AGUA CALIENTE BAND OF CAHUILLA INDIANS
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May 19, 2022

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

Submitted via email to: NIGC.Outreach@nigc.gov

Re: Comments on NIGC Tribal Consultation 2021 Series B, Proposed Changes to 25 C.F.R. Part 518

Dear Chairman Simermeyer:

I am submitting these comments on behalf of the Agua Caliente Tribe of Cahuilla Indians ("Tribe") in response to the National Indian Gaming Commission's ("NIGC") Tribal Consultation 2021 Series B, and to its Summary of Proposed Changes to 25 C.F.R. Part 518 dated September 20, 2021 ("Summary of Proposed Changes").

The Tribe is happy to see that the NIGC is considering changes to the Part 518 regulations governing self-regulation of Class II gaming. Tribes have expressed frustration with the NIGC's approach to self-regulation over the years and reforms to the Part 518 regulations are needed to reduce significant, unnecessary burdens on petitioning Tribes. However, the relatively minor changes to the regulations that the NIGC has actually proposed fall far short of addressing these issues in a meaningful way and will not, in the Tribe's view, result in any real improvements to the NIGC's implementation of the self-regulation certification process. As discussed further below, the Tribe urges the NIGC to focus on reforms to the Part 518 regulations to better align the petition documentation and submission requirements with the statutory criteria for self-regulation, and to more powerfully encourage and support the exercise of tribal self-governance through self-regulation of Class II gaming.

I. The Proposed Changes Do Not Address Fundamental Problems with the NIGC's Implementation of the Self-Regulation Certification Process.

Despite the promised benefits of self-regulation, very few Tribes have petitioned for or received a certificate of self-regulation pursuant to 25 U.S.C. § 2710(c)(3)-(4). This lagging participation is not the result of a lack of interest by Tribes in self-regulation. Rather, the NIGC has consistently erected barriers to participation through both the imposition of unnecessarily burdensome documentation requirements and a punitive, rather than cooperative, approach to its petition review process.

By requiring Tribes to compile and submit documentation far beyond what is necessary to establish whether or not the statutory criteria for self-regulation are met, and choosing to threaten or pursue enforcement action rather than technical assistance to overcome perceived shortcomings in a Tribe's petition, the NIGC has failed to meaningfully implement the self-regulation provisions of 25 U.S.C. § 2710(c). Unfortunately, the proposed changes to Part 518 as described in the Summary of Proposed Changes do not address either of these fundamental issues.

While the Tribe has no specific objection to the narrow changes proposed to sections 518.7(f), or to the clarifications of the role and duties of the Office of Self-Regulation in sections 518.11, 518.13, and 518.14, a much more significant review and overhaul of the Part 518 regulations is necessary to bring the NIGC's implementation of self-regulation into compliance with the letter and the spirit of the Indian Gaming Regulatory Act ("IGRA"). The Tribe strongly urges the NIGC to undertake a thorough review of its Part 518 regulations to ensure that they (1) do not impose documentation or other requirements on petitioning Tribes that are more burdensome than what the statutory criteria require, and (2) provide for technical assistance and otherwise encourage eligible Tribes to petition for and obtain a certificate of self-regulation consistent with the federal policy of tribal self-determination and self-governance.

II. NIGC Should Require Petitioning Tribes to Submit Documentation Necessary to Establish the Statutory Requirements for Self-Regulation – Not More.

The NIGC's documentation requests in connection with petitions for a certificate of self-regulation go far beyond what the statute requires and impose significant, unnecessary burdens on petitioning Tribes. The statutory requirements for a certificate of self-regulation at 25 U.S.C. § 2710(c)(4) are relatively straightforward: A Tribe meets the qualifications set by Congress for self-regulation of Class II gaming so long as it has otherwise complied with § 2710 and has:

> (A) conducted its gaming activity in a manner which—
> (i) has resulted in an effective and honest accounting of all revenues;
> (ii) has resulted in a reputation for safe, fair, and honest operation of the activity; and
> (iii) has been generally free of evidence of criminal or dishonest activity;
>
> (B) adopted and is implementing adequate systems for—
> (i) accounting for all revenues from the activity;

(ii) investigation, licensing, and monitoring of all employees of the gaming activity; and
(iii) investigation, enforcement and prosecution of violations of its gaming ordinance and regulations; and

(C) conducted the operation on a fiscally and economically sound basis.

25 U.S.C. § 2710(c)(4). Moreover, the statute is couched in mandatory language: the NIGC "**shall** issue a certificate of self-regulation if it determines from available information, and after a hearing if requested by the tribe," that the Tribe meets these criteria. The NIGC is not free to impose additional requirements beyond those set out in the statutory language.

Certainly, a Tribe petitioning for a certificate of self-regulation should be able to adequately document that it meets the statutory criteria. However, the existing Part 518 regulations do not even consider a petition complete for review unless it includes a long list of "descriptions" with supporting documentation that may or may not be relevant to any of the criteria in 25 U.S.C. § 2710(c)(4) for a given Tribe. Section 518.4 of the regulations should not require anything beyond what is described in subsection (b), which reasonably requires petitioning Tribes to provide "A description of how the tribe meets the eligibility criteria in § 518.3, which may include supporting documentation[.]" A description of how the Tribe meets the statutory criteria, along with copies of relevant ordinances, regulations, and policies and any other *necessary* documentation in support of that description, should be sufficient to render a petition complete for review.

The regulations at § 518.5(b) also impose requirements beyond those the statute itself requires or permits. The language itself, in stating that "A tribe may illustrate that it has met the criteria listed in paragraph (a) of this section by addressing factors such as those listed below" and that "The list of factors is not all-inclusive; other factors not listed here may also be addressed and considered[,]" is poorly drafted and vague regarding whether or not a petitioning Tribe must address all of the "factors" listed. Section 518.5(b) should therefore, at a minimum, be revised to clarify that the "factors" listed are examples only, and that a petitioning Tribe need not specifically "address" all of them if it can establish through other means that it meets the statutory criteria for self-regulation. Likewise, the regulations at § 518.7(b) should be clear that the "approval criteria" to be met is limited to the criteria listed in § 518.5(a) and does not also include the list of specific "factors" in § 518.5(b).

Currently, the regulations at § 518.7(b) broadly state that the Office of Self-Regulation "May request from the tribe any additional material it deems necessary to assess whether the tribe has met the criteria for self-regulation." In the Tribe's opinion, this authority has unfortunately been interpreted far too broadly and the Office of Self-Regulation has consistently requested documentation far beyond what is reasonably necessary to assess whether the petitioning Tribe meets the statutory criteria. Indeed, the burden imposed on petitioning Tribes has been sufficient to discourage Tribes from submitting petitions or completing the review process following an initial submission, despite the benefits that self-regulation would provide. This is not what Congress intended when it established the right of Tribes to exercise self-regulation of their own Class II gaming operations upon meeting the clear, straightforward criteria listed in 25 U.S.C. § 2710(c)(4).

These comments do not constitute a comprehensive review of the regulatory changes that would be needed to bring the Part 518 regulations in line with the statutory criteria for tribal self-regulation of Class II gaming. Further, some of the problem lies with agency practice in the implementation of the statute and regulations. The purpose of these comments is instead to urge the NIGC to undertake a more thorough and comprehensive review of its Part 518 regulations, with the specific goal of ensuring that the petition process is not more burdensome than what is actually necessary to comply with the statutory requirements.

III. The NIGC Should Support and Encourage Self-Regulation as an Implementation of Federal Self-Determination Policy

For the last several decades, Congress has pursued an overall policy of tribal self-determination. In enacting the IGRA itself, Congress specifically found that "a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government[.]" 25 U.S.C. § 2701(4). The current Administration has followed in the footsteps of past administrations in pursuing a policy of respecting tribal sovereignty and self-governance.[1]

[1] *E.g.*, Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships (Jan. 26, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-on-tribal-consultation-and-strengthening-nation-to-nation-relationships/ ("It is a priority of my Administration to make respect for Tribal sovereignty and self-governance, commitment to fulfilling Federal trust and treaty responsibilities to Tribal Nations, and regular, meaningful, and robust consultation with Tribal Nations cornerstones of Federal Indian policy.").

Encouraging tribal self-regulation of Class II gaming under the IGRA is one of the ways Congress—*and* the Executive Branch—implement the federal policy of tribal self-determination and self-governance. To that end, the NIGC should welcome tribal petitions for a certification of self-regulation and should do everything possible to assist Tribes in successfully obtaining those certifications. This should include, for example, technical assistance to overcome any perceived obstacles to self-regulation encountered by the Office of Self-Regulation in the course of its review.

Unfortunately, many Tribes have found that the NIGC has instead erected barriers to self-regulation, even approaching the review process with a punitive mindset and seemingly seeking opportunities to take enforcement actions. In the absence of repeated or egregious violations, Tribes that seek to establish their eligibility for self-regulation by inviting the NIGC to scrutinize the sufficiency of their policies and procedures should not fear enforcement actions as retribution for doing so. The punitive approach often taken by the NIGC has served as a significant disincentive for Tribes that would otherwise be happy to work in partnership with the NIGC to address any potential pitfalls or shortcomings and strengthen their regulatory capacities, to everyone's benefit. The Tribe therefore urges the NIGC to make clear in its Part 518 regulations that the agency pursues, and is committed to implementing, a policy of tribal self-determination and self-governance including through the implementation of tribal rights to self-regulation of Class II gaming under the IGRA.

Thank you for the opportunity to submit these comments.

Sincerely,

Reid D. Milanovich,
Chairman, Tribal Council
AGUA CALIENTE BAND OF CAHUILLA INDIANS