribal governments;
2. The NIGC identifies and articulates the problem(s), issue(s) or matter(s), or a set of them, to be addressed with sufficient clarity, with credible evidence of need for action or decision, with sufficient, relevant background information to adequately equip tribal representatives to fully evaluate the legitimacy of the issue or matter presented as well as its scope, facets, and gravity;<sup>14</sup>
3. The NIGC evidences a clear absence of a preconceived "agency-favored" approach to addressing the problem, issue or matter that serves to increase the agency's authority and role and minimize that of tribal governments', and also evidences a genuine willingness to consider alternative approaches identified through consultation and additional analysis;
4. The NIGC is committed to marshalling substantial outside expertise and full consideration of all the facts brought to light through consultation and is willing to accept that all governmental processes and fully informed decision making takes time;
5. The NIGC allows sufficient time and process for tribal governmental bodies and institutions to adequately review and analyze the problem, issue or matter including weighing the evidence; employing the best processes for resolving the problem including potential use of additional fact finding, analysis,

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<sup>14</sup> One possible outcome at this point in the process is that tribes conclude that there really isn't an issue and the NIGC agrees and drops the matter.

advisory committees, and negotiated rulemaking approaches; considering the best outcomes from a tribal perspective; and providing sufficient time for tribal government representatives to articulate their proposals and their rationale;

6. If the regulatory or other action will affect more than one tribe, the quality of the consultation allows sufficient time and process for tribes to learn from one another to broaden their perspective and their understanding of the scope, aspects and gravity of the problem and to better inform themselves of innovative ways to address the problem;
7. There is sufficient transparency in the decisionmaking process that tribes can see which considerations go into making ultimate decisions and the manner and extent to which their proposals and evidence are considered and acted on;
8. The NIGC takes steps to accommodate the tribal interests and to defer to tribal authority and action to the fullest extent possible;
9. The ultimate action taken is fair, its basis well-understood, its implementation as minimally intrusive as possible, and its effect supportive of tribal sovereignty, tribal governmental processes, and tribal members as represented by their governments; and
10. To the extent possible, the ultimate action taken accords with tribal policy views or, at a minimum, achieves a minimum level of acceptance by the tribes affected unless the NIGC believes the tribes' position is expressly barred by statute or its own proposed action is expressly required to implement Sections 6 through 21 of IGRA, other federal statutes, or federal court orders.

Ultimately, the goal of the consultative process is the development of a healthy and well-regulated tribal gaming industry that helps tribes develop their economics, fosters tribal self-sufficiency, and strengthens tribal government processes and institutions. The Nation believes that a healthier collaboration between the NIGC and the tribes will lead to a much greater level of mutual respect and trust and help tribes achieve this ultimate goal.

#### **4. REGULATIONS REQUIRING REVISION OR AMENDMENT**

The Nation believes the time is ripe for the NIGC's new leadership to reform the NIGC's approach by shifting to a less intrusive regulatory role that is more respectful of the role of tribes as primary regulators of their gaming activities. The NIGC's current regulatory review process is a step in the right direction as it will help illuminate those regulations that operate to undermine tribal sovereignty and the right to self-government. We strongly urge the NIGC to engage in a collaborative process with tribal governments and to actively incorporate tribal input into their decisionmaking process during this review.

The Nation is thankful for the NIGC's efforts to seek tribal input on existing and proposed regulations, and appreciates the opportunity to provide comments on those regulations that it believes are in need of revision or amendment. Rather than presenting our views on all of the items listed in the Notice of Inquiry, we have addressed just those regulations that we believe should be accorded the highest priority during this regulatory review period. We hope the NIGC gives favorable consideration to our views and suggestions outlined below.

a. Sole Proprietary Interest

The Nation urges the NIGC to take a cautious approach in interpreting the "sole proprietary interest" provision of the IGRA and to formulate its policy around the principle that tribal governments have the right to exercise their independent judgment in relation to the operation of their gaming enterprises. Although the legislative history of the IGRA offers limited guidance with regard to the sole proprietary interest provision in the Act, the relevant legislative history supports the reading of the phrase "sole proprietary interest and responsibility" as simply meaning "owner." Attempting to stretch the meaning of the phrase "sole proprietary interest and responsibility" 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. When set against the context of the IGRA, it simply is not possible to square a more expansionist meaning of the phrase, such as extending it to some "level of control" or some concept of an "ownership interest in the profits of the gaming activity," without the meaning being directly counter to § 2511 of the IGRA, which deals with management contracts, and § 2510(b)(2)(C), which relates to other contractual arrangements. Any other reading of the IGRA implies that Congress meant to nullify the contracting provisions it anticipated and countenanced in § 2510(b)(2)(C) and explicitly authorized in § 2511. Further, an overemphasis on the element of control produces illogical conclusions as to the meaning of the term sole proprietary interest, the application of which could needlessly and unfairly constrain the ability of tribal governments to operate gaming facilities efficiently and effectively. Governments routinely outsource functions without relinquishing ultimate control or ownership of government property. There is a long record of decisions by the former Acting General Counsel of the NIGC which, the Nation believes, cross these lines, are without support in law, and reflect muddled policy.

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 and to limit the concept of sole proprietary interest to ownership.

b. Facility Licensing

The Nation strongly believes that the entire Part on facility licensing notifications, renewals, and submissions, is unnecessary and beyond the scope of the NIGC's authority. Under the IGRA, the regulation of the environment, and the public health and the issuance of gaming facility licenses are proper exercises of a tribe's inherent sovereignty and jurisdiction. The facility licensing regulations in Part 559 constitute an unwarranted intrusion into the governmental prerogatives of tribes and exceed the statutory authority delegated by the Congress in IGRA because they impose affirmative regulatory mandates on tribal governments. It is clear

that Congress did not intend an extensive regulatory role for the NIGC given the statute's very limited reference to facility licensing and the environment, public health & safety within IGRA. Indeed, the legislative history indicates Congressional intent to the contrary—Congress intended to leave these duties to the prerogative of the sovereign tribes.<sup>15</sup>

While the IGRA does require facility licensing via the tribal gaming ordinance,<sup>16</sup> and protection of environment, public health and safety,<sup>17</sup> it does not specify a time frame for renewing or reissuing a facility license. Nor does the statute make any mention of licensing including any Indian land determinations. Perhaps most importantly, the statute does not grant the NIGC authority to require an affirmative duty to submit such licenses for NIGC review. The only affirmative duty is the *tribal* licensure of facilities. There is clearly no explicit Congressional authority to impose these additional enforceable burdens on tribal governments.

### c. Self-Regulation

The Nation asks the NIGC to prioritize its review of Part 518 in the following manner: (1) simplifying the requirements for submitting a petition and eliminating any requirements for information already in the possession of the federal government; (2) increasing the benefits of becoming a self-regulating tribe by reducing federal oversight over Class II gaming operations and, in particular, deleting § 518.9 from Part 518; and (3) revising the reporting requirements for tribes holding a certificate of self-regulation.

Section 518.3(a) of the regulations contains a rather impressive list of unnecessary submissions that a tribe applying for a certificate of self-regulation must submit to the NIGC. These submission requirements are unnecessary and violate the intended purposes of the Paperwork Reduction Act, which are to minimize the paperwork burden resulting from the collection of information by the Federal Government, and to coordinate, integrate, and make uniform Federal information resources management policies and practices as a means of reducing collection burdens on the public.<sup>18</sup> Among other things, the applicant tribe must provide a brief history of the operation, including the opening dates and whether it has ever closed voluntarily or involuntarily; copies of its gaming facility license; a tribe's Constitution and governing documents; a tribe's revenue allocation plan, if applicable; and the tribe's current set of regulations. The NIGC, as the initiator of all NOV's, the maintainer of the NIGC Indian Lands Database, and the recipient of facility license and environmental and public health and safety information under its Facility Licensing regulations, already maintains all of this information. The NIGC also has information regarding a tribe's Tribal Internal Control Standards (TICS) since TICS are evaluated against the NIGC's MICS in a yearly audit submitted to the NIGC.<sup>19</sup>

In particular, there are a few requirements in § 518.3(a) that warrant the NIGC's close scrutiny. Section 518.3(a)(1)(vii) requires tribes to submit a sworn statement and a report

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<sup>15</sup> See S. Rep. No. 100-446, at 3 (1988).

<sup>16</sup> 25 U.S.C. § 2710(b)(1).

<sup>17</sup> 25 U.S.C. § 2710(b)(2)(E).

<sup>18</sup> See 44 U.S.C. § 3501.

<sup>19</sup> 25 C.F.R. § 542.3(f).



explaining how tribal net gaming revenues were used in accordance with the IGRA. Because the annual self-regulation report already covers the proper use of net gaming revenues, both the sworn statement and supporting documentation regarding this topic are superfluous and should be removed from the regulations since they are redundant and comprise an unnecessary burden on the submitter.

Also, the NIGC should seriously reconsider § 518.3(a)(2)(iii), which requires “[a] description of the accounting system(s) at both the gaming operation and the tribe that account for the flow of the gaming revenues from receipt to their ultimate use . . . .”<sup>20</sup> The Nation views this requirement as well outside the NIGC’s statutory authority. By subjecting the entire tribal government accounting system to the NIGC, the NIGC gives the impression that it would have the power to mandate changes in overall governmental operations before approving a certificate of self-regulation for Class II gaming. The IGRA already requires that all tribes, including those with certificates of self-regulation, submit annual independent audits of their gaming operation’s financial statements.<sup>21</sup> Rather than forcing the tribal applicant to describe its gaming operation accounting system, the NIGC could instead rely on two years of clean financial audits or unqualified audits with minimal findings on non-material issues as presumptively establishing that the tribe has an adequate accounting system in place.

Rather than the lengthy submission requirements in § 518.3(a)(3), the NIGC should consider revising the submission requirements in this Part so that a tribe wishing to engage in self-regulation after three years of gaming experience could simply send in a petition for self-regulation approved by the governing body of the tribe and certified as authentic by an authorized tribal official.

In addition, the Nation asks the NIGC to revise its regulatory approach to be more consistent with Congress’ intent to grant self-regulating tribes minimal NIGC oversight, enforcement and supervision. Section 518.9 provides that, “[s]ubject to the provisions of 25 U.S.C. § 2710(c)(5)(A), the Commission retains its investigative and enforcement authority over self-regulating tribes.”<sup>22</sup> The referenced section of IGRA, § 2710(c)(5)(A), expressly provides that a self-regulating tribe shall not be subject to the monitoring, inspection, and investigative authority set forth in § 2706(b). The NIGC’s retention of investigative and enforcement authority over tribes is problematic because it is not possible for the NIGC to retain investigative rights pursuant to a section that exempts self-regulating tribes from the NIGC’s investigative authority. The regulations thus violate IGRA’s specific exemption of agency investigatory authority to tribes with certificates of self-regulation.

As discussed above, once a tribe has obtained a certificate of self-regulation for Class II gaming, the NIGC has no authority to monitor, inspect and examine the gaming facility; conduct background investigations; or demand access to books and records regarding the gaming activity. Despite this statutory exemption, § 518.7 of the NIGC regulations mandate that as a condition to maintaining self-regulatory status, a tribe must submit a self-regulation report annually to the NIGC. The report must contain a sworn statement, signed by an authorized tribal official, which

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<sup>20</sup> 25 C.F.R. § 518.3(a)(2)(iii).

<sup>21</sup> 25 U.S.C. § 2710(b)(2)(C).

<sup>22</sup> 25 C.F.R. § 518.9.

explains how tribal net gaming revenues were used in accordance with IGRA.<sup>23</sup> The NIGC already has enough information from annual outside CPA financial and MICS audits, and regularly receives background investigation reports and suitability determinations for licensing decisions, as well as Indian Gaming Working Group information to determine if a problem exists sufficient to hold a “just cause” hearing<sup>24</sup> on repealing the certificate of self-regulation. There is no logical reason why the self-regulation report should include an accounting of net revenue allocations, complete with supporting documentation. Submitting an annual report on the tribe’s usage of its own monies to the federal government is overly intrusive and an affront to tribal sovereignty.

d. Class III Minimum Internal Control Standards

The Nation asks the NIGC to consider treating the Class III MICS contained in Part 542 of its regulations as voluntary in light of the *Colorado River Indian Tribes v. National Indian Gaming Commission*<sup>25</sup> decision. In *Colorado River*, the D.C. Court of Appeals affirmed the lower court’s decision and held that the IGRA did not give the NIGC authority to promulgate regulations establishing mandatory operating procedures for Class III gaming. No provision of IGRA explicitly granted the NIGC the authority to regulate Class III gaming; rather, IGRA was designed so that Class III gaming would be regulated through tribal and state compacts.

The MICS should be treated as a guideline for tribes to use in developing their Tribal Internal Control Standards. IGRA preserves the legislative prerogative of tribal governments to determine, through their tribal ordinances, how to regulate Indian gaming, subject only to minimum statutory requirements. The NIGC’s MICS guidelines should be flexible in recognition of this tribal right to develop comparable tribal standards on MICS issues consistent with IGRA’s statutory requirements. The MICS should acknowledge the right of tribal governments to develop tribal MICS standards equivalent to the NIGC guidelines for MICS, without an NIGC veto provision.

e. Class II Minimum Internal Control Standards

During an earlier rulemaking process for the NIGC’s Class II MICS, the Nation raised the concern that Part 543 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.<sup>26</sup> The NIGC responded by agreeing that confusion would result, but believed leaving a gap in its regulatory scheme was too great a risk to delay action. The NIGC disagreed with the need for a clarifying statement because it felt that the risk of confusion was minimal and it expected the remaining sections to be in place before the tribal internal control standards conforming to Class II MICS

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<sup>23</sup> 25 C.F.R. § 518.7.

<sup>24</sup> 25 U.S.C. § 2710(c)(6) (“The Commission may, for just cause and after an opportunity for a hearing, remove a certificate of self-regulation by majority vote of its members.”).

<sup>25</sup> *Colorado River Indian Tribe v. National Indian Gaming Commission*, 466 F.3d 134 (D.C. Cir. 2006).

<sup>26</sup> Part 542 defines “random number generator” as “a device that generates numbers in the absence of a pattern. May be used to determine numbers selected in various games such as keno and bingo. 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.”

would need to be implemented. The Nation urges the NIGC to work closely with tribes to ensure that Part 542 regulations referenced in Part 543 are consistent with the IGRA, the distinction between the classes of gaming, and the policy that tribes are the primary regulators of their gaming operations.

f. Class II Technical Standards

The Nation asks the NIGC to revisit some of the issues that were raised during the proposed rulemaking for Class II Technical Standards that were never fully resolved by the NIGC. For instance, the NIGC extends the same standards designed for “bingo” to “games similar to bingo” in § 547.8 of its regulations. The Nation believes there must be a distinction between “bingo” and “other games similar to bingo” or Congress would not have used two separate terms – at least this is how federal courts would view it under the canons of construction. This provision defies common sense and in application produces absurd results. An example can be found in § 547.8(d)(4)(vi)(B), which requires bingo terminals to display a notice to players that “this is a game of bingo.” By operation of this provision, a game similar to bingo would be required to display the same notice, even though it is a different game. The NIGC should revise this section to clarify that it only applies to games of bingo.

Similarly confounding is the requirement that the gaming system be able not only to recall the last game information, but the “alternative display,” which, in fact, is an entertaining feature without any significance to the outcome of a bingo game. The Nation believes this provision disadvantages tribes by placing regulatory significance on a feature that 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.

g. Privacy Act and Federal False Claims Act Notices

Tribal governments are not instrumentalities of the federal government, but rather independent sovereigns entitled to the protections of the United States. 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.”<sup>27</sup> Additionally, the applicability of federal regulations under which a state may operate does not turn states into “agencies” for purposes of the Privacy Act.<sup>28</sup> This

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<sup>27</sup> *Stevens v. Skenandore*, 234 F.3d 1274, 1274. (7th Cir. 2000), WL 1069404.

<sup>28</sup> *See, e.g., St. Michael’s Convalescent Hospital v. California*, 643 F.2d 1369, 1374 (9th Cir. 1981) (“However, those regulations do not convert acts of local and state governmental bodies into federal governmental acts”); *Adelman v. Discover Card Services, Inc.*, 915 F. Supp. 1163, 1166 (D. Utah 1996) (“... to the extent that Plaintiff

same logic from cases involving states would apply to tribes. In spite of this, the NIGC has adopted regulations that operate to impose a duty upon tribal governments to enact legislation incorporating the Privacy Act. Such an extraordinary intrusion upon tribal sovereign authority by the NIGC is neither justified nor authorized by IGRA.

The Nation strongly urges the NIGC to eliminate the Privacy Act notice requirement in § 556.2. Not only does it lack the authority to command tribal legislative bodies in this manner, but the requirements create a wide variety of problems. Foremost among these is the language in the notice itself that operates to form an information barrier between tribal gaming regulatory agencies and casino human resources departments. If tribal law limits the use of Privacy Act waivers to licensing decisions only, then tribal gaming regulatory agencies would be constrained from sharing information they collect in background investigations with the human resources staff of casinos. It is nonsensical to create an information vacuum when both tribal gaming regulatory agencies and gaming operations have a legitimate interest in and what would otherwise be a right to the information collected in such investigations.

The Nation also points out that the revision operates to impose an inordinate burden on tribal gaming regulatory agencies and consume substantial resources. Tribal gaming regulatory agencies have to contact all licensees and require each to sign a new waiver. To the Chickasaw Nation, this means contacting some 7,000 individuals, a significant portion of whom were extremely unhappy about signing the waiver in the first place. In fact, the waiver requirement generates the most protest of any aspect of the licensure process. Many of our employees read the waiver and believe that the Nation is requiring them to waive important Constitutional rights. We recognize that such waivers are necessary in order that the Nation's Gaming Commission may obtain Privacy Act protected documents from sources subject to the Privacy Act, but we do not view it reasonable to create an environment of fear and distrust among the Nation's gaming employees for the sake of an insignificant and arbitrary change in the content of the notice.

The Nation's arguments to modify the language of the Privacy Act Notice apply with equal force to the False Statement Act Notice. Dutifully, the Nation's gaming license application forms contain a False Statements Notice notwithstanding the fact that the Nation has no power to enforce the federal criminal code or imprison non-Indians. Moreover, false statements made on a gaming license offend the Nation's law as distinguished from federal law. It is one thing to include language on a form and quite another to enact it into statutory law. We suggest that the NIGC reconsider § 556.2 and § 556.4 on the basis that they create unwarranted and unnecessary problems in addition to the fact that they unlawfully infringe upon tribal sovereignty.

#### h. Enforcement Regulations

The Nation urges the NIGC to include, as part of its regulatory review, a fresh look at the agency's enforcement regulations and a reconsideration of its current punitive approach to enforcement. The NIGC's enforcement policy should be more reflective of a civil regulatory regime that is consistent with the overall purposes and goals of the IGRA and the civil nature of the NIGC's functions rather than a punitive criminal enforcement regime. The NIGC's

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argues that the federal regulatory control over DDS [a State of Utah agency] transforms DDS into a federal agency for purposes of the Privacy Act, this court holds that it does not . . .").

enforcement authority under the IGRA, which includes the authority to levy and collect fines and order temporary and permanent closures, must be interpreted in light of Congress' stated intent for "tribes to have the exclusive right to regulate gaming activity on Indian lands"<sup>29</sup> and to advance the "principal goal of . . . tribal self-sufficiency, and strong tribal government."<sup>30</sup> The Nation thus encourages the NIGC to adopt a voluntary compliance model that would defer to tribal regulatory agencies on enforcement matters in the first instance and provide a notice and opportunity to cure before an enforcement action is taken by the NIGC. As an oversight regulatory body, the NIGC's mission is to ensure compliance and provide guidance when necessary, not to punish. A voluntary compliance model would allow the NIGC to carry out its enforcement duties in a more constructive and less punitive manner while strengthening the regulatory stature, experience, and capacities of tribal governments.

## 5. Conclusion

In closing, we would like to thank you again for undertaking this important consultation process at the beginning of your terms and for allowing us to provide these comments. We firmly believe that cooperative engagement and constructive dialogue are both necessary to ensure a strong regulatory framework for tribal gaming. We hope you find our comments useful in correcting the NIGC's historical top down, command and control approach reflected in the regulations discussed above. We look forward to continuing to work together with the NIGC, on a government-to-government basis, on matters of common importance.

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<sup>29</sup> 25 U.S.C. § 2701(5).

<sup>30</sup> 25 U.S.C. § 2701(4).