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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:

Included in with this letter are the Quapaw Nation Gaming Agency'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 and 28, 2021. We sincerely appreciate the NIGC's efforts to solicit and consider tribal input on these matters, which will have a tangible impact on Tribal Gaming Regulatory Agencies' ability to adequately protect the integrity of gaming.

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Erin Eckhart, Acting Director
Quapaw Nation Gaming Agency

Enclosure.

COMMENTS OF THE QUAPAW NATION GAMING AGENCY 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 Quapaw Nation Gaming Agency ("QNGA") 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 QNGA views technology as of central importance to efforts to increase the accessibility of consultation sessions, but it is not a complete substitute for face-to-face consultation between tribal governments and the NIGC. Certainly, the utilization of Zoom made it possible for there to be communication between tribal governments and the NIGC during the Covid 19 Pandemic, which was extremely important and it does increase the NIGC's capacity to reach out to tribal governments whose representatives may not otherwise be able to attend in person, but there are drawbacks to Zoom and similar platforms as we discuss more fully below. In sum, we encourage the NIGC to continue offering the option for tribal officials to access consultations via electronic platforms or by phone, even where live consultation sessions are conducted.

We also urge the NIGC to consider using other technologies to increase accessibility. For example, the use of adaptive technologies, such as real-time closed captioning or interpretation would provide a better experience for deaf or hearing-impaired participants and increase the opportunity for engagement. Without use of such adaptive technologies, some may have to wait for the transcript to fully comprehend the discussion. At that point, it may be too late to provide feedback prior to the deadline for comment.

Along that same vein, using technology to publish the questions posed and answers provided during a consultation session shortly thereafter would assist in ensuring that representatives have fullest possible scope of information on which to comment. Accordingly, we would recommend writing up a document that includes in written form all questions asked verbally and in writing prior to and during the consultation, as well as the answers thereto, and disseminating such document via website publication and via email to all participants as soon as practicable.

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?*

Although we are favorably disposed to the concept of utilizing Zoom or similar platforms, in our experience, it does not facilitate a robust exchange of information. Sometimes it may be difficult to access for many reasons. Sometimes the availability of Wi-Fi/internet access is limited in Indian Country. Sometimes there are too many users, and sometimes there are inexplicable glitches. Another issue is unfamiliarity with the platform as well as difficulty in figuring out how to "raise hands" or "unmute" or access other program features. Some people may be hesitant to speak without clear indicators of when it may be 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 the next 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) allowing designated time periodically throughout the consultation session to allow for Tribal representatives 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 QNGA found that the NIGC outlines performance measures for each individual goal, as well as sub-objectives within each goal. However, the results of these performance measures do not seem to be shared with tribes, TGRAs, or the general public. It is our opinion that such failure to publish, and the resulting lack of feedback on the NIGC's performance, poses a major challenge to the NIGC's ability to meet its goal of accountability. Accordingly, we would 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. It is our opinion that it would be useful for these updates to come in addition to larger, in-depth updates provided to TGRAs on an annual basis.

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 QNGA agrees with the above-proposed revision, which would empower tribes to submit a gaming ordinance, resolution, or amendment thereto in whatever manner is most convenient to it, including via electronic means. We are strongly in favor of the flexibility this revision would provide, as well as the potential for cost savings. We further believed 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.

> 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 QNGA strongly opposes the proposed revisions to this section, which would require a tribal government to submit a copy of its constitution along with its request for approval of a gaming ordinance, resolution, or amendment thereto. During the recent virtual Consultation session held by the NIGC, the NIGC stated that the purpose of this section was to ensure that the NIGC could 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.). This requirement, including the reasoning behind it, is problematic for two reasons.

First, the QNGA is of the opinion that it is inappropriate for the NIGC, as an arm of the federal government, to take part in the interpretation and enforcement of tribal law in a situation not required by federal law. Indeed, checking to ensure that tribal governments pass resolutions pursuant to a certain standard offends the notion of tribal sovereignty and ignores the possibility that a tribe has adopted and enacted laws affecting resolutions outside the generalities that may be included in a tribal constitution. It has long been a basic premise of federal policy that tribal governments, not federal agencies interpret tribal law. A tribal government's certification that a resolution, legislation, or other formal action has been completed in conformity with tribal law should be given deference by the NIGC.

Second, this revision is drafted in such a way that certain tribal governments are destined for noncompliance, since many tribal governments that are governed traditionally have not adopted constitutions in the sense sought by the NIGC here. Certainly, nothing in IGRA suggests that tribal governments must operate under written constitutions. The Quapaw Nation, for example, currently operates under a governing resolution and has done so for decades. To require tribal governments to draft a justification as to why its submissions do not include a written constitution would impose an undue and disparate burden on the submitting tribe.

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

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

While the QNGA believes that publication of approved gaming ordinances in the federal register as set forth in IGRA provides a valuable tool for tracking the enforcement date of tribal governments' laws and regulations and increases public access to tribal law, we understand that

this is a cumbersome step that would take up a lot of space in the Federal Register. We urge, however, that in these regulations the NIGC, simultaneously with the publication of the Federal Register Notice, publish the new/revised gaming ordinance on its website.

> *5. § 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 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 QNGA does not object to this revision. We would, however, recommend adding details regarding the procedures following approval by operation of law into this section. Specifically, it would be helpful to know how long after approval by operation of law the gaming ordinance will be published into the federal register (or on the NIGC's website). We would also recommend including details clarifying whether the "date of submission" shall mean the date mailed in the event a tribe elects not to electronically transmit a copy of their new or revised gaming ordinance to the NIGC.

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"*

The QNGA, somewhat reluctantly, opposes the proposed revisions to this section. Specifically, we are concerned that the proposed language is inconsistent with the Indian Gaming Regulatory Act ("IGRA,") which clearly intended the licensing provisions to pertain to employees of tribal gaming operations, *not* employees of the tribe itself or its tribal gaming regulatory agencies. While it might be convenient if the NIGC were to process background checks for TGRA licensing staff given to the revised Criminal History Record Information (CHRI) requirements, it is questionable whether convenience justifies overlooking the plain language of IGRA, particularly when TGRAs (including the QNGA) have a long history of successfully conducting background checks of individuals involved in licensing outside the NIGC process.

Moreover, we would note 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.

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

The QNGA opposes the proposed revision of § 502.14 (c) due to the likelihood that such revision would dramatically reduce the number of employees that the QNGA will have the authority to background check using the FBI database. Especially considering the cost of living and standard rates of pay in more rural areas of the country, many of which are home to Indian gaming operations, the QNGA considers $100,000.00 to be a prohibitively 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 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 significantly impede TGRAs' duties to protect the integrity of gaming, which is often based in ensuring that those assisting in the conduct of gaming do not increase the likelihood of unfair play or otherwise pose a risk to the safety of patrons, employees, and tribal assets.

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

The QNGA is of the opinion that the wording of this provision 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 QNGA is concerned that individuals outside the traditional licensing authority of TGRAs could be subject to licensure. Moreover, this could create a situation wherein the Director of a TGRA 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 that they are tasked with overseeing, disrupting the neutrality of the licensing process. More importantly though, we are again concerned that this provision risks distorting the intent of IGRA, which was solely intended to capture tribal gaming operation employees within the definition of Primary Management Official. To avoid such unintended results, we would recommend expanding § 502.19 (b) to read, "Any person employed by a tribal gaming operation who has the authority to…"

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)."

While the QNGA has no objection to this revision, we believe that the addition of supplemental information is warranted. Especially in light of revisions to retention requirements related to the use of Criminal History Record Information, it is our opinion that the NIGC should add a timeline for how long the maintained information should be held. For example, this provision could be revised to read, " 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) for at least one year after the term of the primary management official or key employee's employment, excepting any information gathered during the course of the background investigation conducted pursuant to § 556.4 that constitutes Criminal History Record Information."

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 QNGA 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 the 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), thus forcing tribal governments to undertake an unnecessary and expensive revision of their own regulations and policies.

To avoid this issue, the QNGA 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. *"(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."*

Here, the NIGC's proposed revision would permit a gaming operation to deduct all such amounts the gaming operation can demonstrate were issued to patrons as promotional credits from "the total amount of money wagered." 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. We agree 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.")

However, 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. In response to concerns to this effect raised during the consultation session held on July 28, 2021, the NIGC stressed that the structure and clarity of the fee worksheets would assist submitters in avoiding miscalculations. However, considering the relative ease at which fee worksheets may be changed, it is our opinion that any regulatory requirements related to AGR should be cemented in the specific regulatory section related to the AGR formula itself at 25 C.F.R. § 514.4 (c). We believe that streamlining the regulatory language here would positively increase agency efficiency and ensure that the correct amount of funds is assessed and, later, available to fund core tribal services.

F. Facility License Notifications and Submissions

1. *"(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)"*

The QNGA generally supports this change, which would reduce the burden currently imposed on TGRAs by requiring inclusion of a property address that may be unknown as of the time of application by no fault of the TGRA. However, we would emphasize that it is not necessary to ascertain the address of a property in any case in order to determine whether the location is eligible

to host Indian gaming. In fact, the NIGC only needs the legal description of the property to make such a conclusion. We would 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.

G. Management Contract Regulations

> 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 QNGA 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.

Further, for the sake of consistency, the QNGA recommends revising the term "Chairman" to "Chair," as the NIGC has suggested elsewhere in the revised regulations. The QNGA notes and appreciates such change for its inclusivity and would be pleased to see it reflected throughout the entirety of the NIGC regulations, as proposed.

> 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 QNGA 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 QNGA appreciates the opportunity to participate in consultation with the NIGC by providing the comments herein, and we are confident that, through cooperative discourse, the NIGC will achieve regulations that foster the integrity of gaming without imposing an undue burden on TGRAs and tribal governments. We look forward to continuing to engage in meaningful consultation with the NIGC on these matters throughout the revision process.