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VIA Email: reg.review@nigc.gov

The National Indian Gaming Commission
1441 L Street Northwest, Ste. 9100
Washington, D.C. 20005

**RE: Formal Comment
National Indian Gaming Commission
Notice of Inquiry and Request for Information
Comprehensive Review of Regulations to Implement the Indian Gaming
Regulatory Act**

Ladies and Gentlemen:

The Southeast Law Institute is a nonprofit legal organization providing assistance on public policy issues. It has provided assistance over the last several years to Citizens for a Better Alabama, ALCAP, and other organizations which oppose gambling expansion in the State of Alabama. As a consequence of this work, SLI has acquired knowledge in and concern for not only gambling expansion by non-Indian interests, but the form and nature of gambling existing at the several Indian facilities in the State of Alabama.

This comment is directed to the following in your Notice of Inquiry and Request for Information ("Notice"):

**(3) Part 547 – Minimum Technical Standards for Gaming
Equipment Used With the Play of Class II Games.**

Your Notice states that Part 547 was recently revised and questioned whether there should be further revisions and solicited comments. Our comments are directed to the necessity for Part 547 to appropriately limit the reach of the Indian Gaming Regulatory Act (IGRA) into the sovereign affairs of a state, including the State of Alabama, and specifically limit Class II gaming. Our concern is that the vagueness of Part 547 encourages protracted arguments to be made by Indians that Class II gaming permits bingo, regardless of the actual nature of the game.

The Southeast Law Institute, Inc.™ is a 501(c)(3) organization providing legal counsel on constitutional and public policy issues.

Background

The State of Alabama has had significant political and legal efforts concerning the nature of permitted gambling. Non-Indian interests have sought to expand gambling in Alabama and the Indians have sought to tag along with them.

Article IV, Section 65, 1901 Constitution of Alabama, prohibits games of chance. There are 18 constitutional amendments permitting bingo to be played in 18 counties. That bingo is to be limited play of charity games. Non-Indian gambling establishments tried through failed legislation and de facto use to expand this bingo to the use of electronic machines which are in fact by operation and description "slot machines." In 2009, Alabama Governor Bob Riley appointed a Task Force on Gambling which pursued and prosecuted non-Indian gambling interests. These efforts resulted in a court opinion which clearly defined bingo and avoids what had earlier been argued to be permitted electronic bingo in the state. As a result, the only bingo operating in Alabama at this time are the simple paper card bingo that was actually intended by the constitutional amendments.

We refer you to your August 4, 2008 letter by the Acting Deputy Assistant Secretary – Policy and Economic Development of the United States Department of the Interior to the Honorable Bill H. Pryor, Jr., Alabama Attorney General. Arguments were being made by Alabama Indians that Class III gaming was permitted in Alabama due in part to "electronic bingo in the format that is played at racetracks in Macon and Greene Counties, Alabama." The position of the Alabama Poarch Band of Creek Indians was that this was Class III gaming and therefore they should be permitted to engage in all types of Class III gaming under the supervision of IGRA and without reference or regard to Alabama criminal laws.

Governor Bob Riley firmly believed the electronic bingo machines referenced in that letter and in use at Alabama facilities were in fact "slot machines" as defined by Section 13A-12-20 (10), 1975 *Code of Alabama*. Although there is still litigation existing in the courts of Alabama, the case of *David Barber, et al. v. Cornerstone Community Outreach, Inc., et al.*, 42 So.3d 65, 86 (Ala., 2009), defined bingo in such a way as to preclude what the Indians had earlier claimed to be Class III electronic gambling:

Based on the foregoing, we must conclude that the term "bingo" as used in Amendment No. 674 was intended to reference the game commonly or traditionally known as bingo. The characteristics of that game include the following:

1. Each player uses one or more cards with spaces arranged in five columns and five rows, with an alphanumeric or similar designation assigned to each space.
2. Alphanumeric or similar designations are randomly drawn and announced one by one.

3. In order to play, each player must pay attention to the values announced; if one of the values matches a value on one or more of the player's cards, the player must physically act by marking his or her card accordingly.

4. A player can fail to pay proper attention or to properly mark his or her card, and thereby miss an opportunity to be declared a winner.

5. A player must recognize that his or her card has a "bingo," i.e., a predetermined pattern of matching values, and in turn announce to the other players and the announcer that this is the case before any other player does so.

6. The game of bingo contemplates a group activity in which multiple players compete against each other to be the first to properly mark a card with the predetermined winning pattern and announce that fact.

We do not necessarily contend this precludes bingo being played on an electronic device. However, these requirements severely restrict the electronic play of bingo and would clearly avoid the definition of a "slot machine." Consequently, the Poarch Tribe arguments that Class III gaming has existed in Alabama are clearly in error. Any gambling facilities which may have used expanded electronic machinery were clearly in violation of the law and as a result of the criminal prosecutions of Governor Riley's Task Force, they are no longer in business. Because they were operating illegally does not give the Indians a basis for claiming their right to have Class III gaming.

IGRA and Its Goals

In considering changes to Part 547, the National Indian Gaming Commission ("NIGC") reported concerning 25 C.F.R. Part 547, RIN 3141-AA29 that "specially excluded from Class II gaming are . . . slot machines of any kind. 25 U.S.C. 2703 (7)(B)." Further, the "ultimate goal . . . of technical standards . . . [is] to insure the auditability of the gaming revenue . . ." In other words, the electronic standards envisioned by Part 547 are not to encourage Class III gaming, but to provide a record by which Indian operations can be reviewed and audited. Your Notice states in the Summary:

"The Commission is taking a fresh look at its rules in order to determine whether amendments are necessary to more effectively implement IGRA's policies of protecting Indian gaming as a means of generating tribal revenue, insuring that gaming is conducted fairly and honestly . . ."

The statutory authority upon which you operate, 25 U.S.C. Section 2703 (7)(B)(ii), makes it clear that Class II gaming does not include slot machines. This is the statutory authority that is extended to IGRA for adopting the regulations that exist, *inter alia*, for Section 547.

State Sovereignty

IGRA has generated lawsuits, including *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). That case established the sovereignty of the right of Florida not to be subject to lawsuits brought against it by Indians under IGRA to expand gambling. When the Secretary of the Interior attempted to overstep his bounds, similar sovereignty rights protected the State of Texas in *State of Texas v. United States of America, et al.*, and *Kickapoo Traditional Tribe of Texas*, 497 F3d 491 (5th Cir. 2007), precluding NIGC from expanding Texas gaming into Class III for Indians.

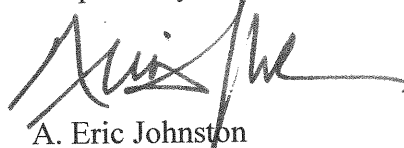
Sovereignty is important to the state under the 10th Amendment of the U.S. Constitution and other laws. Of particular concern for states are their criminal statutes, one of the hallmarks of state sovereignty. Alabama's long held public policy has been a strong criminal code. In that code, along with its constitutional provisions, Alabama has prohibited gambling. It continues to do so with zeal.

Conclusion

Based on the foregoing, we suggest that Part 547 be strengthened and clarified to protect state sovereignty and require NIGC to observe the criminal laws of the states where Indian gambling facilities exist. Any game that the state classifies as a slot machine should be prohibited. Class II bingo in Alabama should be limited to play as defined by *Cornerstone* above.

Thank you for your consideration of our comment.

Respectfully submitted,



A. Eric Johnston
General Counsel