House Resource Committee Oversight Hearing
April 9, 2008
H.R. 5608

Chairman Rahall and members of the Committee: Thank you for allowing me to speak with you today. I am Phil Hogen, Chairman of the National Indian Gaming Commission. I am here to comment on H.R. 5608, a bill to establish regular and meaningful consultation and collaboration with tribal officials.

H.R. 5608 identifies NIGC, the Department of the Interior and the Indian Health Service as agencies requiring an accountable consultation process. Without a doubt, the need for tribal consultation applies to many federal agencies and programs, and certainly—and prominently—t o the work of the National Indian Gaming Commission (NIGC).

NIGC is firmly committed to the consultation process. The agency is strongly opposed to this bill, however.

In keeping with the obligation to consult, NIGC adopted its consultation policy in early 2004 and published it in the Federal Register. A copy is attached. This policy was itself a product of the Commission's consultation with tribes as it was formulated. In the course of formulating this policy, NIGC also gathered and examined the consultation policies of other federal agencies, and discussed the utility of those policies with those agencies.

The question that the bill seeks to answer, I believe, is what kind of consultation constitutes adequate, accountable consultation. This bill does not answer that question, and it certainly does not answer the question as to how the NIGC, a regulatory agency, can meet these new consultation responsibilities while at the same time effectively fulfilling its statutory obligations under the Indian Gaming Regulatory Act. In fact, it is our firm belief that enactment of this legislation would eviscerate the agency's good faith ability to regulate.

We continue to seek consultation in the most effective ways. While there are 562 recognized tribes in the United States, only about 230 are engaged in Indian gaming, and so it is that group to whom the NIGC has most often turned for consultation. The great breadth of tribal diversity is reflected in their varying cultures, economies, and geography. They vary from having large land bases to small, large tribal membership to small, urban settings to rural. Some are found in jurisdictions where there is much non-tribal commercial gaming and others where gambling opportunities are almost exclusively tribal. Thus, the Commission quickly learned that a position or policy favored by tribes with small land bases and memberships, located where huge urban populations make for great market opportunities, will not necessarily be favored by tribes with large tribal memberships and large, remote, rural reservations near no large population centers.

It is not possible, of course, for the Commission to visit every tribe on its reservation each time an issue or policy might affect tribes. Gaming tribes have formed regional gaming associations, such as the Great Plains Indian Gaming Association (GPIGA), the

Oklahoma Indian Gaming Association (OIGA), the Washington Indian Gaming Association (WIGA), the California Nations Indian Gaming Association (CNIGA), the Midwest Alliance of Sovereign Tribes (MAST), and the New Mexico Indian Gaming Association (NMIGA), among others, as well as national organizations such as National Indian Gaming Association (NIGA), National Congress of American Indians (NCAI) and United South and Eastern Tribes (USET). Those organizations meet annually or more often, and NIGC has taken those opportunities to invite tribal leadership to attend consultation meetings on a NIGC-to-individual-tribe basis. Consulting at gaming association meetings maximizes the use of the Commission's time and minimizes the travel expenses that tribes, who ordinarily attend those meetings anyway, must expend for consultation.

Many tribes accept these invitations, many do not. Some tribes send their tribal chair, president or governor, and members of their tribal council, while others send representatives of their tribal gaming commissions, or in some instances staff members of the gaming commissions or of the tribal gaming operations. The consultation sessions are always most effective when tribal leadership, by way of tribal chair or council, is present. The letters of invitation, samples of which are attached, identify issues on which NIGC is currently focusing and about which the agency is seeking tribal input. The letters always include an invitation to discuss any other topics that might be of particular interest to an individual tribe. Some tribes have limited their consultations to a single issue, such as NIGC's proposals to better distinguish gaming equipment permissible for uncompacted Class II gaming from that permitted for compacted Class III gaming.

We do not only make ourselves available for numerous consultations, but we also listen seriously to what we hear at those consultations. The regulations NIGC adopts are published with thorough preambles, which attempt to summarize all of the issues raised in the government-to-government consultation sessions the Commission has held with tribes, as well as those raised by all other commenter's providing written comment, during the comment period on the regulation. I have attached the preamble from the Commission's recently adopted facility license regulation as an example.

The NIGC does not believe its current consultation practices are perfect, but we do believe that they are effective. We also believe that consultation should not mean agreement and that the parties consulting should not measure the good faith or effectiveness of the consultation by whether agreement is reached. Experience has shown that there is little or no clamor for consultation if the action being considered is favorably received throughout the Indian gaming industry. NIGC's recent reduction in the fees it imposes on gross gaming revenues to fund NIGC operations provides such an example.

On the other hand, if the issue the agency is considering is viewed as problematic, often there are concerns expressed that consultation has been inadequate. A further challenge the NIGC has observed is that consultation is most often criticized by tribes when the eventual policy that the agency settles on is at odds with the position expressed by tribes during consultations. That is, the NIGC's failure, from the tribal point of view, was not in the consultation per se but rather that the Commission did not agree with tribal points of

view. It does not seem fair or just that the only consultation deemed adequate is that in which the Commission always fully comports with tribal points of view. NIGC often finds itself sympathetic to tribal points of view, but it is also bound by statutory constraints. For example the Indian Gaming Regulatory Act's characterization of a number of gambling practices as Class III requires the sanction of tribal-state compacts.

I am fearful that if legislation such as H.R. 5608 is enacted, nearly every policy adopted by the National Indian Gaming Commission will be subject to challenge in court by one of the 230 gaming tribes on the basis that the regulation was not supported by consultation. I am also fearful that the Commission's mission of providing the gaming regulation mandated in IGRA will be overwhelmed by such litigation.

A problem created by the proposed legislation is distinguishing "policies that have tribal implications" from those that do not. In the legislation, the former are defined as:

> any measure by the agency that has or is likely to have a direct effect on one or more Indian tribes, on the relationship between the federal government and Indian tribes, or on the distribution of power and responsibilities between the federal government and Indian tribes, such as regulations, legislative comments or proposed legislation, and other policy statements or actions, guidance, clarification, standards, or sets of principles.

It would seem that this would leave precious little for a regulatory agency such as the NIGC to do without first engaging in consultation. Determining the extent of the consultation that would be adequate likely would be problematic too.

An example of this would be the agency's position on this legislation. The Office of Management and Budget coordinates the views of the federal family on legislation that impacts the administration. On March 25, 2008, OMB asked the NIGC to provide its views on H.R. 5608 within the remainder of that week. Needless to say, if H.R. 5608 were the law of the land, doing so would have been impossible given the requirement that consultations must first occur. Questions that the proposed bill also leaves unanswered are: How long would such consultation take? How many tribes would have to be consulted? Where would that consultation best occur? How would that consultation be best documented?

Next, with respect to the application of consultation requirements, I think it is appropriate to draw distinctions between federal agencies and their functions. If a federal program will build homes on Indian lands for Indian people, certainly extensive consultation ought to occur with respect to the implementation of such meritorious programs. That federal activity, however, I believe, can be qualitatively distinguished from the regulation or oversight that an agency such as the National Indian Gaming Commission is mandated to provide.

While the following example is perhaps too stark, it may have some application here. To require that before the basketball referee calls a foul or charges a player with "traveling," it would probably be impractical and of questionable fairness if on each occasion he or she had to first hear the point of view of the player on whom the foul or the traveling was called, and of course, in fairness, to hear from the opposition, and then the coaches of both teams. As the rules of the game are written, those who participate ought to be invited to the table to discuss them. However, in the application of those rules, consultation is inappropriate and certainly impracticable, and I am concerned that similar constraints on regulatory agencies, which might be imposed by H.R. 5608, ought to be avoided. The definition found in section 2(4), "POLICIES THAT HAVE TRIBAL IMPLICATIONS," would require clarity and need to clearly distinguish the adjudicative functions of regulatory agencies from the rulemaking they conduct.

Similarly, section 6, addressing unfunded mandates, would pose great challenges to those who make rules that relate to commercial enterprises, such as tribal bingo halls and casinos. If the National Indian Gaming Commission imposed a regulation that required surveillance cameras to be placed over the counter of the cashiers that count the money at the gaming facility, under an enacted H.R. 5608, a tribe might argue that such surveillance could not be so required, unless the federal government paid for the cameras. First, NIGC does not use federal taxpayers' dollars. Instead, the agency's activities are supported by fees on the tribes; as a result, requiring federal payment of a regulatory cost does not work in the context of NIGC's budgetary status. Furthermore, it is not appropriate with respect to regulatory requirements for commercial activities such as gaming, which the NIGC helps regulate under IGRA.

Finally, administrative agencies are peculiar in that they exercise quasi-executive, quasi-legislative (rulemaking) and quasi-judicial (adjudication) functions. Reduced to essentials, rulemaking is the adoption of regulations that have the force and effect of law, adjudication is the application and further interpretation of those rules in particular cases in dispute. Fair process is required for each of the processes, but nowhere in the Administrative Procedure Act, which is a remarkable and proven body of law by which our federal government has successfully operated for over 40 years, are there any constraints similar to those which would be imposed by H.R. 5608.

There is a history to the development of consultation. That the United States has trust obligations to Indian tribes is recognized explicitly in many treaties. Chief Justice John Marshall, in his famous trilogy of opinions written in the 1830s, characterized the relationship generally as that of a guardian and ward. While the United States is not a common law trustee, the federal-tribal relationship is in fact a government-to-government relationship, and as the United States fulfills its role in that relationship, it needs to bear its obligations in mind. The world has changed much since Chief Justice Marshall's time, and not the least of these changes is the positive movement by tribes toward self-determination and self sufficiency. In recent decades, federal Indian policy has fostered that evolution.

The United States, of course, needs to consider the needs and desires of tribes, and as tribes attain greater political and economic stability, the greater the deference the United States ought to afford their expressions of need and desire. What this means, of course, is that the federal government ought to consult with tribes as it formulates and executes policies that impact those tribes.

President Bush reiterated the Administration's adherence to a government-to-government relationship in his Memorandum for the Heads of Executive Department and Agencies in September 2004. E.O. 13175 directs federal agencies to conduct meaningful government-to-government consultation with tribes when policies that affect them are formulated. Challenges to such policies cannot legally be founded on perceived or alleged shortcomings of the consultation process attending those policies. This legislation, however, would require a degree of collaboration with the regulated community (Indian gaming tribes) that is wholly inconsistent with a robust and healthy regulatory mission such as NIGC's.

Thank you for the opportunity to present the Commission's view on H.R. 5608. We stand ready to answer any questions.

Government to Government Policy

National Indian Gaming Commission Government-to-Government Tribal Consultation Policy – published in the federal register March 24, 2004

The National Indian Gaming Commission ("NIGC" or "Commission"), in consultation with Federally-recognized Indian tribes, establishes and issues this Government-to-Government Tribal Consultation Policy, which shall take effect immediately and remain in effect until further order of the Commission.

I. Introduction

A. Fundamental Principles of the Government-to-Government Relationship

1. The United States of America has a unique government-to-government relationship with Federally-recognized Indian tribes, as set forth and defined in the Constitution of the United States and Federal treaties, statutes, Executive Orders, and Federal court

decisions. Since its formation, the United States has recognized Indian tribes as sovereign nations, which possess and exercise inherent sovereign authority over their members and territory to the extent recognized and defined by the Constitution of the United States, Federal treaties, statutes, Executive Orders, and Federal court decisions. Pursuant to this unique government-to-government relationship, the Federal Government has enacted numerous statutes and promulgated numerous administrative regulations that establish and define its trust responsibilities to Indian tribes and address issues concerning tribal self-governance, tribal territory and resources, and tribal treaty and other rights.

2. A principal goal of long-standing Federal Indian policy is to support the federally recognized sovereignty of Indian tribes by promoting tribal economic development, tribal self-sufficiency, and strong tribal governance and self-determination over their internal affairs. In 1988, to further this policy and also address congressional concerns regarding the absence of clear Federal standards or regulations for the conduct of Indian gaming, Congress enacted the Indian Gaming Regulatory Act ("IGRA" or "Act"), *25 U.S.C. 2701 et seq.*, for three specified purposes:

(a) To provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal government;

(b) To provide a statutory basis for the regulation of Indian gaming adequate to shield it from organized crime and other corrupting influences; ensure that tribes are the primary beneficiaries of their gaming operations; and assure that the gaming is conducted fairly and honestly by both the operator and players; and,

(c) To declare that the establishment of independent Federal regulatory authority and

Federal standards for Indian gaming and the establishment of the NIGC are necessary to meet congressional concerns regarding Indian gaming and protect it as a viable means of generating tribal governmental revenues and furthering the policies and purposes of IGRA.

B. Tribal, Federal, State and Local Rights and Interests Regarding the Operation and Regulation of Indian Gaming Under IGRA

1. The NIGC was established by IGRA as an independent Federal regulatory agency. The Act vests the Commission with certain regulatory powers and responsibilities for Indian gaming, including broad authority to promulgate such regulations and guidelines as it deems appropriate to implement the provisions of the Act.

2. IGRA recognizes and provides that the operation of gaming on Indian lands is primarily a function of tribal sovereignty. Indian gaming is conducted by tribal governments, who may use the net revenues derived from gaming only to fund tribal governmental operations or programs; provide for the general welfare of the tribe and its members; promote tribal economic development; donate to charitable organizations; and help fund operations of local government.

3. The regulatory framework established by IGRA for Indian gaming provides differing, but complementary, regulatory authority and responsibility to Indian tribes, the NIGC, the Secretary of the Interior, and state governments, dependent upon which of three different statutorily defined classes of tribal gaming activity is conducted. Under IGRA, Class I gaming remains under the exclusive sovereign jurisdiction of Indian tribes and is not subject to the Act's other regulatory provisions. Indian tribes also retain

primary sovereign regulatory authority and responsibility for the day-to-day regulation of Class II and Class III Indian gaming operations under IGRA. However, the Act also vests the NIGC with certain independent Federal regulatory powers and responsibilities regarding the regulation of Class II and Class III gaming activity on Indian lands. In addition, IGRA also requires that Class III Indian gaming activity be conducted in conformance with a Tribal-State compact that is in effect and approved by the Secretary of the Interior. Under IGRA, such Tribal-State Compacts may include negotiated provisions for state participation in the regulation of Class III tribal gaming activity conducted on Indian lands within the state.

4. IGRA's statutory system of shared regulatory authority and responsibility for Indian gaming will work most effectively to further the Act's declared policies and purposes, when the three involved sovereign governmental authorities work, communicate, and cooperate with each other in a respectful government-to-government manner. Such government-to-government relationships will make it possible for all three sovereign governments to mutually resolve their issues and concerns regarding the operation and regulation of Indian gaming, and efficiently coordinate and assist each other in carrying out their respective regulatory responsibilities for Indian gaming under IGRA.

5. Accordingly, the NIGC deems it appropriate to issue this Government-to-Government Tribal Consultation Policy, to promote and enhance the government-to-government relationships, consultations, and mutual cooperation among Indian tribes, the NIGC, other involved Federal departments and agencies, and state and local governments, regarding the operation and regulation of Indian gaming under IGRA.

II. NIGC Policy Making Principles and Guidelines

A. Fundamental Principles

The NIGC will adhere to and be guided by the following fundamental principles of Federal Indian policy, when formulating and implementing Federal regulatory policies, programs, procedures, requirements, restrictions, or standards that may substantially affect or impact the operation or regulation of gaming on Indian lands by a Federally-recognized tribal government under the provisions of IGRA:

1. The NIGC recognizes and respects the Federally recognized sovereignty of Indian tribes, which possess and exercise inherent sovereign authority over their members and territory and have certain rights to self-government over their internal governmental affairs under Federal law.

2. The NIGC recognizes and is committed to maintaining a respectful and meaningful government-to-government relationship with Federally-recognized Indian tribes and their authorized governmental leaders, when exercising and discharging its regulatory authority and responsibilities for Indian gaming under IGRA.

3. The NIGC acknowledges that Indian tribes retain and exercise primary sovereign authority and responsibility with respect to the day-to-day operation and regulation of gaming on their tribal lands under IGRA, subject to independent Federal regulatory oversight and the conditions, restrictions, and requirements of the Act, Tribal-State Compact provisions, Federal procedures in lieu of Tribal-State compacts, and NIGC

regulations promulgated pursuant to the Act.

4. The NIGC will honor and respect the provisions of Tribal-State Class III Gaming Compacts that are duly approved by the Secretary of the Interior and in effect, or, in the alternative, Federal Class III tribal gaming procedures approved by the Secretary of the Interior, in lieu of a Tribal-State Compact, pursuant to IGRA and Department of Interior regulations.

5. To the extent practicable and permitted by law, the NIGC will engage in regular, timely, and meaningful government-to-government consultation and collaboration with Federally recognized Indian tribes, when formulating and implementing NIGC administrative regulations, bulletins, or guidelines, or preparing legislative proposals or comments for Congress, which may substantially affect or impact the operation or regulation of gaming on Indian lands by tribes under the provisions of IGRA.

6. The NIGC will encourage Federally-recognized Indian tribes and state and local governments to consult, collaborate and work cooperatively with each other in a respectful, good faith government-to-government manner to mutually address and resolve their respective issues and concerns regarding the operation and regulation of gaming on Indian lands under IGRA, in furtherance of the policies and purposes of the Act.

7. The NIGC will also work cooperatively with other Federal departments and agencies and with state and local governments to enlist their interest and support to assist the Commission and Indian tribes in safeguarding tribal gaming from organized crime and other corrupting influences; providing adequate law enforcement, fire, and emergency health care services, and environmental protections for the health and safety of the public in tribal gaming facilities; and accomplishing the other goals of IGRA.

B. Other Policy Making Principles and Guidelines

To the extent practicable and permitted by law, the NIGC will also adhere to and be guided by the following additional principles and guidelines, when formulating and implementing Federal regulatory policies, programs, procedures, requirements, restrictions, or standards, that may substantially effect or impact the operation or regulation of gaming on Indian lands by a Federally-recognized tribal government(s) under the provisions of IGRA:

1. The NIGC acknowledges and will reasonably consider variations in the nature and scale of tribal gaming activity across Indian country, as well as variations in the extent and quality of tribal gaming regulation and state regulatory involvement under the different Tribal-State Compacts, when determining the need, nature, scope, and application of new or revised Federal regulatory policies, procedures, programs, requirements, restrictions, or standards for Indian gaming operations under IGRA.

2. The NIGC will also provide technical assistance, advice, guidance, training, and support to help Indian tribes and tribal leaders and employees understand and comply with Federal policies, regulations and standards for Indian gaming.

3. The NIGC will defer to tribally established regulations and standards for Indian gaming, when the Commission determines that they are permitted by IGRA and further its policies and purposes; that they adequately address congressional concerns regarding Indian gaming; that tribal compliance and enforcement are readily verifiable by the NIGC; and, that similar Federal regulations and standards are not statutorily required or necessary to implement the Act.

4. The NIGC will also encourage and provide technical assistance, advice, guidance, and support to Indian tribes and tribal leaders to formulate and implement their own regulatory policies, procedures, requirements, restrictions, and standards for their gaming operations, in lieu of similar Federal regulations and standards, if the Commission determines that the proposed tribal regulations and standards are permitted by IGRA and further its policies and goals; that they will adequately address congressional concerns regarding Indian gaming; that tribal compliance and enforcement will be readily verifiable by the NIGC; and, that similar Federal regulations and standards are not statutorily required or necessary to implement the Act.

5. The NIGC will not formulate and implement Federal regulatory policies, procedures, programs, requirements, restrictions, or standards for Indian gaming that will impose substantial direct compliance or enforcement costs on an Indian tribe(s), if the Commission determines that such Federal regulations and standards are not required by IGRA or necessary to implement its provisions or further accomplishment of its policies and purposes.

6. In general, the NIGC will strive to grant Indian tribes the maximum administrative and regulatory discretion possible in operating and regulating gaming operations on Indian land under IGRA; and also strive to eliminate unnecessary and redundant Federal regulation, in order to conserve limited tribal resources, preserve the prerogatives and sovereign authority of tribes over their own internal affairs, and promote strong tribal government and self-determination, in accordance with Federal Indian policy and the goals of IGRA.

C. Applicability

The NIGC will be guided by the above policy-making principles and guidelines in its planning and management activities, including budget development and execution, legislative initiatives and comments, and policy and rule making processes.

III. Tribal Consultation Procedures and Guidelines

A. To the fullest extent practicable and permitted by law, the NIGC is committed to regular, timely, and meaningful government-to-government consultation with Indian tribes, whenever it undertakes the formulation and implementation of new or revised Federal regulatory policies, procedures, programs, requirements, restrictions, or standards for Indian gaming, either by means of administrative regulation or legislative initiative, which may substantially affect or impact the operation or regulation of gaming on Indian lands by a tribe(s) under IGRA.

B. Based on the government-to-government relationship and in recognition of the sovereignty and unique nature of each Federally-recognized Indian tribe, the primary focus of the NIGC's consultation activities will be with individual tribes and their recognized governmental leaders. Consultation with authorized intertribal organizations and representative intertribal advisory committees will be conducted in coordination with and not to the exclusion of consultation with individual tribal governments. When the NIGC determines that its formulation and implementation of new or revised Federal regulatory policies, procedures, programs, requirements, restrictions, or standards may substantially effect or impact the operation or regulation of gaming on Indian lands by a tribe(s) under IGRA, the Commission will promptly notify the affected tribes and initiate

steps to consult and collaborate directly with the tribe(s) regarding the proposed regulation and its need, formulation, implementation, and related issues and effects. Tribes may and are encouraged, however, to exercise their sovereign right to request consultation with the NIGC at any time they deem necessary.

C. The Chairman of the NIGC or his or her designee is the principal point of contact for consultation with Indian tribes regarding all NIGC programs and related policies and policy-making activities of the Commission under IGRA.

D. The NIGC will initiate consultation by providing early notification to affected tribes of the regulatory policies, procedures, programs, requirements, restrictions, and standards that it is proposing to formulate and implement, before a final agency decision is made regarding their formulation or implementation.

E. The NIGC will strive to provide adequate opportunity for affected tribes to interact directly with the Commission, to discuss and ask questions regarding the substance and effects of proposed Federal regulations and standards and related issues, and to provide meaningful input regarding the legality, need, nature, form, content, scope and application of such proposed regulations, including opportunity to recommend other alternative solutions or approaches. Such consultation will be conducted with tribes by means of scheduled meetings, telephone conferences, written correspondence, and other appropriate methods of communication, before a final agency decision is made regarding the formulation or implementation of the proposed Federal regulations or standards.

F. As part of the tribal consultation process, the NIGC will answer tribal questions and carefully consider all tribal positions and recommendations, before making its final decision to formulate and implement proposed new or revised Federal regulatory polices,

procedures, programs, requirements, restrictions, or standards that may substantially affect or impact the operation or regulation of gaming on Indian lands by affected tribe(s) under IGRA.

G. As an independent Federal regulatory agency, the NIGC has authority and responsibilities under IGRA to conduct investigations, take enforcement actions, and render regulatory and quasi-judicial decisions regarding the approval of tribal gaming ordinances and third party management contracts, the suitability of management contractors to participate in Indian gaming, and tribal compliance with the Act. The nature of these statutory responsibilities necessarily places some limitations on the nature and type of consultation that the Commission may engage in with the involved tribes. These limitations on consultation are necessary to preserve the integrity of the NIGC's investigations, enforcement actions, and decision-making processes, and also comply with provisions of the Federal Administrative Procedures Act that limit Commission contact with parties in contested cases. Nevertheless, the NIGC will endeavor, to the extent practicable and permitted by law, to reduce procedural impediments to consulting directly with tribal governments to resolve issues regarding the operation and regulation of Indian gaming under IGRA.

H. The NIGC will, to the extent necessary and appropriate, consult with affected tribes to select and establish fairly representative intertribal work groups, task forces, or advisory committees to assist the NIGC and tribes in developing administrative rules or legislative recommendations to address and resolve certain issues of regulatory concern regarding the operation and regulation of Indian gaming under IGRA.

I. The NIGC will, to the extent it deems practicable, appropriate, and permitted by

law, explore and consider the use of consensual policy making mechanisms, including negotiated rulemaking, when formulating and implementing Federal regulatory policies, procedures, programs, requirements, restrictions, or standards that may substantially effect or impact sovereign tribal rights of self-government regarding the operation or regulation of gaming under IGRA, or related tribal resources, or tribal treaty or other rights.

IV. Increasing Flexibility for Tribal Waivers of Regulatory Requirements

A. The NIGC will review the provisions and processes under which Indian tribes may apply for waivers of regulatory requirements under NIGC regulations, and take whatever steps it determines appropriate and permitted by law to further streamline those processes, consistent with the policy making principles and guidelines set forth in Part II of this policy.

B. This Part only applies to regulatory requirements that are discretionary and subject to waiver by the NIGC.

V. General Limitations

This policy is not intended to nor does it create any right to administrative or judicial review, or any other right, benefit, trust responsibility, or cause of action, substantive or procedural, enforceable by any party against the United States of America, its departments, agencies or instrumentalities, its officers, or employees, or any other persons or entities.

This policy is not intended to create a forum for resolution of specific disputes or

issues that are the subject of litigation between the NIGC and a tribe(s) nor is it meant to replace presently existing lines of communication.

February 1, 2005

Connie Lewis, Chairperson
Big Sandy Rancheria
P.O. Box 337
Auberry, CA 93602

GOVERNMENT-TO-GOVERNMENT CONSULTATION
NOTICE AND REQUEST

Dear Chairperson Lewis:

Pursuant to our commitment to government-to-government tribal consultation, the National Indian Gaming Commission (NIGC) will be in Sacramento, California, on February 23-24, 2005, for the purpose of meeting and consulting separately with the individual California Tribes and their government leaders. Accordingly, I am requesting a separate government-to-government consultation meeting with you and other leaders of your Tribe to consult regarding Indian gaming issues. The meetings will be held at the NIGC's Region II office located at 801 I Street, Suite 489, in Sacramento.

Based on our separate government-to-government relationship with each individual tribe and in recognition of the individual uniqueness of each tribe, the Commission's Tribal Consultation Policy, which was officially adopted and issued on March 2004, is fundamentally promised upon the principle of meeting and consulting separately and privately with each individual tribe and its leaders. Meetings can be scheduled on Wednesday, February 23rd, between 8:30 a.m. and 5:00 p.m.; or Thursday, February 24th between 8:30 a.m. and 5:00 p.m. Each meeting will be scheduled for 40-minutes. During each meeting, the Commission would like to hear and discuss your comments, questions, concerns and recommendations regarding:

- The Commission's proposed revisions of the current rule definitions of "Electronic or Electromechanical Facsimile" (25 CFR § 502.8) and "Other Games Similar to Bingo" (25 CFR § 502.9), which were previously sent to you for comment and are posted on the NIGC website;

- The Commission's 4th working draft of proposed Class II Game Classification Standards, which was sent with the foregoing proposed revised definitions and posted on the NIGC website;

- The Commission's latest working draft of proposed Class II Game Technical Standards, which is being separately sent to you tomorrow for review and comment and will be posted on the NIGC website;

- The first and second sets of proposed MICS revisions posted on the NIGC website; and

- Any other issues on which your Tribe would like to consult with the Commission.

To schedule your Tribe's private government-to-government consultation meeting with the Commission, please complete and fax the enclosed meeting reservation form to Ms. Rita Homa at 202-632-0045 as soon as possible. Each meeting will be scheduled on a first come first serve basis, with preference given to Tribes traveling the greater distance.

To facilitate meaningful consultation, we encourage you to bring Tribal Council and Tribal Gaming Enterprise and Regulatory Commission members with you to your Tribe's consultation meeting. Since there is limited parking available at our Region II office, I recommend that you park at the Holiday Inn Downtown Sacramento located at 300 J Street for your scheduled meeting. The NIGC's Region office is located approximately 3 blocks northeast from the hotel on I Street.

If you have any questions regarding the scheduling or consultation process, please call me or Ms. Homa at 202-632-7003.

Commissioners Westrin, Choney and I are looking forward to meeting and consulting with as many California tribes and their leaders as possible during our visit to Sacramento and hope you are able to schedule a meeting with us.

Sincerely,

Philip N. Hogen
Chairman

August 30, 2005

Marilyn Scott, Chairperson
Upper Skagit Indian Tribe
25952 Community Plaza Way
Sedro Woolley, WA 98284

GOVERNMENT-TO-GOVERNMENT CONSULTATION
NOTICE AND REQUEST

Dear Chairperson Scott:

The National Indian Gaming Commission (NIGC) will be at the Coeur d'Alene Casino Hotel Resort in Worley, Idaho, for the Affiliated Tribes of Northwest Indians (ATNI) Annual Conference on September 19-22, 2005. In addition to attending the conference, we also plan to meet and consult with individual Northwest Tribes and their government leaders. Accordingly, I am requesting a separate government-to-government consultation meeting with you and other leaders of your Tribe regarding Indian gaming issues.

The Commission requests to meet and consult separately and privately with each individual Tribe and its governmental and regulatory gaming leaders, based on our separate government-to-government relationship with each Tribe and in recognition of the individual uniqueness of each Tribe. Meetings can be scheduled on Wednesday, September 21 between 1:00 p.m. and 6:00 p.m. and Thursday, September 22 from 8:30 a.m. to 6:00 p.m. Each meeting will be scheduled for 30 minutes. During each meeting, the Commission would like to hear and discuss Tribal comments, questions, concerns and recommendations regarding:

- The Commission's proposed revisions of the current rule definitions of "Electronic or Electromechanical Facsimile" (25 CFR § 502.8) and "Other Games Similar to Bingo" (25 CFR § 502.9);

- The Commission's most recent working draft of proposed Class II Game Classification Standards;

- The Commission's most recent working draft of Class II Game Technical Standards;

- The Commission's most recent working draft of Class II Game Technical Standards;

- The Third set of proposed MICS revisions recently sent to each Tribe for review and comment; and

- Any other issues on which your Tribe would like to consult with the Commission.

To schedule your Tribe's private government-to-government consultation meeting with the Commission, please complete and fax the enclosed meeting reservation form to Ms. Rita Homa at 202-632-0045 as soon as possible. Each meeting will be scheduled on a first come first served basis with preference given to Tribes traveling the greater distance.

If you have any questions regarding the scheduling or consultation process, please call me or Ms. Homa at 202-632-7003.

Commissioners Westrin, Choney and I are looking forward to meeting and consulting with as many Northwest Tribes and their leaders as possible while attending the ATNI Annual Conference and hope you are able to schedule a meeting with us.

Sincerely,

Philip N. Hogen
Chairman

cc: Chairman, Gaming Commission

Enclosure

November 30, 2005

Richard Milanovich, Chairman
Agua Caliente Band of Cahuilla Indians
600 E. Tahquitz Canyon Way
Palm Springs, CA 92262

GOVERNMENT-TO-GOVERNMENT CONSULTATION
NOTICE AND REQUEST

Dear Chairman Milanovich:

Pursuant to our commitment to government-to-government tribal consultation, the National Indian Gaming Commission (NIGC) will be at the 11th Annual Western Indian Gaming Conference (WIGC) on Tuesday, Wednesday and Thursday, January 10-12, 2006, for the purpose of meeting and consulting separately with individual Tribes in California and Northern Nevada. Based on our separate government-to-government relationship with each Tribe and in recognition of the individual uniqueness of each Tribe, the Commission is requesting to meet and consult separately and privately with each individual Tribe and its governmental and regulatory gaming leaders. In keeping with our commitment to government-to-government tribal consultation, the Commission has reserved the Snow Creek Board Room in the Wyndham Palm Springs Hotel for the purpose of meeting and consulting with individual Tribes and their leaders. Accordingly, I am requesting a separate government-to-government consultation meeting with you and other leaders regarding Indian gaming issues.

Meetings can be scheduled on Tuesday, January 10th between 1:00 p.m. and 6:00 p.m., Wednesday, January 11th between 9:00 a.m. and 6:00 p.m., and on Thursday, January 12th between 2:00 p.m. and 6:00 p.m. Each meeting will be scheduled for 45 minutes. During each meeting, the Commission would like to hear and discuss your comments, questions, concerns and recommendations regarding:

- The Colorado River Indian Tribe (CRIT) court decision and proposed amendments of IGRA to clarify the scope of NIGC oversight and authority;

- The Commission's proposed revisions of the current rule definitions of "Electronic or Electromechanical Facsimile" (25 CFR § 502.8) and "Other Games Similar to Bingo" (25 CFR § 502.9) as they interface with the Department of Justice's proposed Johnson Act amendments;

- The Commission's most recent working draft of proposed Class II Game Classification Standards posted on the NIGC website, as they interface with the Department of Justice's proposed Johnson Act amendments;

- The Commission's most recent second working draft of Class II Game Technical Standards posted on the NIGC website, as they interface with the Department of Justice's proposed Johnson Act amendments;

- The third and fourth sets of proposed MICS revisions posted on the NIGC website;

- Comments and discussion on standards for development of uniform federal standards for licensing of tribal gaming facilities by Tribes;

- Senator John McCain's proposed bill to amend IGRA's provisions regarding NIGC funding (SB 1295);

- Representative Richard Pombo's most recent discussion draft bill (November 1, 2005) to amend Section 20 of IGRA regarding Indian lands eligible for Tribal gaming and proposed BIA regulations for taking land into trust for Tribes for purposes of gaming ; and;

- Any other issues on which your Tribe would like to consult with the Commission.

To schedule your Tribe's private government-to-government consultation meeting with the Commission, please complete and fax the enclosed meeting reservation form to Ms. Rita Homa at 202-632-0045 as soon as possible. Each meeting will be scheduled on a first come first served basis with preference given to Tribes traveling the greater distance.

If you have any questions regarding the scheduling or consultation process, please call me or Ms. Homa at 202-418-9807.

Commissioner Choney and I look forward to meeting and consulting with Tribes and their leaders during our visit to WIGC and hope you are able to schedule a meeting with us.

Sincerely,

Philip N. Hogen
Chairman

Enclosure

March 10, 2006

Phillip Largo, Chairman
Jicarilla Apache Tribe Gaming Commission
P.O. Box 740
Dulce, NM 87528

MEETING NOTICE

Dear Chairman Largo:

The National Indian Gaming Commission (NIGC) will be attending the National Indian Gaming Association (NIGA) 2006 Trade Show and Convention in Albuquerque, New Mexico, on April 3-5, 2006. This is also an excellent opportunity to consult with individual Tribes in New Mexico and their government leaders.

Preference will be given to New Mexico Tribes that were not able to schedule a consultation meeting during the Southwest Indian Gaming Conference in February. In keeping with our stated policy regarding government-to-government tribal consultation, the Commission has reserved the Cutter Room in the Doubletree Albuquerque Hotel for this purpose. Accordingly, I am requesting a separate government-to-government consultation meeting with you and other leaders regarding Indian gaming issues.

Meetings can be scheduled on either Monday, April 3rd between 3:00 p.m. and 5:00 p.m., Tuesday, April 4th between 10:00 a.m. and 5:00 p.m., or Wednesday, April 5th between 10:00 a.m. and 5:00 p.m. Each meeting will be scheduled for 45 minutes. At these meetings, the Commission would like to hear and discuss your comments, questions, concerns and recommendations regarding:

- Proposed amendments to the Indian Gaming Regulatory Act (IGRA) as framed in S. 2078 (McCain), which address, among other things:
  1. Clarification of the scope of the Commission's Minimum Internal Control Standards (MICS) authority over class III gaming;
  2. Expanded scope of "gaming-related contracts", which would be subject to the Commission's review and approval; and

3. Revisions to the exceptions to the prohibition on gaming on land acquired after 1988.

- Proposed legislation H.R. 4893 (Pombo) to amend section 20 of the Indian Gaming Regulatory Act (IGRA) to restrict off-reservation gaming.

- Proposed amendments to the formula that sets the Commission's annual funding, as framed in S. 1295, which has passed the Senate and is pending before the House Resources Committee.

- Proposals to more clearly identify the dividing line between non-compacted Class II gaming and compacted Class III gaming, including the Department of Justice's draft amendment of the Johnson Act (15 USC § 1171, *et seq.*) and the Commission's draft classification and technical standards for technologic aids to Class II gaming.

- Pending proposed rules to modify the MICS.

- Proposals that would require applications for Tribal gaming facility licenses to specify and certify that the facility is on "Indian Lands" and to identify the environmental, health and public safety standards that apply to the facility and certify compliance therewith.

- Any other issues of concern to your Tribe.

To schedule your Tribe's meeting with the Commission, please complete and fax the enclosed meeting reservation form to Ms. Rita Homa at 202-632-0045 as soon as possible. Each meeting will be scheduled on a first-come-first-served basis.

If you have any questions regarding the scheduling, please call me or Ms. Homa at 202-418-9807.

I look forward to meeting with New Mexico Tribes and their leaders during the NIGA Convention and Trade Show and hope you are able to schedule a meeting with us.

Sincerely,

Philip N. Hogen
Chairman

Enclosure

May 7, 2007

Sharon Whitebear, Chairperson
Ho-Chunk Nation
P.O. Box 667
Black River Falls, WI 54615

GOVERNMENT-TO-GOVERNMENT CONSULTATION
NOTICE AND REQUEST

Dear Chairperson Whitebear:

Pursuant to our commitment to government-to-government tribal consultation and in keeping with our stated policy, the National Indian Gaming Commission (NIGC) will be in Bloomington, Minnesota for the 15th Annual Great Plains/Midwest Indian Gaming Association Conference and Trade Show on Tuesday, May 22nd and Wednesday, May 23rd, 2007, for the purpose of meeting and consulting separately with individual Tribes in Michigan, Minnesota, Wisconsin, Iowa, Montana, Nebraska, North Dakota, South Dakota and Wyoming.

Based on our separate government-to-government relationship with each Tribe and in recognition of the individual uniqueness of each Tribe, the Commission asks to meet and consult separately and privately with each individual Tribe and its governmental and regulatory gaming leaders. The Commission has reserved the Atrium 3 Room in the Sheraton Bloomington Hotel for this purpose. Meetings times may be scheduled on Tuesday, May 22nd between 9:00 p.m. and 5:00 p.m. and Wednesday, May 23rd between 9:00 a.m. and 12:00 p.m. Each meeting will be scheduled for 45 minutes. At these meetings, the Commission would like to hear and discuss your comments, questions, concerns and recommendations regarding:

- Proposed classification regulations to better distinguish between technically aided Class II games and Class III electronic or electromechanical facsimiles;

- Proposed technical standards for Class II gaming equipment;

NATIONAL HEADQUARTERS 1441 L St. NW, Suite 9100, Washington, DC 20005 Tel: 202.632.7003 Fax: 202.632.7066 WWW.NIGC.GOV

REGIONAL OFFICES Portland, OR; Sacramento, CA; Phoenix, AZ; St. Paul, MN; Tulsa, OK

- Scope of NIGC's regulation of Class III gaming activities in light of Court holdings in *Colorado River Indian Tribes v. NIGC* litigation;

- Planning for NIGC's compliance with the Government Performance Results Act (GPRA), including budget review, training and technical assistance;

- Regulations proposed by the Department of the Interior to establish standards for implementing off-reservation gaming acquisitions (Section 20) of IGRA and amending Revenue Allocation Plan (RAP) regulations;

- Proposals for regulations concerning tribal licenses for gaming facilities, specifying "Indian Lands" on which the gaming is conducted, identifying the environmental, health and public safety standards that apply to the facility and certifying compliance therewith;

- Proposals for regulations to reduce the requirement to submit fees to twice a year from four times a year; to allow tribes to request a reduced scope audit in certain circumstances; to update and clarify the management contract regulations; and to revise the definition of net revenue; and

- Other gaming regulatory issues of concern of your Tribe.

Please complete and fax the enclosed meeting reservation form to Ms. Rita Homa at 202-632-0045 to schedule your Tribe's private government-to-government consultation meeting with the Commission, as soon as possible. Each meeting will be scheduled on a first come first served basis with preference given to Tribes traveling the greater distance.

If you have any questions regarding the scheduling or consultation process, please call me or Ms. Homa at 202-418-9807.

Commissioners Choney, DesRosiers, and I look forward to meeting and consulting with Tribes and their leaders during our visit to the Great Plains/Midwest Indian Gaming Association Conference and hope you are able to schedule a meeting with us.

Sincerely,

Philip N. Hogen
Chairman

Enclosure

February 28, 2007

Delia Carlyle, Chairperson
Ak-Chin Indian Community
42507 W. Peters & Nall Rd.
Maricopa, AZ. 85239

GOVERNMENT-TO-GOVERNMENT CONSULTATION
NOTICE AND REQUEST

Dear Chairperson Carlyle:

Pursuant to our commitment to government-to-government tribal consultation and in keeping with our stated policy, the National Indian Gaming Commission (NIGC) will be in Phoenix, Arizona for the National Indian Gaming Association (NIGA) 2007 Trade Show and Convention on Tuesday, March 27th and Wednesday, March 28th, 2007, and will be meeting and consulting separately with individual Tribes in Arizona, Colorado, and southern Nevada.

Based on our separate government-to-government relationship with each Tribe and in recognition of the individual uniqueness of each Tribe, the Commission asks to meet and consult separately and privately with each individual Tribe and its governmental and regulatory gaming leaders. The Commission has reserved Room 208 A & B in the West Hall in the Phoenix Convention Center for this purpose. Meetings times may be scheduled on Tuesday, March 27th between 9:00 p.m. and 5:00 p.m. and Wednesday, March 28th between 9:00 a.m. and 5:00 p.m. Each meeting will be scheduled for 45 minutes. At these meetings, the Commission would like to hear and discuss your comments, questions, concerns and recommendations regarding:

- Draft proposed classification regulations to better distinguish between technically aided Class II games and Class III electronic or electromechanical facsimiles;
- Draft proposed technical standards for Class II gaming equipment;
- Scope of NIGC's regulation of Class III gaming activities in light of Court holdings in *Colorado River Indian Tribes v. NIGC* litigation;

NATIONAL HEADQUARTERS 1441 L St. NW, Suite 9100, Washington, DC 20005 Tel: 202.632.7003 Fax: 202.632.7066 WWW.NIGC.GOV
REGIONAL OFFICES Portland, OR; Sacramento, CA; Phoenix, AZ; St. Paul, MN; Tulsa, OK

- Planning for NIGC's compliance with the Government Performance Results Act (GPRA), including budget review, training and technical assistance;

- Regulations proposed by the Department of the Interior to establish standards for implementing off-reservation gaming acquisitions (Section 20) of IGRA and amending Revenue Allocation Plan (RAP) regulations;

- Proposals for regulations concerning tribal licenses for gaming facilities identifying the environmental, health and public safety standards that apply to the facility and certifying compliance therewith and, for new gaming operations, specifying the "Indian Lands" of the places, facilities, or locations on which gaming will occur and certifying the status of these lands;

- Proposals for regulations to reduce the requirement to submit fees to twice a year from four times a year; to allow tribes to request a reduced scope audit in certain circumstances; to update and clarify the management contract regulations; and to revise the definition of net revenue; and

- Other gaming regulatory issues of concern of your Tribe.

Please complete and fax the enclosed meeting reservation form to Ms. Rita Homa at 202-632-0045 to schedule your Tribe's private government-to-government consultation meeting with the Commission, as soon as possible. Each meeting will be scheduled on a first-come, first-served basis with preference given to Tribes traveling the greater distance.

If you have any questions regarding the scheduling or consultation process, please call me or Ms. Homa at 202-418-9807.

Commissioners Choney, DesRosiers, and I look forward to meeting and consulting with Tribes and their leaders during our visit to the NIGA Convention and Trade Show and hope you are able to schedule a meeting with us.

Sincerely,

Philip N. Hogen
Chairman

Enclosure

(iv) Zilpaterol alone or in combination as in § 558.665.

■ 3. In § 558.625, add paragraph (f)(2)(ix) to read as follows:

§ 558.625 Tylosin.

* * * * *

(f) * * *

(2) * * *

(ix) Zilpaterol alone or in combination as in § 558.665.

■ 4. In § 558.665, revise paragraph (e) to read as follows:

§ 558.665 Zilpaterol.

* * * * *

(e) *Conditions of use in cattle.* It is administered in feed as follows:

Zilpaterol in grams/ton	Combination in grams/ton	Indications for use	Limitations	Sponsor
(1) 6.8 to provide 60 to 90 mg/head/day		Cattle fed in confinement for slaughter: For increased rate of weight gain, improved feed efficiency, and increased carcass leanness in cattle fed in confinement for slaughter during the last 20 to 40 days on feed.	Feed continuously as the sole ration during the last 20 to 40 days on feed. Withdrawal period: 3 days.	057926
(2) [Reserved]				
(3) [Reserved]				
(4) 6.8 to provide 60 to 90 mg/head/day	Monensin 10 to 40, plus tylosin 8 to 10	Cattle fed in confinement for slaughter: As in paragraph (e)(1) of this section; for prevention and control of coccidiosis due to *Eimeria bovis* and *E. zuernii*; and for reduction of incidence of liver abscesses caused by *Fusobacterium necrophorum* and *Arcanobacterium (Actinomyces) pyogenes*.	As in paragraph (e)(1) of this section; see §§ 558.355(d) and 558.625(c) of this chapter. Monensin and tylosin as provided by No. 000986 in § 510.600(c) of this chapter.	057926

Dated: January 24, 2008.

Bernadette Dunham,

Director, Center for Veterinary Medicine.

[FR Doc. E8–1903 Filed 1–31–08; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF THE INTERIOR

National Indian Gaming Commission

25 CFR Parts 502, 522, 559 and 573

RIN 3141–AA23

Facility License Standards

AGENCY: National Indian Gaming Commission ("NIGC" or "Commission").

ACTION: Final rule.

SUMMARY: The rule adds new sections and a new part to the Commission's regulations that require tribes to adopt and enforce standards for facility licenses. These standards will help the Commission ensure that each place, facility or location where class II or class III gaming will occur is located on Indian lands eligible for gaming as required by the Indian Gaming Regulatory Act. The rules will ensure that gaming facilities are constructed, maintained and operated in a manner that adequately protects the environment and the public health and safety.

DATES: Effective March 3, 2008.

FOR FURTHER INFORMATION CONTACT: Penny J. Coleman, Acting General Counsel, at 202–632–7003; fax 202–632–7066 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

I. Background

On October 17, 1988, Congress enacted the Indian Gaming Regulatory Act ("IGRA" or "Act"), 25 U.S.C. 2701–21, creating the National Indian Gaming Commission ("NIGC" or "Commission") and developing a comprehensive framework for the regulation of gaming on Indian lands. 25 U.S.C. 2702. The NIGC was granted, among other things, the authority to promulgate such regulations and guidelines as it deems appropriate to implement the provisions of IGRA, 25 U.S.C. 2706(b)(10), as well as oversight and enforcement authority, including the authority to monitor tribal compliance with the Act, Commission regulations, and tribal gaming ordinances.

First, the IGRA allows gaming on Indian lands pursuant to 25 U.S.C. 2703(4), and it contains a general prohibition against gaming on lands acquired into trust by the United States for the benefit of the tribe after the Act's effective date of October 17, 1988, unless one of several exceptions are met. 25 U.S.C. 2719. The Commission has jurisdiction only over gaming operations on Indian lands and therefore must establish that it has jurisdiction as a prerequisite to its monitoring, enforcement, and oversight duties. 25 U.S.C. 2702(3).

Second, the NIGC needs to obtain information on a tribe's environmental and public health and safety laws to oversee the implementation of approved tribal gaming ordinances. Before opening a gaming operation, a tribe must adopt an ordinance governing gaming activities on its Indian lands. 25 U.S.C. 2710. The Act specifies a number of mandatory provisions to be contained in each tribal gaming ordinance and subjects such ordinances to the NIGC Chairman's approval. *Id.* Approval by the Chairman is predicated on the inclusion of each of the Act's specified mandatory provisions in the tribal gaming ordinance. *Id.* Among these is a requirement that the ordinance must contain a provision ensuring that "the construction and maintenance of the gaming operation, and the operation of that gaming is conducted in a manner that adequately protects the environment and the public health and safety." 25 U.S.C. 2710(b)(2)(E). Since 1993, when the Commission became operational, the Chairman has required each tribal gaming ordinance submitted for approval to include the express environmental and public health and safety statement set out in 25 U.S.C. 2710(b)(2)(E).

The Commission believes that tribes must have some form of basic laws in the following environmental and public health and safety areas: (1) Emergency preparedness, including but not limited

to fire suppression, law enforcement and security; (2) food and potable water; (3) construction and maintenance; (4) hazardous materials; and (5) sanitation (both solid waste and wastewater). Accordingly, in 2002, the Commission issued an interpretive rule to ensure the adequate protection of the environment, public health, and safety. 67 FR 46109, Jul. 12, 2002 ("Interpretive Rule").

The NIGC has conducted many environment and public health and safety inspections since the issuance of the Interpretive Rule and has worked with a consultant to allow the agency to gain expertise in this area. Through this inspection process, the NIGC has identified weaknesses in tribal laws or enforcement thereof and has worked with tribes to cure deficiencies. The Commission has also identified several deficiencies in the Interpretative Rule that will be corrected by the Facility License Standards. Namely, the Interpretive Rule does not assist the Commission in identifying what environmental and public health and safety laws apply to each gaming operation nor does it ensure that tribal gaming regulatory authorities are enforcing those laws.

There is a need for a submission to the Commission of a certification by the tribe that it has enacted or identified laws applicable to its gaming operation and is in compliance with them together with a document listing those laws. This process will enable tribes and the Commission to identify problem areas where laws are needed so that the NIGC may offer technical advice and encourage adoption and enforcement of appropriate laws. The final Facility License Standards will not replace the Interpretive Rule but will work in conjunction with it. The final rule does not preclude the Chairman's authority to take an enforcement action in the event imminent jeopardy exists at a tribal gaming facility.

Regulatory Matters

Regulatory Flexibility Act

The rule will not have a significant economic effect on a substantial number of small entities as defined under the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq*. Moreover, Indian tribes are not considered to be small entities for the purposes of the Regulatory Flexibility Act.

Small Business Regulatory Enforcement Fairness Act

The rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. The rule does not have an annual effect on the economy of $100 million or more. The rules will not cause a major increase in costs or prices for consumers, individual industries, Federal, state or local government agencies or geographic regions and does not have a significant adverse effect on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

Unfunded Mandates Reform Act

The Commission, as an independent regulatory agency within the Department of the Interior, is exempt from compliance with the Unfunded Mandates Reform Act, 2 U.S.C. 1502(1); 2 U.S.C. 658(1). Regardless, the rule does not impose an unfunded mandate on state, local, or tribal governments or on the private sector of more than $100 million per year. Thus, it is not a "significant regulatory action" under the Unfunded Mandates Reform Act.

Takings

In accordance with Executive Order 12630, the Commission has determined that the rule does not have significant takings implications. A takings implication assessment is not required.

Civil Justice Reform

In accordance with Executive Order 12988, the Office of General Counsel has determined that the rule does not unduly burden the judicial system and meet the requirements of sections 3(a) and 3(b)(2) of the Order.

National Environmental Policy Act

The Commission has determined that the rule does not constitute a major federal action significantly affecting the quality of the human environment and that no detailed statement is required pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. 4321, *et seq*.

Paperwork Reduction Act

The following final Facility Licensing Standards require information collection under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501, *et seq*., and are subject to review by the Office of Management and Budget.

General Comments to Final Facility License Standards

We requested written comments from the public on the proposed Facility License Standards (72 FR 59044) during the comment period that opened on October 18, 2007, and closed on December 3, 2007. During that comment period we received 81 comments: 70 from tribal governments or tribal gaming commissions; 3 from citizens' associations; 3 from gaming associations and 1 each from a governor's association, a county, a private citizen, a state environmental agency, and a cardroom. Many of the comments were grouped based on the common topics addressed. The Commission carefully reviewed all comments and where appropriate revised the final rule to reflect those comments. The comments and the NIGC response follow.

Comments Questioning NIGC Authority To Promulgate the Facility License Standards Under IGRA

Many of the comments to the proposed Facility License Standards pertained to the Commission's authority. We address the specific issues and Commission response below.

Comments Regarding NIGC Authority

Several commenters stated that the proposed rule improperly intrudes upon tribal sovereignty in the absence of a clearly expressed intent by Congress to do so and seeks to replace the tribe's sovereign regulatory authority with NIGC's authority. Stated variously, the proposed rule would compel the tribes to adopt NIGC's facility licensing standards instead of the tribes' own, or it would compel the tribes to enact positive law and then grant the NIGC the right to judge the adequacy of that law.

The Commission disagrees with these characterizations of IGRA and of the proposed rule's purpose and consequence. The Commission recognizes that tribes are the primary regulators of Indian gaming and has no intention or desire to intrude upon that vital role or to usurp tribal authority. Thus, in the general case, the rule only asks each tribe to identify and enforce the laws it has adopted to ensure the health and safety of the public and the environment, i.e., the laws or standards it has adopted in the areas of emergency preparedness, food and potable water, construction and maintenance, etc. There is no requirement that a tribe adopt and enforce any particular law. The Commission merely wishes to know, for example, whether a tribe has written its own fire code, whether it has adopted a county's code, or whether a tribal-state compact provides for the application of a particular fire code.

It is only in the unusual case where a tribe has adopted no, or obviously inadequate, health and safety standards that the rule would insist that the tribe adopt laws. That, however, places no obligation on the tribe that does not already exist. IGRA obligates each tribe, through its gaming ordinance, to ensure

that the construction, maintenance, and operation of each tribal gaming facility is conducted in a manner that adequately protects the environment and the public health and safety. 25 U.S.C. 2710(b)(1)(E). In short, the rule encroaches no further on tribal sovereignty than IGRA already has.

Likewise, the Commission already "judges" the adequacy of tribal health and safety standards. The Commission already has, and already exercises, oversight responsibility for health and safety at tribal gaming operations. As with all aspects of regulating Indian gaming, the primary responsibility belongs to the tribes, and the Commission plays only an oversight role under the Commission's existing interpretive rule, 67 FR 46109. The adoption of the rule would make no change to this arrangement.

Several commenters stated that the NIGC has no authority to require adoption of specific health and safety or operational standards because IGRA contains no such standards.

Although IGRA does not enumerate specific health and safety requirements for gaming facilities, the Act requires that the construction, maintenance and operation of a gaming facility "is conducted in a manner which adequately protects the environment and the public health and safety." 25 U.S.C. 2710(b)(1)(E). Congress created the NIGC, 25 U.S.C. 2704(a), and gave it the specific authority to "promulgate such regulations and guidelines as it deems appropriate to implement the provisions of [IGRA]." 25 U.S.C. 2706(b)(10). The Commission is doing so here. This rule mandates that tribes identify, and certify their enforcement of, the health and safety laws, resolutions, codes, policies, standards and/or procedures that apply to their gaming operations. Therefore, the rule implements the requirements of 25 U.S.C. 2710(b)(1)(E). Further, when certain terms are used herein to describe applicable health and safety requirements, such as laws, resolutions, codes, policies, standards and/or procedures, the use of such term or terms is not meant to exclude all other terms of similar meaning.

Several commenters stated that NIGC has no authority to attach specific requirements, such as a three-year renewal period, to issuing a facility license because IGRA contains no such requirements. Other commenters suggested that the three-year renewal period was arbitrary.

The Commission agrees that IGRA does not specify any period of renewal or other conditions to the obligation to issue a facility license. The Commission disagrees, however, with the commenters' conclusion that the Commission therefore lacks the authority to promulgate such requirements. The Commission also disagrees that the three-year renewal period is arbitrary, as it is a reasonable period to periodically review changes in tribal requirements and/or changes in physical circumstances at a gaming facility.

IGRA obligates each tribe to license its gaming facilities: "A separate license issued by the Indian tribe shall be required for each place, facility or location on Indian lands at which Class II gaming is conducted." 25 U.S.C. 2710(b)(1). IGRA also obligates each tribe, through its gaming ordinance, to ensure that the construction, maintenance, and operation of each tribal gaming facility is conducted in a manner that adequately protects the environment and the public health and safety. 25 U.S.C. 2710(b)(1)(E). What exactly is required by each of these sections, or when it is required, however, Congress did not say. Congress has neither the institutional expertise nor the inclination to specify all regulatory details in this or any other organic statute for any regulatory agency. Accordingly, it creates regulatory agencies and gives to them the responsibility to fill in those gaps.

Congress created the NIGC, 25 U.S.C. 2704(a), and gave it the specific authority to "promulgate such regulations and guidelines as it deems appropriate to implement the provisions of this chapter [i.e., IGRA]." 25 U.S.C. 2706(b)(10). The Commission has deemed it appropriate to implement the specific provisions set out in 25 U.S.C. 2710(b)(1) and 2710(b)(1)(E).

The rule does not require that each facility be licensed only every three years. Rather, the rule requires that a facility be licensed no less frequently than once every three years, proposed 25 CFR 559.3, and the Commission observes that most tribes license their gaming facilities more frequently. The choice of a three-year renewal period is therefore consistent with, and largely encompasses, the tribes' existing practices. The rule also requires that the tribe submit a list of applicable health and safety laws and certify its compliance with them. Proposed 25 CFR 559.5. The Commission has deemed it appropriate to implement the specific provisions in 25 U.S.C. 2710(b)(1) and 2710(b)(1)(E).

By seeking to have tribes periodically license gaming facilities and identify the health and safety rules they enforce, the rule creates mechanisms by which the tribes and the Commission can ensure that gaming facilities are licensed and that their construction, maintenance and operation is "conducted in a manner which adequately protects the environment and the public health and safety." 25 U.S.C. 2710(b)(1)(E).

Several commenters stated that NIGC has no authority to require submissions of facility licenses, a list of all applicable health and safety laws and standards, or any documents other than those specifically identified in IGRA such as: (1) Annual audit reports; (2) proposed gaming ordinances; (3) notice of the issuance of a gaming license to key employees and primary management officials; and (4) an application for self-regulation.

The Commission agrees that IGRA does not specifically identify the submissions required by the proposed rule. The Commission disagrees that the comment contains an exhaustive list of documents whose submission IGRA specifically requires. The comment omits, for example, the submission of management contracts for the Chairman's review and approval. 25 U.S.C. 2711. The Commission also disagrees with the commenters' conclusion that the ability to require submission of information is limited to those specific submissions identified in IGRA.

As to the submission of the facility license itself and the information about health and safety laws and compliance that must accompany it, IGRA, again, obligates each tribe to license its gaming facilities. 25 U.S.C. 2710(b)(1). IGRA also obligates each tribe, through its gaming ordinance, to ensure that the construction, maintenance, and operation of each tribal gaming facility is conducted in a manner that adequately protects the environment and the public health and safety. 25 U.S.C. 2710(b)(1)(E). What exactly is required by each of these sections, however, Congress did not say. Congress has neither the institutional expertise nor the inclination to specify all regulatory details in this or any other organic statute for any regulatory agency. Accordingly, it creates regulatory agencies and gives to them the responsibility to fill in those gaps.

Congress created the NIGC, 25 U.S.C. 2704(a), and gave it the specific authority to "promulgate such regulations and guidelines as it deems appropriate to implement the provisions of this chapter [i.e., IGRA]." 25 U.S.C. 2706(b)(10). The Commission has deemed it appropriate to implement the specific provisions set out in 25 U.S.C. 2710(b)(1) and 2710(b)(1)(E).

By seeking to have tribes periodically license gaming facilities and identify the

health and safety rules they enforce, the rule creates mechanisms by which the tribes and the Commission can ensure that gaming facilities are licensed and that their construction, maintenance and operation is "conducted in a manner which adequately protects the environment and the public health and safety." 25 U.S.C. 2710(b)(1)(E).

That said, there is a second, sufficient source of authority within IGRA for the submission of facility licenses to the Commission. A facility license is a requirement of IGRA, 25 U.S.C. 2710(b)(1), and the failure to issue a license is a violation of IGRA against which the NIGC Chairman may bring an enforcement action. 25 U.S.C. 2713. The Chairman, therefore, has the authority to request any facility license for any facility as part of a routine investigation. 25 U.S.C. 2706(b). Rather than regularly making such a demand through the Commission's enforcement staff, the proposed rule simply establishes an administrative process for the submission of facility licenses upon their issuance.

Similarly, as to the submission of Indian lands information, IGRA requires that all gaming take place on "Indian lands." *See, e.g.*, 25 U.S.C. 2710(b)(1), 2710(d)(1). Gaming that does not take place on Indian lands is subject to all state and local gambling laws and federal laws apart from IGRA. The Chairman therefore has the authority to request Indian lands information for any facility as part of a routine investigation in order to establish whether gaming is, in fact, occurring under IGRA. 25 U.S.C. 2706(b). Rather than regularly making such a demand through the Commission's enforcement staff, the proposed rule simply establishes an administrative process for the submission of minimal Indian lands information before the opening of a new facility.

A few commenters stated that requiring tribes to submit site-specific facility licenses to the NIGC for approval presumes the NIGC is mandated by IGRA to engage in site-specific Indian lands determinations, but the Commission has no role in determining Indian lands. In previous litigation, the Commission has argued that it does not have a statutory duty to make pre-construction Indian lands determinations.

The Commission disagrees with the characterization of the proposed rule and with the commenters' assertion that the Commission has no role in determining Indian lands.

The rule does not establish any mechanism or system whereby facility licenses are submitted to the Commission for approval. Rather, the rule simply requires that 120 days prior to the opening of a new facility, the tribe submit a notice that a facility license is under consideration to make the Commission aware of the impending opening. The rule also requires the submission of minimal information for determining Indian lands. Again, the location of a gaming facility on Indian lands is a necessary prerequisite to gaming under IGRA. The proposed rule requests some of the information necessary to make an Indian lands determination and was a change from a previous draft of the rule, which imposed an affirmative obligation on each tribe to make an Indian lands determination before opening a new facility.

One commenter stated that the NIGC does not have the authority to make Indian lands determinations because IGRA plainly gives that authority to the Secretary of the Interior.

The Commission disagrees. IGRA gives the ability to make Indian lands determinations both to the Secretary, for example, while taking land into trust, and to the Commission. Again, the location of a gaming facility on Indian lands is a necessary prerequisite to gaming under IGRA and to the Commission's jurisdiction under IGRA. A reading of IGRA under which the Commission is unable to determine its own jurisdiction would undermine, if not make meaningless, the Chairman's enforcement authority under 25 U.S.C. 2713.

A number of commenters stated that under the decisions in *Colorado River Indian Tribes* v. *NIGC*, the Commission does not have the authority to regulate class III gaming and that these regulations are an unauthorized rulemaking intended to encroach on class III gaming.

The Commission respects and abides by the courts' decisions in the *Colorado River Indian Tribes* v. *National Indian Gaming Commission* ("CRIT") cases. The Commission disagrees, however, that the CRIT cases stand for the broad proposition that the NIGC lacks any authority over class III gaming. Rather, CRIT stands for the narrower propositions that (1) an administrative agency has only the authority Congress delegated to it and (2) that Congress did not grant the Commission authority to promulgate minimum internal control standards for class III gaming. The latter is not applicable here and the Commission, as stated at length above, believes that it does have the authority to promulgate these facility license standards.

A few commenters stated that the NIGC may not issue these regulations because under the well-established canons of construction in federal Indian law, statutory ambiguities must be resolved in favor of the tribes.

The Commission agrees that the Indian canon of construction holds that statutory ambiguities are to be resolved in favor of the tribes. The Commission disagrees, however, that the canon prohibits the Commission from adopting the rule. The Commission believes that the rule effectuates some of IGRA's statutory requirements: the licensing of gaming facilities and the construction, maintenance and operation of those facilities so as to protect the environment and the public health and safety. Doing these things ensures not only the health of casino employees and patrons but the health of the Indian gaming industry itself.

Assuming for the sake of argument that there are ambiguities in IGRA, the Commission believes that the rule resolves them in favor of the tribes. The commenters would have otherwise. In such a situation where there are competing views of what is "in favor of the tribes," the canon will not bar the Commission's decision. *See, e.g., Shakopee Mdewakanton Sioux Community* v. *Hope*, 16 F.3d 261, 264 n.6 (8th Cir. 1994).

A few commenters stated that there is no authority to demand that a tribe perform information gathering for the Commission without a contract or compensation. Section 2710(b)(7) of IGRA plainly requires that if the Commission desires a tribal government to perform commission functions, then the Commission should contract to pay them.

The Commission disagrees with this reading of 25 U.S.C. 2710(b)(7). Nothing in this section requires the Commission to contract with tribes for compliance with Commission regulations. Rather, this section permits and recommends to the Commission that it contract with the tribes for enforcement of Commission regulations.

Comments Regarding the Licensing Requirements of the Facility License Standards

Some commenters stated that the requirements of the proposed rule are unnecessary because they duplicate existing Federal and tribal regulations.

The Commission disagrees. The rule does not require the adoption of any particular health and safety rules or standards and thus cannot conflict with standards the tribe has adopted on its own that apply under a tribal-state compact, or that apply under federal

law. Even in a case where the proposed rule would mandate the adoption of a health and safety law—because none had been adopted, for example—no particular law is mandated.

As for the submission of "Indian lands" information, the rule does not require the submission of information already in the possession of the Bureau of Indian Affairs and thus avoids unnecessary duplication.

Some commenters stated that the NIGC has not demonstrated that the current system of licensing facilities is inadequate.

The Commission believes that the rule fills two important regulatory needs. First, it allows the Commission to have advance notice of the opening of gaming facilities, and thus to have the ability to exercise its oversight regulatory authority appropriately and timely. Second, it helps ensure that adequate health and safety standards are maintained and complied with at all gaming facilities.

One commenter sought clarification whether the tribal gaming regulatory authority is the entity that is responsible for implementing the rule, which only uses the word "tribe".

The rule mirrors the language used in IGRA when it places regulatory responsibility on a "tribe." Nothing, however, prohibits a tribe from vesting a tribal gaming regulatory authority with the responsibility to act in compliance with the proposed rule.

A number of commenters recommended that the NIGC require tribal governments to certify the implementation of their public health and safety ordinances as part of the annual audit process.

The Commission disagrees. The rule is designed to be minimally intrusive. It requires licensing of facilities no less frequently than once every three years. Making certification of enforcement of health and safety ordinances part of each tribe's annual audit process would make three times the work and is more likely to be inconsistent with current licensing practices.

One commenter requested that facility license submission be required not only for new facilities but also for substantial expansions of existing facilities (substantial being defined as either a 25% increase in the number of class II/III machines or an increase of more than 150 machines).

The Commission disagrees. This would be inconsistent with the purpose underlying notification to the Commission of new facilities. The notification allows the Commission to exercise its oversight regulatory responsibility for the new facility appropriately and timely. There is no such need for notification with existing facilities because the Commission has regular contact with, and is generally aware of the circumstances of, gaming facilities already in operation.

One commenter believed that a copy of the tribe's facility license submission should be sent to the governing boards of the county and any city immediately adjacent to or surrounding the facility as well as to the Governor of the state and allow those entities to provide comment. One commenter proposed that notice be provided to state Governors of tribal submissions concerning the opening and closing of gaming facilities.

The Commission disagrees. Indian gaming is an expression of the sovereign right of Indian tribes to regulate their own affairs on their own land, separate and apart from the laws and requirements of the states or their political subdivisions. To the extent Congress wished the involvement of the states in Indian gaming, IGRA so provides, and the Commission does not believe it to be appropriate to add more. As facility licensing is a matter of gaming regulation, notification to the states may be provided for by tribal-state compact.

One commenter requested that the rule distinguish between class II and class III in each subsection and that tribes be required to submit tribal-state compacts as part of their submission as evidence of compliance of state law as it relates to new facilities.

The Commission disagrees. The requirements of the rule are applicable regardless of the class of gaming involved, and thus no distinction is necessary. Further, if a tribal-state compact provides for the application of particular health and safety laws, then identification of the compact and its requirements is sufficient.

One commenter stated that it is unclear whether state or local governments or other entities could challenge tribes' facility license notice and, thus, Indian lands determinations.

The Commission does not intend to permit such a challenge.

One commenter believed that the license submission should also state whether the land is trust land eligible for Indian gaming under IGRA and the basis for that assertion.

The Commission disagrees. The submission of Indian lands information is required only for new facilities. If a tribe is opening a facility on land newly taken into trust, then the Department of the Interior will have made an Indian lands determination as part of the trust acquisition process. Requiring the information suggested here would be duplicative.

Comments Regarding the Environment, Public Health and Safety

Several commenters suggested that adopting the Facility License Standards would conflict with the Interpretative Rule previously issued by the NIGC that lays out a "limited and discrete responsibility" for the Commission in regulating the environment and public health and safety.

The Commission agrees with the commenters that the Environment, Public Health and Safety Interpretative Rule (67 FR 46109) envisions a limited and discrete responsibility. The Interpretative Rule also highlighted, however, that this did not leave the Commission without authority or responsibility in this area as "IGRA explicitly accords the Commission a role in ensuring compliance with the environment, public health and safety provision of IGRA." The Facility License Standards do not increase the NIGC's limited role. They do not demand adoption of any particular health and safety rules; rather, the rule primarily requires tribes to make the NIGC aware of what health and safety rules apply. This compliments NIGC's oversight role under 67 FR 46109.

Several commenters noted that the requirements of the Facility License Standards are already addressed in some tribal-state compacts and that those tribes should be exempted from the reporting requirements in this rule.

For those tribes whose tribal-state compacts identify those laws, resolutions, codes, policies or standards, other than federal laws that are required in the NIGC's Facility License Standards, they can submit to the NIGC the location where that information can be found in their tribal-state compact. It should be noted, however, that tribal-state compacts are only required for class III gaming and the Facility License Standards apply to both class II and class III gaming facilities.

Several comments related to the ability of the NIGC to carry out its duties under the Facility License Standards without creating a new bureaucracy within the Commission.

The Commission disagrees. The NIGC already has existing personnel who conduct site visits to tribal gaming facilities under the Interpretative Rule and who handle environmental issues. Existing personnel will continue to work on these and other environmental issues that arise.

Several comments related to the NIGC's statement that it had conducted many site visits and inspections since

issuance of the Interpretative Rule which led to the NIGC identifying the deficiencies addressed by this rule. Commenters requested that the NIGC detail the results of those inspections to justify the necessity of the Facility License Standards.

The NIGC has identified the following health and safety issues during site visits: lack of fire suppression systems; lack of fire or ambulance service; insanitary food storage and handling; and, storage of hazardous materials in locations with non-compatible chemicals. In its Facility License Standards, the Commission seeks to carry out its obligations under IGRA to ensure that gaming is occurring in a manner that adequately protects the environment and the public health and safety.

Several commenters were unclear as to what the NIGC's remedy would be for non-compliance with the Facility License Standards.

The Chairman has the power to order temporary closure of a gaming facility for substantial violation of the provisions of 25 U.S.C. 2713.

One commenter requested that the Facility License Standards be expanded to provide for independent audits by qualified, certified environmental/engineering firms, according to a schedule established by the tribe and agreed upon by the Commission, with local governmental entities allowed to review the results of the audit.

The Commission determined that adding this requirement to the Facility License Standards would be unnecessary as the NIGC's site visits and the material requested to be submitted with the Facility License Standard would be sufficient for the NIGC to determine compliance with IGRA.

Comments Regarding the Lands Information Required Under the Facility License Standards

Several comments stated that the information required for a new gaming facility is onerous, duplicative and overly-burdensome.

The Commission disagrees. In this final rule, the NIGC has significantly reduced the lands information tribes are required to submit with a new facility license. In the initial working drafts of the proposed rule, the NIGC required the lands information on both new and existing gaming facilities. In this final rule, the NIGC is only requiring qualifying land information for a facility license on new facilities. In addition, the final rule only requires the facility name, legal description, and BIA tract number for a new facility. Prior drafts required a great deal more: A legal analysis, copies of trust documents, copies of court decisions, executive orders, secretarial proclamations or other documentation regarding land ownership. The information required in the final rule represents the basic information necessary so that the NIGC can then determine whether additional lands documentation is required.

One commenter expressed concern that the NIGC will respond directly to inquiries from other governmental offices and Congress while public and state governments will be subject to the Freedom of Information Act, 5 U.S.C. 552.

The Commission complies with the Freedom of Information Act ("FOIA"), therefore, any requests for information submitted as part of the Facility License Standards requirements will be subject to FOIA and the Privacy Act of 1974, 5 U.S.C. 552a. With the exception of law enforcement agencies and requests from Congressional committees, which are exempt from FOIA, the NIGC treats all requests for information obtained as subject to FOIA. This includes requests from Congressional offices, state and federal offices, and the general public.

Comments Regarding the Information Collection Burden

One commenter suggested that the estimates provided by the NIGC regarding the amount required for information collection are far too low in the event a tribe does not have laws already in place in one or more of the areas identified as required by the Facility License Standards.

The Commission's estimate of approximately $5,000 to $10,000 is for those tribes who do not currently have laws in one of the areas enumerated in § 559.5 of the rule. The Commission feels this estimate is reasonable for a tribe who must hire an attorney to assist in identification of those laws, codes, or standards that apply to its gaming facility. The Commission recognizes that there may be underlying expenses related to instituting an environmental, public health and safety program in the event a tribe identifies a deficiency in a certain area while complying with the Facility License Standards; however, the costs associated with these efforts would vary greatly depending on the size and location of the gaming facility and on the level of environmental, public health and safety standards already in place.

One commenter suggested that the environment, public health and safety requirements in the Facility License Standards be tied to applicable federal laws (i.e., Clean Water Act, Safe Drinking Water Act, Resource Conservation and Recovery Act, etc.).

The Commission disagrees. The purpose of the rule is to identify environment, public health and safety laws that apply that are not Federal laws.

Comment Regarding Paperwork Reduction Act

The commenter requested that "burden" be struck through this section and replaced with "resources required for" and that "annual information burden" be replaced with "resources required to collect the information annually."

This language, however, is based on the language in the Paperwork Reduction Act and is not the NIGC's language.

Comments Regarding the Regulatory Flexibility Act

The Commission received a comment that contrary to the statement in the proposed rule that Indian tribes are not considered to be small entities for purposes of the Regulatory Flexibility Act, it may be that tribes are small entities for this purpose. The Commission disagrees. Indian tribes are not included in this definition. 5 U.S.C. 601(5)(c).

Comments Regarding NIGC Consultation in Connection With This Rule

Several comments pertained to the level of consultation conducted in connection with the Facility License Standards stating that the NIGC did not conduct meaningful consultation and that the consultation conducted was in violation of the NIGC's consultation policy.

The NIGC published its Government-to-Government Tribal Consultation Policy on March 24, 2004, 69 FR 16973. In that policy the Commission recognized the government-to-government relationship that exists between the NIGC and federally-recognized tribes and stated that the primary focus on the NIGC's consultation policies would involve consulting with individual tribes and their recognized governmental leaders. The Commission's consultation policy also calls for providing early notification to effected tribes of any regulatory policies prior to a final agency decision regarding their formulation or implementation.

In keeping with its consultation policy, the NIGC sent its first working draft of the Facility License Standards to tribal leaders on May 12, 2006. That notice was also published on the NIGC

Web site, *http://www.nigc.gov*, for public comment. The Commission also invited 309 tribes to meet with it in consultation on this rule and other gaming matters. Following notification of this first working draft, the NIGC received 56 written comments and held over 53 government-to-government consultation meetings with tribal leaders.

Following written and oral comments from tribal leaders, the draft Facility License Standards were revised and sent to tribal leaders for comment on March 21, 2007, with comments due on May 15, 2007. The comment period was subsequently extended another 15 days to May 30, 2007. Again the Commission invited tribal leaders to provide comments and to meet with the Commission during tribal consultations. The Commission received 78 written comments and held over 60 separate consultation meetings to discuss this draft of the Facility License Standards and other gaming matters.

The Facility License Standards were again revised based on input from tribal leaders and the public. The Commission published the proposed Facility License Standards on October 18, 2007, after holding more than 113 meetings with tribal leaders and careful consideration of the 134 comments received on the two prior drafts.

In keeping with its consultation policy, the NIGC involved tribes early in the process of considering the Facility License Standards and tribes had the opportunity to provide written comments and to meet with the Commission over a lengthy period. The Commission carefully reviewed the comments received on the proposed rule and took those comments into consideration prior to making a final determination on the final Facility License Standards.

Several commenters stated that the NIGC's consultation process for this regulation fell short of prior agency consultations where tribal representatives were active participants not only in providing advice and input to the NIGC, but also in the drafting process itself.

While the NIGC has chosen to utilize various rulemaking formats when formulating several Commission regulations, including tribal advisory committees, the NIGC consultation policy provides that the NIGC will utilize that form of rulemaking to the extent it deems practicable and appropriate. It is within the Commission's discretion to determine the appropriate form of rulemaking for each regulation. The Commission determined that for purposes of such a narrow and limited rule such as the Facility License Standards, sharing early drafts and allowing for a lengthy period of comment and consultation would be the most comprehensive approach.

Comments Regarding Extension of the Comment Period

Many commenters requested that the NIGC extend the comment period in which to provide comments on the proposed rule.

The NIGC received a total of 83 tribal comments on the proposed Facility License Standards. This was in addition to the 134 written comments received and considered on the prior working drafts of the rule and after meeting with over 113 tribal leaders in consultation on the proposed rule along with other Commission matters.

The Commission allowed for a 45-day comment period on the proposed rule. In deciding not to grant an extension of the comment period, the Commission took into account the significant number of comments received on the proposed rule and on the two prior drafts, totaling over 215 written comments combined. In addition the consultation period for this rule was well over one and one-half years, from the first draft in May 2006 to the publication of the proposed rule in October 2007.

Comments Regarding NIGC Compliance the Government Performance and Results Act

Several commenters suggested that the NIGC may have violated the Government Performance and Results Act ("GPRA") by embarking on several rulemaking exercises without an overall plan in violation of Public Law 109–221.

The Commission agrees that Public Law 109–221, the Native American Technical Corrections Act of 2006, provides that the NIGC shall be subject to the GPRA. On September 30, 2007, the NIGC filed its performance and accountability report with the Office of Management and Budget. The Commission is currently seeking comments from tribes and all interested parties on the contents of this report.

Comments Regarding Financing of New Tribal Gaming Facilities

Several commenters were concerned that the Facility License Standards would have an impact on a tribe's ability to secure financing for gaming development projects.

The NIGC disagrees that requiring tribes to notify the Commission 120 days prior to opening a new facility will interfere with financing opportunities for new gaming operations. The purpose of the regulation is to inform the NIGC prior to the opening of a new facility. The NIGC believes any financing difficulties posed by compliance with this rule will be less significant than if it is later determined that a new facility has been constructed on lands that do not meet the requirements for "Indian lands" under IGRA. Further, the Facility License Standards have no effect in those circumstances where a tribe has not yet obtained financing due to uncertainty regarding the status of the lands.

Comments Regarding Specific Language

One commenter suggested the addition of the word "standards" wherever the phrase "laws, resolutions, codes, policies, or procedures" appears in the regulation. The Commission agrees and has revised §§ 502.22 and 559.5(b) accordingly.

One commenter suggested that standards pertaining to the environment and the public health and safety may be included in Secretarial procedures. Accordingly, the Commission revised § 502.22 to reflect this change from "including standards negotiated under a tribal-state compact" to "including standards under a tribal-state compact or Secretarial procedures."

One commenter noted the use of the phrase "gaming operations" in § 559.5(b) and correctly pointed out that the term should be "gaming facilities" as is used throughout the remainder of the regulation. This correction was made.

One commenter noted the use of the phrase "gaming facilities, places or locations" as contradicting the statutory language of IGRA which uses the phrase "gaming places, facilities or locations." This correction was made in § 559.5(b)(6).

One commenter recommended that the Commission remove the phrase "as needed" following in §§ 552.2(i) and 559.7. The commenter felt this phrase was redundant as the statement prior reflects that the Chairman may use his or her discretion to request lands or environmental and public health and safety information. The Commission agrees and made this correction in the final rule.

One commenter noted that the title to § 559.6 was inconsistent with the language in the body of the section and recommended the Commission add "or reopens" to the title to match the requirements set out in the section. The Commission agrees and this change was made.

One commenter felt the proposed rules were unclear regarding the submission requirements to the

Commission. The Commission agreed that clarification could be added to ensure that tribes more clearly understood the requirements for initial and subsequent submissions of their facility licenses. The following changes were made in §§ 559.3, 559.4, and 559.5 to reflect clarification of the submission requirements. Section 559.3 in the proposed rule read "[a]t least once every three years, a tribe shall issue a separate facility license to * * *." In the final rule, this section was changed to "[a]t least once every three years after the initial issuance of a facility license, a tribe shall renew or reissue a separate facility license." Section 559.4 previously read "When must a tribe submit a copy of a facility license to the Chairman?" A tribe must submit to the Chairman a copy of each issued facility license within 30 days of issuance. This section is now clarified to read, "When must a tribe submit a copy of a newly issued or renewed license to the Chairman? A tribe must submit to the Chairman a copy of each newly issued or renewed facility license within 30 days of issuance." Section 559.5 also changed to clarify the submission requirement. This section previously read "What must a tribe submit to the Chairman with the copy of each facility license that has been issued?" It now reads, "What must a tribe submit to the Chairman with the copy of each facility license that has been issued or renewed?"

Comments Regarding Part 502—Definitions of This Chapter

A few commenters objected to the insertion of the definition of "construction and maintenance of the gaming facility, and the operation of that gaming is conducted in a manner which adequately protects the environment and the public health and safety" as "clarification" for 2710(b)(2)(E) of IGRA without any explanation or foundation for the NIGC's conclusion that this "definition" provides clarification.

The Commission believes that this definition and the entire rule clarifies what the expectations are for tribes to verify that that they are maintaining their gaming facilities in a manner that adequately protects the environment, public health and safety.

Another commenter objected to § 502.22(f), "other environmental or public health and safety standards adopted by the tribe in light of climate, geography, and other local conditions and applicable to its gaming facilities, places or locations," as being too broad a standard.

The Commission retained subsection (f). The geographical and local conditions under which Indian gaming may occur vary greatly. This provision was included to capture the varying circumstances under which Indian gaming facilities may occur and allow for a tribe to address specific local and geographic conditions that may apply to its gaming facility.

One commenter stated that the phrase "the construction and maintenance of the gaming operation and the operation of the gaming is conducted in a manner which adequately protects the environment, public health and safety," defies understanding.

While the Commission agrees that this language is not a model of clarity, this language is taken directly from IGRA at 25 U.S.C. 2710(b)(2)(E).

One commenter suggested consideration should be given to deleting the defined term proposed to be added as new § 502.22. The defined term is only used in the proposed regulations twice, at §§ 559.1(a) and 559(a)(3). Both of those sections work well if the sentence is used in its plain meaning sense, rather than in its defined meaning sense. Also, it is unconventional for the definition section to include substantive provisions, such as the sentence in the proposed definition which states that the "laws * * * shall * * *." Finally, including substantive provisions in the definitional section could lead to misunderstandings by readers who read part 559 and miss the fact that the thirty word sentence starting with the words "Construction and maintenance * * *" is actually a defined term. Therefore, consideration should be given to simplifying the regulations by deleting the defined term and moving the substantive content contained in the proposed defined term to a location in § 559.5.

While this recommendation has its merits, the Commission ultimately decided to retain the definition.

The same commenter suggested that if the defined term is retained, consideration should be given to modifying the text by including a reference to Secretarial procedures and standards.

The Commission agrees to this recommendation.

One commenter suggested that language be added which referenced the various federal environmental laws that tribes are required to follow.

The Commission disagrees. The purpose of the rule is to identify environment, public health and safety laws that apply that are not federal laws.

One commenter suggested § 502.22 should be revised to add: "(f) If an Environmental Impact Statement was prepared for the gaming facility, then the laws, resolutions, codes, policies or procedures in this area shall cover at a minimum, the construction, operational and maintenance standards identified in the EIS as well as mitigation measures that address the environmental consequences of the facility."

The Commission disagrees that this change would be useful.

One commenter suggested that the Commission revise § 502.22 by changing "construction and maintenance of the gaming facility, and the operation of that gaming" to "construction and maintenance of the gaming facility, and the operation of class II or class III gaming."

The Commission disagrees. This language was taken directly from IGRA at 2710(b)(2)(E).

One commenter requests the addition of new § 502.23 to read as follows: "Facility license means a separate license issued by a tribe to each place, facility, or location on Indian lands where the tribe elects to allow class II or class III gaming."

No change is necessary, however, as this proposed language is identical to that of the rule.

Comments Regarding Part 522—Submission of Gaming Ordinance or Resolution

One commenter suggested language that clarifies that the information required in § 522.2 is in addition to the requirements of §§ 559.2 and 559.5.

The Commission disagrees as the submission requirement is already repeated in § 559.5.

A commenter suggested that consideration should be given to adding the phrase "gaming eligibility" or "gaming eligibility (for lands acquired after October 17, 1988)" to § 522.2 this and to § 559.7.

The Commission disagrees that this recommendation would clarify the rule.

A commenter suggested that consideration should be given to deleting the phrase "as needed" in this section to avoid disputes as to whether the documentation requested by the Chairman is "needed."

The Commission agrees to this change.

Comments Regarding Part 559—Facility License Notifications, Renewals, and Submissions

A commenter urged the Commission to revise the draft rule to distinguish between class II and class III gaming in each subsection.

The Commission has not made this revision. The requirements for submission of facility license remain the same whether gaming is occurring in a class II or class III gaming facility.

One commenter suggested that since part 559 is presumably intended to apply to a "gaming operation" as that term is defined in § 502.10, consideration could be given to changing the phrase "the operation of class II or class III gaming" to "class II or class III gaming operation."

The Commission uses the reference to "gaming places, facilities or locations" to remain consistent with IGRA.

Another commenter recommended that part 559 should be clarified to determine whether the Commission intends to regulate (i) a tribe; (ii) place, facility or location; or (iii) both.

No change was made as a result of this comment. The Commission believes it is clear from the language of IGRA that "a separate license issued by the Indian tribe shall be required for each place, facility, or location."

Comments Regarding § 599.1—What is the scope and purpose of this part?

One commenter suggested that the phrase "the construction and maintenance of the gaming facility" be changed to "the gaming facility is constructed and maintained."

The Commission declined to make this change as the language is taken from IGRA at 2710(b)(2)(E).

One commenter observed that § 559.1 fails to require that the land must be under the jurisdiction of the tribe. Furthermore, the regulations do not detail the eligibility requirements for gaming on Indian lands, and make clear that the land must be under the jurisdiction of the tribe.

The purpose of part 559 is to ensure that each facility where gaming is operated is located on Indian lands eligible for gaming pursuant to IGRA. IGRA sets out the eligibility requirements and jurisdictional requirements for gaming to occur on Indian lands. Consequently, no additional language is contemplated.

One commenter observed that the regulation fails to require that the NIGC actually make a determination [on Indian lands] and fails to provide a process for such determination. Furthermore, the regulations as proposed apply only to new facilities when the same rules need to be applied to existing facilities.

The Commission did not intend, under these rules, to develop a broad program for making Indian lands decisions. The Commission makes such decisions in the context of its enforcement actions and approval of management contracts and site-specific ordinances.

One commenter recommended that the notice requirement include documentation that the tribe seeking a new facility license complies with the class III conditions necessary to engage in casino-style gambling. The commenter recommended that the tribe submit a valid state-tribal compact as evidence of compliance.

No change was made as a result of this comment. The Commission has endeavored to take into consideration that various documentation may be available at other federal agencies (i.e., Department of the Interior) and has removed any duplicative submission requirements for documents that are available through other means.

Several commenters requested that additional language be added requiring notification to surrounding local and state governmental entities when tribes submit notice to the Chairman that a facility license is under consideration for a new facility.

The Commission disagrees. Indian gaming is an expression of the sovereign right of Indian tribes to regulate their own affairs on their own land, separate and apart from the laws and requirements of the states or their political subdivisions. To the extent Congress wished the involvement of the states in Indian gaming, IGRA so provides, and the Commission does not believe it to be appropriate to add more. As facility licensing is a matter of gaming regulation, notification to the states may be provided for by tribal-state compacts.

One commenter suggested that that the proposed "charitable events" exception creates a loophole that swallows the notice requirement. Absent a reasonable numeric cap, a tribe could sponsor a string of charitable events lasting six days or less on a continuous basis without giving notice to the NIGC or, if class III gaming is involved, the state that a tribe issued a new facilities license.

The Commission disagrees. The language of § 559.2(b) makes clear that this exception relates to the "occasional charitable event" and not to continuous gaming or class III gaming.

Comment Regarding § 559.4—When must a tribe submit a copy of a facility license to the Chairman?

One commenter requested additional language that requires notification to surrounding local and state governmental entities.

The Commission disagrees. Indian gaming is an expression of the sovereign right of Indian tribes to regulate their own affairs on their own land, separate and apart from the laws and requirements of the states or their political subdivisions. To the extent Congress wished the involvement of the states in Indian gaming, IGRA so provides, and the Commission does not believe it to be appropriate to add more. As facility licensing is a matter of gaming regulation, notification to the states may be provided for by tribal-state compact.

Comments Regarding § 559.5—What must a tribe submit to the Chairman with the copy of each facility license that has been issued?

One commenter recommended that the NIGC require submission of applicable state or federal licenses or permits that demonstrate that a tribe is in compliance with federal or state environmental laws applicable to its gaming operation.

The Commission disagrees. The NIGC has determined that for purposes of this rule, Tribes will supply a list of identified applicable laws and that it shall be within the Chairman's discretion to request additional information if necessary. These state and federal licenses could be requested by the Chairman if a need for such documentation is deemed necessary.

One commenter suggested deleting the term "identified" in § 559.5(a)(1) and replacing with "adopted, issued or agreed to" as any law or standard which the tribe has "identified" but has not adopted, issued or agreed to, is without legal effect or significance.

The Commission declined to make this change as the term identified is a broader term which allows tribes to show that they are aware of the environment, public health and safety laws that apply to their facilities even if those laws may not have been specifically promulgated by the tribes themselves.

One commenter suggested that in order to be consistent with the Interpretative Rule, the Commission should consider requiring the tribe to certify that it has established policies, procedures or systems for monitoring compliance. No change was made based on this suggestion. The Commission anticipates that the three-year renewal process for facility licensing will ensure that a system for ongoing monitoring is in place.

One commenter recommended that clarification is needed in § 559.5(a)(3) to determine whether the regulation intends for the entity or thing which the tribe is to certify to be in compliance with various laws is (i) the tribe; (ii) the

place, facility or location; (iii) the gaming operation; or (iv) some combination of the three. The language adopts the approach that the tribe certifies that both the gaming operation and the place, facility or location (but not the tribe) are in compliance with the identified laws.

The rule mirrors the language used in IGRA when it places regulatory responsibility on a "tribe." Nothing, however, prohibits a tribe from vesting a tribal gaming commission with the authority to act in compliance with the rule.

One commenter suggested that consideration should be given to adding appropriate language to accommodate the possibility that, at the time of the tribe's submission to the Commission, the gaming operation and or gaming place, facility or location is not in full compliance. The commenter recommended adding the phrase "or, if the tribe has identified any noncompliance, the tribe has taken appropriate action to ensure future compliance" to this section.

The Commission agreed with this concept and changed this section to require that if a tribe is not in compliance with any or all of its environmental and public health and safety laws, resolutions, codes, policies, standards or procedures, the tribe will identify those with which it is not in compliance, and will adopt and submit its written plan for the specific action it will take, within a period not to exceed six months, required for compliance. At the successful completion of such written plan, or at the expiration of the period allowed for its completion, the tribe shall report the status thereof to the Commission. In the event that the tribe estimates that action for compliance will exceed six months, the Chairman must concur in such an extension of the time period, otherwise the tribe will be deemed noncompliant. The Chairman will take into consideration the consequences on the environment and the public health and safety, as well as mitigating measures the tribe may provide in the interim, in his or her consideration of requests for such an extension of the time period.

One commenter pointed out the confusion in usage of the terms "facilities" and "operations" with the correct term being "gaming facilities."

The Commission agreed with the commenter and changed the term to be consistent throughout the regulation.

One commenter suggested that the language of § 559.5(b) as written is overbroad and unclear as to whether it requires only a list of items material to the topic, or requires detailed information of specific laws, resolutions, codes, policies, or procedures for each area. The commenter also requested that the Commission specify how much detail is required in the information to be submitted with the facility license. The commenter requested an option for the gaming operation to list the name of the applicable policy and procedure manual or to identify individual items that are material, and to allow an option to develop and submit a matrix in the form of a table or spreadsheet.

The Commission recognizes that tribes may utilize varying internal methods for maintaining this information and refrained from specifying what form the list of applicable laws must take. This will allow each facility to submit the information in the form or format that is appropriate for each facility without the NIGC dictating a particular approach which may require increased resources at the tribal level.

One commenter suggested that consideration should be given to adding the phrase "to the extent not already addressed by applicable federal laws, regulations and standards" to § 559.5(b).

The Commission did not make this change. The language in this section already addresses the commenter's concern with the phrase "other than federal laws."

One commenter suggested the Commission consider whether the topics of "fire suppression" and "law enforcement and security" in § 559.5(b)(1) should be independent topics rather than subsets of "emergency preparedness."

The Commission determined that the topics are appropriately grouped and declined to make this change.

One commenter pointed out that the phrase "facility, place or location" in § 559.5(a)(6) differs from the statutory language of IGRA which reads "place, facility or location."

The Commission agreed with this comment and made the change.

One commenter requested that the Commission include tribal regulation in its list of laws governing the gaming operation in § 559.5(a)(6).

The Commission did not make this change because the term "laws" in this section is meant to include all laws applicable to the gaming operations, which includes tribal laws.

One commenter requested that if a tribe's environment, public health and safety laws are available in a public location, the tribe notify the Commission so the Commission can locate such items and as necessary can notify members of the public who make inquires.

The Commission did not make this change in the language of the rule. Any information obtained from tribes in relation to this rule will be governed by the Freedom of Information Act. However, if the information provided by the tribe is available publically and the Commission has such information available, it could direct inquiries to the appropriate public site.

Section 559.6—Does a tribe need to notify the Chairman if a facility license is terminated or not renewed or if a gaming place, facility, or location closes?

One commenter recommended that that state Governors also receive notification of the termination or non-renewal of a class III facility license by a tribe, or if such a gaming facility closes or reopens.

The Commission disagrees. Indian gaming is an expression of the sovereign right of Indian tribes to regulate their own affairs on their own land, separate and apart from the laws and requirements of the states or their political subdivisions. To the extent Congress wished the involvement of the states in Indian gaming, IGRA so provides, and the Commission does not believe it to be appropriate to add more. As facility licensing is a matter of gaming regulation, notification to the states may be provided for by tribal-state compacts.

One commenter recommended adding "reopens" to the end of the title in § 559.6. The language would read "Does a tribe need to notify the Chairman if a facility license is terminated or not renewed or if a gaming place, facility, or location closed or reopens?"

The Commission agrees with this recommended change.

Section 559.7—May the Chairman request Indian lands or environmental and public health and safety documentation regarding any gaming place, facility, or location where gaming will occur?

Several commenters were concerned that the language in this section relating to the Chairman's discretion in requesting additional documentation was too broad and allowed for too much interpretation on what to request on the part of the Chairman.

The Commission has endeavored to require only the minimum obligation for documentation submission, but must reserve the right of the Chairman to request additional information in the event it is necessary to carry out his or her duties in ensuring that all gaming

facilities are located on Indian lands and are operated in a manner that adequately protects the environment, public health and safety.

One commenter requested language in this section to clarify that the "Tribe" and "Tribal Gaming Regulatory Authority are separate entities and it is the Tribal Gaming Regulatory Authority who is responsible for enforcing the environment, public health and safety laws and for issuing the facility license."

The rule mirrors the language used in IGRA when it places regulatory responsibility on a "tribe." Nothing, however, prohibits a tribe from vesting a tribal gaming commission with the authority to act in compliance with the rule.

One commenter requested that the Commission delete the phrase "as needed" from § 559.7 or change to "from time to time" so there is no dispute as to what is "needed."

The Commission agreed with commenter and removed "as needed" from this section.