SENECA - CAYUGA NATION

Office of the Gaming Commissioner

August 11, 2021

Mr. E. Sequoyah Simermeyer, Chairperson
National Indian Gaming Commission
1849 C. Street NW
Mail Stop #1621
Washington, D.C. 20240

Re: Tribal Comments to the Final Draft of the NIGC's Proposed Changes to its Regulations and Policies

Dear Chair Simermeyer & Members of the Commission:

The Seneca Cayuga Nation Office of the Gaming Commissioner's is pleased to offer these comments on the National Indian Gaming Commission's proposed amendments to its regulations and policies, which were discussed and presented via video conference on July 27 and 28, 2021. We appreciate the NIGC's efforts to solicit and consider tribal input on these important matters in advance of the initiation of the formal rulemaking process. The opportunity to provide input at this early stage is in keeping with the government-to-government relationship and, we believe, will produce better, more fully considered rules.

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Danielle Brashear, Commissioner
Seneca-Cayuga Office of the Gaming Commissioner

Enclosure.

COMMENTS OF THE SENECA-CAYUGA NATION OFFICE OF THE GAMING COMMISSIONER ON THE NATIONAL INDIAN GAMING COMMISSION'S PROPOSED REVISIONS TO ITS REGULATIONS, AS WELL AS ITS POLICY ON CONSULTATION PRACTICES AND STRATEGIC PLAN.

I. Introduction.

These comments are made in response to the topics of consultation published by the NIGC on its website and discussed via Zoom on July 27 and 28, 2021. We are pleased provide input on the proposed changes to the NIGC's consultation policy, strategic plan, and proposed changes to its regulations regarding 1) the definitions of Key Employee and Primary Management Official, 2) NIGC fee regulations, 3) facility license notifications and submissions, and 4) management contracts.

The Seneca-Cayuga Nation Office of the Gaming Commissioner ("SCOGC") therefore submits the following comments, which are included under the pertinent text of the consultation questions or revised language below.

II. Comments.

A. NIGC Consultation Policy

1. *How can technology be used to broaden the impact of the NIGC's consultation efforts?*

The appropriate use of technology can have a highly beneficial impact on the consultation process. At the same time, though useful, platforms such as Zoom, are not an ideal substitute for one-on-one, face-to-face dialogue in the consultation process. Over the past year in the wake of the Covid-19 pandemic, the NIGC has used electronic platforms, such as Zoom, to provide training and consultation to tribal governmental representatives, which overall has proven to be a favorable, if imperfect, experience. At the same time, the use of such platforms broadens the potential for fuller participation by tribal representatives who may otherwise not have been able to attend. Accordingly, we support the NIGC's continued utilization even in the event of in-person consultation.

As to the imperfections of platforms such as Zoom, we recommend utilization of adaptive technologies, such as real-time closed captioning or interpretation during consultation sessions. For those that are hearing impaired, it may be difficult to hear or follow the discussion, making it difficult to fully engage.

2. *What procedures or practices impede a robust exchange of information during a consultation process and how might the Agency address its protocols in order to maximize tribal governments' participation in NIGC hosted consultations?*

While we view platforms like Zoom favorably, we again note that it is not ideal for achieving a robust exchange of information. Electronic conferences are unwieldy as they are prone to Wi-Fi glitches, dropped connectivity, and other access difficulties. Participants may be unfamiliar with

or uncomfortable using the "raise hand" or "unmute" features to speak or they may be hesitant to speak without clear signals of when it is appropriate to do so. Moreover, solely electronic consultations produce artificial time constraints that do not exist in in-person consultation sessions. For example, during the recent zoom consultation, Tribal representatives endeavored to ask questions and provide comments in the comment box; however, by the time such representatives had the chance to type out their comments, the presenters had already moved on to a new topic.

We believe these issues could be remedied by 1) holding consultation sessions in person, 2) allowing individuals to access the in-person consultation via video or phone call, and 3) building in designated time periods for written comment between each topic so that Tribal representatives have an opportunity to type and submit their thoughts on each topic.

B. Strategic Plan

1. *What external risk factors highlight possible challenges the NIGC may encounter in achieving its goals*?

Upon review of previous strategic plans, the SCOGC found that the NIGC outlines performance measures for each individual goal, as well as sub-objectives within each goal. We do not find, however, where the performance measures are reviewed and the results shared with tribes, TGRAs, or the public. Moreover, since the biennial report process was abandoned some years ago, there is no current mechanism for providing tribal feedback in relation to the NIGC's performance. Accordingly, we recommend that the NIGC publish its progress towards meeting the performance measures for each of its goals, both online on its website and through email or mailed updates sent to TGRAs on a regular basis. We also urge the NIGC to consider the re-establishment of the Biennial Report.

C. Proposed Changes to Ordinance Regulations

1. ***§ 522.2 (a)*** *"[A tribe shall submit the following information with a request for approval of a Class II or III ordinance or resolution or amendment thereto] One copy of an ordinance or resolution certified as authentic by an authorized tribal official and that meets the approval requirements in §522.4(b) or 522.6 of this part"*

The SCOGC agrees with the above-proposed revision, which would allow for electronic submissions. We applaud the flexibility this revision would provide, as well as the potential cost savings. Finally, this change will allow for greater ease in record keeping, as electronic submissions will reflect a precise time of submission that could be easily used or referenced later, which is especially important given the time it may take for the NIGC to receive hard copies mailed to the NIGC via the Interior Department.

2. ***§ 522.2(d)*** "*[A tribe shall submit the following information with a request for approval of a Class II or III ordinance or resolution or amendment thereto]* A copy of the tribe's constitution"

The SCOGC strongly opposes the proposed revisions to this section. We were particularly alarmed by the explanation for this additional submission requirement which was to enable the NIGC to verify that any submitted gaming ordinance, resolution, or amendment thereto authorizing class II or class III gaming was appropriately authorized pursuant to tribal law (i.e., that the submitting resolution was passed pursuant to a quorum, etc.). Such a purpose is inconsistent with the principle of tribal sovereignty and needlessly intrudes upon it. Virtually all, if not all, tribal resolutions contain a certification that the resolution is adopted in accordance with tribal law and that a quorum was present. Most document the vote as well. This certification should be sufficient to assure the NIGC that the action was lawfully taken.

The following is an excerpt from a brief published by the Interior Office of Hearings and Appeals on its webpage:

> Tribes have primary authority to interpret their own law and where the tribe has put forth a reasonable interpretation of its law, the Bureau must defer to that interpretation. Paula Brady, Leta K. Jim, and Patricia Stevens v. Acting Phoenix Area Director, 30 IBIA 294 (1997); Shakopee Mdewakanton Sioux Community v. Acting Area Director, 27 IBIA 163 (1995). Neither the Bureau nor the Solicitor's Office should undertake to interpret tribal law without first considering whether the tribe had arrived at an interpretation of its own. Paula Brady. The Bureau should avoid interpreting tribal law unless there is a clear necessity for it to do so. Keweenaw Bay Indian Community v. Minneapolis Area Director, 29 IBIA 72 (1996); Sandra Maroquin v. Anadarko Area Director, 29 IBIA 45 (1996); Parmenton Decorah, et al. v. Minneapolis Area Director, 22 IBIA 98 (1992).
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> In furthering the doctrines of tribal sovereignty and self-determination, the Bureau recognizes the right of tribes to interpret their own laws and gives deference to a tribe's interpretation of its own law. San Manuel Band of Mission Indians v. Sacramento Area Director, 27 IBIA 204 (1995); Donna Van Zile & James Crawford v. Minneapolis Area Director, 25 IBIA 163 (1994); Henry P. Rhatigan v. Muskogee Area Director, 21 IBIA 258 (1992); United Keetoowah Band of Cherokee Indians in Oklahoma v. Muskogee Area Director, & Joe Grayson, Jr., & Pam Thurman Jumper, Muskogee Area Director, 22 IBIA 75 (1992); James C. Greendeer v. Minneapolis Area Director, 22 IBIA 91 (1992).
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> Once the tribe has offered a reasonable interpretation of its own law, the Bureau must defer to it even though the Bureau may also offer an equally reasonable interpretation of the tribal law. San Manuel Band of Mission Indians v. Sacramento Area Director, 27 IBIA 204 (1995) citing Shakopee Mdewakanton Sioux Community v. Acting Minneapolis Area Director, 27 IBIA 163 (1995). "Where a Secretarial election is to be conducted, BIA has the authority to make an independent interpretation of tribal law concerning voter eligibility, although it should give deference to the tribe's reasonable interpretation of its own law in this regard." Prairie Island Community v. Minneapolis Area Director, 25 IBIA 187, 192 (1994).
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> The Bureau should refrain from interpreting tribal law unless it must do so in order to make a decision which it is required to make in furtherance of its government-to-government relationship with the tribe. Sandra Maroquin v. Anadarko Area Director, 29 IBIA 45 (1996) citing Parmenton Decorah. The Bureau may employ the general rules of statutory construction when it reviews or interprets tribal constitutions or ordinances. Shakopee, 27 IBIA 163 (1995). When it must interpret tribal law the Bureau should do so in a manner which avoids the absurd result of rendering the tribal government totally inoperative. Carris LaRocque, Melvin Lenoir, Bruce

Morin, Lee Gourneau, Douglas DeLorme and Raphael DeCoteau v. Aberdeen Area Director, 29 IBIA 201 (1996).

Review of tribal ordinances, even though required by a tribal constitution, is an intrusion into tribal self-government. Review should therefore be undertaken in such a way as to avoid unnecessary interference with tribal self-government. Cheyenne River Sioux Tribe v. Aberdeen Area Director, 24 IBIA 55 (1993); Ottawa Indian Tribe of Oklahoma v. Muskogee Area Director, 24 IBIA 92 (1993); Wallace W. Wells, Jr., Randy Shields, & Leonard Pease, Jr., v. Acting Aberdeen Area Director, 24 IBIA 142 (1993); Ute Indian Tribe of the Uintah & Ouray Reservation v. Phoenix Area Director, 21 IBIA 24 (1991). The BIA properly disapproves a tribal ordinance found to be in conflict with Federal law. White Mountain Apache Tribe v. Acting Phoenix Area Director, 21 IBIA 151 (1992). A lack of absolute legal certainty as to whether the ordinance conflicts with Federal law, however, weighs in favor of approval. Cheyenne River Sioux Tribe, 24 IBIA 55 (1993).

The Bureau properly declines to alter the established manner in which it has been dealing with a tribal government in the absence of definitive evidence that such a change was desired by the tribal membership, as opposed to being desired by a faction of the tribal council which is attempting to control the tribal government's affairs during a serious internal crisis. Frederick Tomah, Danya Boyce, Sally Lindsay, and Anthony Tomah v. Acting Eastern Area Director, 30 IBIA 92 (1996), Reconsideration Denied 30 IBIA 90 (1996). The Bureau should decline to hold fact-finding hearings in such matters because such hearings would constitute not only an unwarranted intrusion into tribal government, but would be a "retreat into the old days of paternalism." Webster Cusick v. Acting Eastern Area Director, 31 IBIA 255 (1997).[1]

Verifying the legitimacy of tribal governmental actions offends the notion of tribal sovereignty and overlooks the possibility that a tribe has adopted and enacted subsequent procedural laws or rules supplementing its constitution or other organic act. Furthermore, not all tribes operate under a constitution. To require such tribal governments to draft a justification as to why its submissions do not include a written constitution would impose an undue burden on the submitting tribe in addition to intruding upon its right of self-governance.

In sum, we would recommend omitting this proposed addition from the final regulation.

3. ***§ 522.8*** *"The Chairman shall publish a notice of approval of class III tribal gaming ordinances or resolutions in the Federal Register"*

While the SCOGC recognizes the NIGC's interest in the above-referenced revision, we understand that this is a statutory requirement, which cannot be changed via rulemaking. [2] Should the NIGC nonetheless proceed with this revision, we recommend that the publication on the NIGC website is published concurrently with the Federal Register notice with no gap in time.

4. ***§ 522.9*** *"If the Chair fails to approve or disapprove an ordinance or resolution or amendment thereto submitted under § 522.2 or § 522.3 of this part within 90 days after*

[1] Wilfahrt - The BIA Must Give Deference to Tribal Interpretation of Tribal Governing Documents | U.S. Department of the Interior (doi.gov)
[2] 25 U.S.C. § 2710(d)(B)(iii)

the date of submission to the Chair, a tribal ordinance or resolution or amendment thereto shall be considered to have been approved by the Chair but only to the extent that such ordinance or resolution or amendment thereto is consistent with the provisions of the Act and this chapter."

The SCOGC does not oppose this technical correction.

D. Key Employee and Primary Management Official Definition

1. ***§ 502.14 (a) – (b)*** *"[Key Employee means] (a) Any person, irrespective of employment status or compensation, who performs one or more of the following functions: …(11) Custodian of licensing records, if designated as a key employee by a gaming ordinance or resolution approached by the Chair; or (12) Compliance inspector or monitor if designated as a key employee by a gaming ordinance or resolution approved by the Chair. (b) Any person with unescorted access to secured areas"*

2. ***§ 502.14 (c)*** *"If not otherwise included, any other person whose total cash compensation is in excess of $100,000 per year"*

3. ***§ 502.19 (b)(3)*** *"[Primary Management Official means any person who has the authority] To supervise a key employee."*

4. ***§556.6 (a)*** *"When a tribe licenses a primary management official or a key employee, the tribe shall maintain the information listed under § 556.4 (a)(1) through (14)."*

The SCOGC is opposed of the above stated proposed revisions to this section. Specifically, we are concerned that the proposed language is not consistent with the Indian Gaming Regulatory Act ("IGRA,") which is clearly intended to embrace only employees of tribal gaming operations, *not* employees of the tribe or tribal gaming regulatory agencies, within the meaning of Key Employee and Primary Management Official. While it would be convenient to process background checks through the NIGC for licensing staff, especially given the latest CHRI requirements, it is not clear that convenience warrants overlooking the intent of IGRA, particularly when TGRAs have a long history of successfully conducting background checks of individuals involved in licensing outside the NIGC process.

Moreover, we would caution the NIGC that such a revision is not significantly dissimilar to the catch-all standard previously captured in § 502.14 (d), which the FBI rejected on the basis of its indeterminate nature. Accordingly, in addition to risking running afoul of IGRA, we do not believe that this provision would achieve the aim the NIGC seeks in drafting it.

Finally, if the NIGC maintains a reference to "secured area," we recommend that the following definition be added to its regulatory definitions:

> Secured Area means an area, room, group of rooms, space, or other segment of or within a gaming facility with both physical and personnel security controls sufficient to protect confidential or protected information or tribal assets.

5. ***§ 558.4 (d)*** *"A right to a hearing under this part shall vest only upon receipt of a license granted under an Ordinance approved by the Chair."*

The SCOGC is opposed to the proposed deletion of this provision without additional clarifying information, especially in relation to the language of the provision that follows in subsection (d) below, which reads, in part, " after a revocation hearing, a tribe shall decide to revoke or reinstate a gaming license." It is our opinion that, by deleting the provision clarifying when a right to a hearing vests, the revised version of § 558.4 (d) may run contrary to tribally-adopted regulations made in reliance on the previous language in § 558.4 (d), forcing tribal governments to undertake an undue revision of their own regulations and policies.

To avoid this issue, the SCOGC recommends 1) deleting the current language of § 558.4 (d), as proposed, 2) adding a new provision as § 558.4 (d) that reads "The right to a hearing under this part shall vest at such time as is determined by tribal law, regulation, and/or policy, *and* 3) retaining the provision beginning "After a revocation hearing…" as § 558.4 (e).

E. Fee Regulations

1. ***§ 514.4 (f)*** *"The amounts wagered that the gaming operation can demonstrate were issued by the gaming operation as promotional credits may be excluded from the total amount of money wagered."*

While we fully support the proposition that promotional credits should be excluded from assessable gross gaming revenue, it is not clear that the proposed revisions fully captures the concept. We are concerned that by addressing the issue of promotional credits in a separate provision from the provision 25 C.F.R. § 514.4(c), which contains the general formula for calculating AGR, risks allowing for miscalculations of AGR. Accordingly, we urge that §514(c) be written as follows:

> For purposes of computing fees, assessable gross revenues for each gaming operation are the total amount of money wagered on class II and III games, plus entry fees (including table or card fees), less any amounts paid out as prizes or paid for prizes awarded, less any promotional credits, and less an allowance for capital expenditures for structures as reflected in the gaming operation's audited financial statements.

F. Facility License Notifications and Submissions

1. **§ 559.2** ***(b)*** *"The notice shall contain the following: … (1) The name and address of the property if known at the time of notice required in (a)"*

It is not necessary to ascertain the address of a property in any case in order for the NIGC to determine whether the location is gaming eligible. This purpose merely requires the NIGC to have the legal description of the property. We, therefore, recommend that the NIGC omit the requirement to submit the name and address of the facility altogether to avoid requiring more than is needed to achieve the NIGC's purpose pursuant to IGRA.

G. Management Contract Regulations

1. **§ 537.1** ***(a)*** *"For each management contract for class II gaming, the Chairman shall conduct or cause to be conducted a background investigation of: … (4) All persons who have 10 percent or more direct or indirect financial interest in a management contract"*

The SCOGC generally supports the proposed amendment to this section. Specifically, we are of the opinion that this revision would reduce the burden on both potential contractors and TGRAs, both of which currently are required to provide more information about their owners and investors than is often pertinent to ensuring that such contractor will not present a danger to the fair and legal conduct of gaming. On the other hand, only requiring information related to those individuals who have a ten (10) percent or higher financial stake in the contractor will ensure that TGRAs and the NIGC can get to the heart of the influences which may negatively affect the contractor's ability to be approved as a management contractor.

2. ***537.1(d)*** *"For any of the following entities, or individuals associated with the following entities, the Chair may, upon request or unilaterally, exercise discretion to reduce the scope of the information to be furnished and background investigation to be conducted:"*

The SCOGC agrees with the above proposed changes, especially to the extent that they will reduce any unnecessary burden on TGRAs during the contract approval and/or licensing processes. However, we would recommend that the NIGC include information as to how and when TGRAs would be notified of a unilateral decision by the Chair to reduce the scope of required information or, alternatively, what would need to be included in a request submitted by TGRAs for the same.

III. Conclusion

The SCOGC appreciates the opportunity to participate in consultation with the NIGC by providing the comments herein, and we look forward to continuing to engage in meaningful consultation with the NIGC on these matters throughout the revision process.