



**Prairie Band Potawatomi
Tribal Gaming Commission**

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August 12, 2021

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

Re: Prairie Band Potawatomi Nation Comments to the Final Draft of the NIGC's Proposed
Changes to its Regulations and Policies

Dear Chair, Simermeyer and Members of the Commission:

Included in with this letter are the Prairie Band Potawatomi Nation Tribal Gaming Commission's 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 27-28, 2021. We appreciate the NIGC's efforts in consulting with Tribal governments and Tribal gaming regulatory agencies on these matters which will have a tangible effect on the regulation of gaming as well as the opportunity to comment on such proposed changes.

A handwritten signature in blue ink, appearing to read 'Rey Kitchkumme', with a long, sweeping horizontal line extending to the right.

Rey Kitchkumme
Chairman
Prairie Band Potawatomi Tribal Gaming Commission

Enclosure.

Comments of the Prairie Band Potawatomi Nation Tribal Gaming Commission on the National Indian Gaming Commission's Proposed Revisions to its Consultation Policy, Strategic Plan, and Regulations.

These comments are made in response to the National Indian Gaming Commission's ("NIGC's") Series A Consultation topics published and discussed on July 27 – 28, 2021. We are pleased to provide input on the proposed changes to the NIGC's consultation policy, strategic plan, and proposed changes to its regulations. The Prairie Band Potawatomi Nation Tribal Gaming Commission ("PBPGC") therefore submits the following comments, which address the NIGC's topics for consultation in order as presented at the July 27 – 28, 2021, Series A Consultation.

1. NIGC's Existing Consultation Policy

We have had the opportunity to review the NIGC Policy on Tribal Consultation and appreciate the opportunity to comment on the questions posed by the NIGC regarding such Policy.

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

The PBPGC believes the use of Zoom to help supplement the facilitation of the NIGC's consultation efforts allows tribal representatives and citizens who otherwise may not have been able to attend a consultation to provide much needed input. Accordingly, the PBPGC would support the future utilization of Zoom by the NIGC to supplement more formal face-to-face consultations.

Further, the PBPGC strongly supports the structure and purposes of the NIGC's Consultation Series, in general. We encourage the NIGC to codify the Tribal Consultation Series within its Consultation Policy as it is a unique and innovative way to increase the quality of consultations between the NIGC and Tribal governments. Codifying the Series within the policy would help to ensure increased consultations between the NIGC and various Tribal governments, and would permanently create large-scale improvements to the NIGC's consultation efforts.

Moreover, the publication of consultation topics and materials on the NIGC's website several weeks in advance of an official consultation better ensures that all Tribal governments and TGRAs have the opportunity to review and inform themselves of the specifics of any changes proposed by the NIGC. However, we believe that using technology to publish the questions posed and answers provided during a consultation session *after* such consultation has occurred would give Tribal governments and TGRAs additional insights and perspectives into the NIGC's proposed changes that may not have otherwise been considered. To this end, we recommend that the NIGC publish a document on its website shortly after a consultation has occurred that includes all questions asked verbally and in writing prior to and during the consultation, the answers thereto, and any other substantive comments made by Tribal governments and TGRAs during the consultation. This

publication could anonymize comments and questions so as not to discourage participation in the Consultation Series similar to how comments are responded to in final rules published in the Federal Register.

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

While the PBPGC believes that Zoom may be used to supplement traditional face-to-face government-to-government consultations, we believe that Zoom should not be the *exclusive* method for such consultation efforts. The exclusive use of Zoom for consultations impedes a robust exchange of information because Tribal representatives may have difficulties using and interacting on the platform. To our knowledge, the NIGC has not provided any Zoom training to Tribal representatives but has held multiple trainings and consultations over the Zoom. Without regular efforts to familiarize less-technologically adept participants with the specific functions of the Zoom platform, or the desired uses of the platform during consultations, we believe that consultations occurring over Zoom will be less meaningful than traditional face-to-face consultations.

Additionally, the exclusive use of Zoom to facilitate the NIGC's consultation efforts creates time constraints that simply do not exist in face-to-face consultations. For example, during the recent Consultation Series A held over Zoom, Tribal representatives attempted to ask detailed and specific questions and provide comments in the comment box, but by the time such representatives had the chance to type out their comments, the presenters had already moved on to a new topic. The same thing also happened during the NIGC's monthly training sessions, except in the trainings there were times when questions were (seemingly unintentionally) skipped over by presenters.

These issues are much more likely to arise on the Zoom platform than if consultations or training sessions were held in-person. Accordingly, we encourage the NIGC to offer consultations primarily in-person with the option of allowing Tribal representatives to access the in-person consultation via video or phone call if they are unable to attend. Further, if the NIGC plans on continuing to utilize Zoom during consultations, allowing designated times throughout the consultation, such as regularly planned breaks, to enable Tribal representatives to type and submit their comments and questions in response to the previously discussed topic, or prepare comments for the next topic, would better serve the purposes of the NIGC's Consultation Series.

2. NIGC's Strategic Plan

While the PBPGC does not take issue with any of the NIGC's proposed strategic goals that are set to be included in the NIGC's next Strategic Plan, it is our view that such Strategic Plans are aspirational and non-binding in nature, and accordingly, are largely overlooked by Tribal governments and TGRAs. However, if the NIGC would publish summary documents to inform Tribal governments and TGRAs of the steps that have been taken to further previous strategic goals, critics could not complain that such Strategic Plans are purely lip service. Further, if the NIGC were to publish summaries of the NIGC's performance for meeting previous strategic goals

on its website, this could be instrumental in furthering two of the newly-proposed strategic goals: Innovative Outreach and Collaboration and, most importantly, agency accountability.

3. Proposed Revisions to Ordinance Regulations at 25 CFR pt. 522

The PBPGC supports several of the proposed regulatory amendments to 25 C.F.R. pt. 522, especially those proposed revisions that modernize, simplify, and expedite the gaming ordinance and/or resolution submission and approval process. However, we are concerned that many of the proposed revisions unnecessarily intrude upon tribal sovereignty, provide too much discretion to the agency, and are wholly unnecessary as it relates to the proper regulation of tribal gaming under IGRA.

a. Regulatory Changes Supported by the PBPGC

The proposed revisions to 25 C.F.R. pt. 522 that are generally supported by the PBPGC are set forth below.

i. Submission of Documents Through Physical or Electronic Form

The PBPGC is particularly supportive of the proposed regulatory amendment that would permit the submission of a gaming ordinance, resolution, or amendment thereto in either physical or electronic form. We are of opinion that the submission of documents to the NIGC via email or through some other electronic means is more dependable than using traditional methods of sending physical documents through the mail. Further, the ability to submit electronic documents can provide both the NIGC and Tribal governments the precise time of submission that can easily be referenced later should any dispute arise.

ii. Treatment of Amendments to Gaming Ordinance

The PBPGC also supports the clarification that including “or amendment thereto” to 25 C.F.R. § 522.2 to reflect the NIGC’s current practices. However, as discussed further below, the Tribe is hesitant to support the proposed revision clarifying that a Tribe that subsequently amends a gaming ordinance or amendment pending before the Chair shall also provide an authentic resolution withdrawing the pending submission and resubmitting the revised submission.

iii. Other Proposed Revisions

Although not substantive in any way, the PBPGC supports the NIGC’s proposed revision changing the term “Chairman” to “Chair” in these regulations. This change is obviously inconsequential as it relates to the regulation of gaming, but the PBPGC nevertheless takes notice of and appreciates this proposed change by the NIGC.

b. Regulatory Changes Opposed by the PBPGC

i. Requiring a copy of the Tribe's Constitution instead of all Tribal Gaming Regulations

The PBPGC *strongly* opposes the NIGC's proposed revision to 25 C.F.R. § 522.2 (d) that would require a Tribal government to submit a copy of the Tribe's constitution when requesting approval of a gaming ordinance, resolution, or amendment thereto. During the two-day Series A Consultation, the NIGC stated that this constitution submission requirement was necessary to ensure that any submitted gaming ordinance, resolution, or amendment thereto authorizing class II or class III gaming was appropriately authorized pursuant to Tribal law. It was also specifically mentioned that by reviewing a submitting Tribal government's constitution, the NIGC could ensure that any quorum requirements were satisfied when approving of a gaming ordinance, resolution, or amendment thereto. Presumably, this requirement would also be for purposes of ensuring the "authenticity" of resolutions amending a pending submission as contemplated by the NIGC in its proposed creation of 25 C.F.R. § 522.4 (b)(8).

This requirement, and specifically the reasons behind it as expressed by the NIGC, are offensive not only to notions of tribal sovereignty, but also to the competency and integrity of Tribal governments in interpreting their own laws. It has long been a general principle that the federal government has no place in interpreting tribal law except as specifically and narrowly required by Congress. In fact, the Department of the Interior has published a legal analysis of this longstanding principle on its webpage.¹ The paternalistic approach recommended here seems to be an unnecessary overreach by the NIGC into a domain reserved exclusively for sovereign Tribal governments.

Furthermore, while the Nation does have its own constitution, there are many Tribal governments that will not have a constitution to submit as required by this proposed regulatory revision. Generally speaking, tribal law can be created and/or developed in many ways, including through a historical course of dealings, which sometimes even predate the establishment of the United States' Constitution.

ii. Eliminate the Requirement that the Chair Publish the Tribe's Entire Gaming Ordinance in the Federal Register

The PBPGC also opposes the proposed revision to 25 C.F.R. § 522.8 that would eliminate the requirement that the Chair publish the Tribe's entire gaming ordinance in the Federal Register upon its approval. We are aware that the NIGC has failed to abide by this requirement for years, and while Tribal governments certainly do not have the similar luxury of skirting and/or intentionally ignoring statutory requirements we happen to find unnecessarily burdensome, we can empathize with the NIGC in why they wish to do away with this requirement because of the costs of publishing materials in the Federal Register.

However, even if the NIGC has refused to follow IGRA and its regulations, that is hardly a compelling reason to do away with this requirement without any attempt to substitute it with a less burdensome standard. One potential option would entail the publication of an approved Ordinance

¹ See <https://www.doi.gov/oha/ibia/Wilfahrt-The-BIA-Must-Give-Deference-to-Tribal-Interpretation-of-Tribal-Governing-Documents>.

or Resolution somewhere else accessible to Tribal governments and other interested parties, such as the NIGC's website, within a specified period of time after approval.

For instance, the PBPGC has first-hand knowledge that the NIGC may publish approved gaming ordinances on its website at a time convenient only to the NIGC. Several weeks after the Nation's Gaming Ordinance was approved per notice in the Federal Register, our newly revised Gaming Ordinance was still not published on the NIGC's website for the PBPGC, counsel, or other third-parties to review as necessary and convenient.² Maintaining a publication requirement would better ensure that respondents subject to enforcement actions will have relevant standards accessible to them and/or their counsel provided by a neutral and independent body. This helps protect the due process rights on third-party individuals as well as the perceived integrity of TGRAs' administrative processes. Rescinding this regulatory requirement, even if it was largely ignored in practice and without any kind of substituted standard to ensure the accessibility of gaming ordinances, will only be harmful to TGRAs and the NIGC in the future.

4. Definitions for Key Employees and PMOs (25 CFR pts. 502, 556, 558)

The PBPGC is opposed to the proposed revisions to § 502.14 (a)-(b). Specifically, we are concerned that the proposed language is not consistent with the IGRA which clearly intended to cover employees of tribal gaming operations, *not* employees of the tribe itself or its TGRAs, 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 in particular, especially in light of revised requirements related to Criminal History Record Information ("CHRI"), it is not clear that convenience warrants overlooking the intent of IGRA, particularly when TGRAs (including the PBPGC) have a long history of successfully conducting background checks of individuals involved in licensing outside of the NIGC process. Furthermore 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.

The PBPGC is also opposed to the proposed revision of § 502.14 (c) since such a revision will significantly reduce the number of employees that the PBPGC will have the authority to background check using the FBI database. Since the cost of living and standard rates of pay in areas of the country where Tribal gaming operations are prevalent (i.e., rural areas similar to Mayetta, KS), the PBPGC considers \$100,000.00 to be an excessively high number so as to meet the intent of the regulation, which was drafted to cover all those employees who carry out key functions but whose roles were not explicitly mentioned in the regulation's list. We believe that by excluding such employees from background check processing (considering the terms of the pending MOU, which will only allow applicants for key employee or primary management officials to have their fingerprints processed by the NIGC) would hinder the PBPGC's duties to protect the integrity of gaming.

² It must be noted General Counsel to the NIGC, Michael Hoenig, was quick to respond to our request to publish the Gaming Ordinance on the NIGC's website. Nevertheless, it still took reaching out the NIGC's General Counsel many weeks after approval to get this done.

With regard to the definition of Primary Management Official, the PBPGC is of the opinion that the wording of § 502.19 (b)(3) could lead to unintended results. Specifically, due to the proposed revisions to the definition of “Key Employee” and the generality of the term “supervise,” should the NIGC adopt such language, the PBPGC is concerned that individuals outside the traditional licensing authority of TGRAs could be subject to licensure. Moreover, this could create a situation wherein a Commissioner of the PBPGC - who is not subject to licensure under tribal law - is subject to licensure as a Primary Management Official and would need to be processed by the very employees we are tasked with overseeing. This does not further the actual or perceived neutrality of the licensing process. More importantly though, we are again concerned that this provision risks distorting the intent of IGRA, which was to solely capture tribal gaming staff within the definition of Primary Management Official. To avoid such unintended results, we would recommend expanding § 502.19 (b) to read, “Any person who is employed by a tribal gaming operation who has the authority to supervise a key employee.”

As for other matters in this section, the PBPGC is opposed to omitting the language currently at § 558.4 (d) absent the addition of supplemental information. It is our opinion that, by deleting the provision clarifying when someone is and is not entitled to a hearing, 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), which reads, in part, “after a revocation hearing, a tribe shall decide to revoke or reinstate a gaming license.” We are concerned that this change will force tribal governments to undertake an undue revision of their own regulations and policies or face undue consequences of noncompliance.

To avoid this issue, the PBPGC 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).

We also recommend revising the definition of “Key Employees” to include surveillance staff due to the specific roles and responsibilities those individuals serve at Tribal gaming operations and their access to sensitive materials and information.

Lastly, the NIGC maintains a reference to “secured area” in its proposed 25 C.F.R. § 502.14 (b) without any further clarifying information. The PBPGC recommends that the following definition be added to the NIGC’s regulatory definitions, which is based on the FBI’s Tribal Access Program definition of “physically secure location:”

“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. NIGC Fee Regulations (25 CFR pt. 514.4)

Next, the PBPGC wishes to comment on the NIGC’s proposed change to 25 C.F.R. § 514.4 which would permit a gaming operation to deduct from “the total amount of money wagered” the amounts the gaming operation can demonstrate were issued to patrons as promotional credits. The total

amount of money wagered is necessary to calculate “assessable gross revenues” and accordingly the amount of annual fees that must be paid the NIGC. Specifically, the newly proposed 25 C.F.R. § 514.4 (f) reads: “[t]he 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.”

Currently, NIGC regulations do not address whether “promotional credits” should be considered in the total amount of money wagered. While we believe that promotional credits or free play credits should be excluded from the total amount of money wagered for the purposes of calculating Assessable Gross Revenues (“AGR”), it is unclear to us why, in structuring the proposed regulatory revision, this issue of promotional credits is addressed in a separate subparagraph rather than in 25 C.F.R. § 514.4 (c), which contains the general formula for calculating AGR. It would appear that including the language excluding promotional credits in the paragraph with the general formula for calculating Assessable Gross Revenues increases the predictability of the formula and puts all TGRAs on notice of a single unwavering standard.

In response to these concerns that were raised in the NIGC’s consultation occurring on July 28, 2021, NIGC CFO, Yvonne Lee, stated that language in the fee worksheets will be very clear and will take each submitter through the formula. While the PBPGC does appreciate Ms. Lee’s attempts of assurance, we are much more comfortable relying on the specific text of the relevant regulatory provisions. Because promotional credits are so vitally important to smaller gaming operations in attracting new patrons, we would be much more comfortable with this provision being included in the AGR formula found at 25 C.F.R. § 514.4 (c).

Additionally, the Nation agrees with the concerns expressed at the July 28, 2021, consultation in which one commentator stated that the “may be excluded” language was too flexible and created unnecessary uncertainty. A definitive standard of “shall” or “must” puts all parties on notice of this standard and creates the same level of expectations of every Tribal gaming operation. Moreover, because only 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” casts doubt on consistently being able to deduct promotional credits from the total amount wagered. (Emphasis added). Because no standards are given in the proposed revision for how a TGRA is supposed to *demonstrate* amounts wagered were issued as promotional credits, the PBPGC’s biggest fear is that this standard will be inequitably applied. Accordingly, the PBPGC recommends that in the following sentence be added to the end of 25 C.F.R. § 514.4 (c):

“The amounts wagered issued by the gaming operation as promotional credits shall be excluded from the total amount of money wagered.”

Alternatively, 25 C.F.R. § 514.4 (c) could be revised to read:

“For purposes of computing fees, assessable gross revenues for each gaming operation are the total amount of money wagered on class II and class 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."

(Emphasis added). In any event, emphasizing that promotional credits will be excluded from the calculation of AGR *in* the regulatory provision providing the formula for calculating AGR creates a standard that is predictable, easily discernable, and creates fewer avenues for any other interpretations of the AGR formula.

6. Facility License Notifications and Submissions (25 CFR pt. 559.2)

The PBPGC supports the NIGC's proposed revision to 25 C.F.R. § 559.2 that would require that facility license notices required to be submitted to the Chair include the name and address of the property only *if known at the time of notice*. This proposed revision creates flexibility when a physical address remains unknown due to factors outside of a Tribal government's control. However, while this proposed revision does reflect the reality that a physical address may not be known at the time a facility license notice is submitted to the Chair, the PBPGC believes that all that should be required is a legal description of the property to determine whether the location is eligible to host Indian gaming.

7. Management Contract Regulations (25 CFR Pt. 537)

The PBPGC generally supports the NIGC's proposed revisions to 25 C.F.R. pt. 537. Specifically, the PBPGC believes that these proposed changes to 25 C.F.R. § 537.1 (a)(3)-(4) requiring the Chair to conduct background investigations on all persons or entities with a ten percent (10%) or more financial interest in a management contract, rather than *any* entity and the ten (10) persons with the greatest financial interest in a management contract, would still adequately protect the security and integrity of Tribal gaming operations. The NIGC's proposed changes here ensure that those potential management contractors with the most to gain from potentially malevolent activities are rightfully deterred from being involved in Tribal gaming operations, but does not unduly burden those contractors from subjecting their employees with a de minimis stake in a management contract to intensive background investigations by the NIGC.

The PBPGC also agrees with the proposed revisions to 25 C.F.R. § 537.1 (d) that would authorize the Chair, upon request or on the Chair's own initiative, to exercise discretion to reduce the scope of the information to be furnished and background investigation to be conducted on certain entities. However, we recommend that the NIGC include information regarding how and when TGRAs would be notified of a unilateral decision by the Chair to reduce the scope of required information. Additionally, standards on what would need to be included in a request submitted by TGRAs for the "reduced scope" background investigations would also be appreciated so as to better put TGRAs on notice of what information is deemed pertinent for their submissions, and to enable the Chair to make a decision based on adequate and complete information.

CONCLUSION

The PBPGC is appreciative of the opportunity to participate in the NIGC's Series A Consultation by providing the comments herein, and we believe that through such continued consultation

efforts, the NIGC will achieve regulations that protect the integrity of gaming without imposing undue burdens on TGRAs and Tribal governments. We look forward to continuing to engage in meaningful consultation with the NIGC regarding these proposed revisions, and furthering the government-to-government relationship between the Nation and the United States.