GREAT PLAINS TRIBAL CHAIRMAN'S ASSOCIATION
1926 Stirling St, Rapid City, SD 57702 Phone: 605-388-5375 Fax: 605-343-3074

February 11, 2011

VIA EMAIL TO: reg.review@nigc.gov

Chairwoman Tracie L. Stevens
Vice Chair Steffani A. Cochran
Associate Commissioner Dan Little
National Indian Gaming Commission
1441 L St., NW, Suite 9100
Washington, DC 20005

Attn.: Ms. Lael Echo-Hawk

Re: Response to Notice of Inquiry and Request for Information: Notice of Consultations (75 Fed. Reg. 70680 (Nov. 18, 2010).

Dear Chairwoman Stevens, Vice Chair Cochran, and Associate Commissioner Little:

The Great Plains Tribal Chairman's Association (the "GPTCA") hereby submits the following comments in response to the NIGC's November 18, 2010 Notice of Inquiry (the "NOI"). The GPTCA appreciates the opportunity to make its views known.

The GPTCA is made up of the 16 Tribal Chairmen, Presidents, and Chairpersons in the states of North Dakota, South Dakota, and Nebraska. The primary purpose of the GPTCA is to unify and defend inherent Tribal rights under our Treaties; to come together in a forum to promote the welfare of our People; to take up matters affecting the Tribes; and to protect the Sovereignty of each Tribe and their citizens. The United States has obligated itself both through Treaties entered into with the sovereign Tribes and Nations of the Great Plains Region and through its own federal statutes, the Snyder Act of 1921 as amended, the Indian Self-Determination Act of 1976 as amended, and the Indian Gaming Regulatory Act of 1988. The GPTCA is interested in the Commission's intentions to review and evaluate existing regulations.

Historical perspective

Tribes are sovereign nations whose existence predates the formation of the United States. From its earliest days, the United States recognized Indian Tribes as sovereigns in our own right, with right over our lands and a guarantee of tribal self-government. This historic acknowledgment of Tribal nations finds expression in the U.S. Constitution and in the treaties made between our tribes and the United States. ▯▯

In 1789, the Constitution of the United States was ratified. It recognizes and affirms the sovereignty of our Tribal nations and the unique and different relationship with the federal government in at least three important ways. First, the Constitution provides in the Supremacy Clause that, "[a]ll Treaties made, or which shall be made. ... shall be the Supreme Law of the Land." (U.S. Const, art. VI.). Chief Justice Marshall acknowledged that our Indian treaties "recognize the preexisting power of [each Indian] Nation to govern itself." (*Worcester*, 31 U.S. at 562.) This principle is enshrined in the Constitution by virtue of the Supremacy Clause and its ratification of Indian treaties "already made."

The Constitution also provides in the Indian Commerce Clause that, "Congress shall have the power to ... regulate Commerce ... with the Indian tribes." (U.S. Const., art. I, sec. 8, cl. 3.) Chief Justice Marshall explained the meaning of this clause in *Worcester v. Georgia*:

> From the commencement of Tribal government, Congress has passed acts to regulate trade and intercourse with the Indians; which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate. (31 U.S. at 556-557.)

The Indian Commerce Clause respects the sovereignty of our Tribal nations. Congress is not given the power to regulate commerce "for" the Indian nations. Nor is it given the power to regulate commerce "among" the Indian nations; as it is in respect to the States through the Interstate Commerce Clause. (U.S. Const., art. I, § 8, cl. 3.) Instead, Congress is given the power to regulate the United States' commerce **"with"** the Indian nations. This power is to be exercised between nations. It is bilateral. It respects the independence of Tribal nations and our prior sovereignty.

Tribal governments are legally and distinct entities under the Constitution as are Tribal members/citizens. Indians are mentioned in the Apportionment Clause of the original Constitution (U.S. Const., art. I, § 2), and again in the Apportionment Clause of the Fourteenth Amendment (U.S. Const., amend XIV, § 2, cl. 1). In both places, our tribal citizens were excluded, as "Indians not taxed," from the apportionment of Representatives in the House.4

By excluding "Indians not taxed" from the American electorate in the original Constitution, the Founding Fathers recognized the separate sovereign status of Indian nations and people. Indian people stood outside the Federal union. Through the Treaty Clause (U.S. Const., art. II, § 2, cl. 2), the United States entered into approximately 350 treaties with our Indian nations in the first eighty years of the American union. Inherent in the treaty-making process was a bilateral, nation-to-nation relationship based on mutual respect.

Through the Treaty, Supremacy, Indian Commerce Clause, and the Apportionment Clauses, and subsequent case law, the U.S. Constitution acknowledges Tribal nations as sovereigns with preexisting rights of self-government and self-determination, and our Tribal members as having a legally separate and distinct citizenship status.

On February 25, 1987, the U.S. Supreme Court issued its decision in *California* v. *Cabazon Band of Mission Indians,* 480 U.S. 202, 107 S. Ct. 1083, 94 L. Ed. 2d 244 (1987) (Cabazon). Cabazon is the precedent establishing the primacy of Indian regulation of gaming on Indian land.

> The Cabazon case involved Tribal high stakes bingo games and card rooms open to the general public. These games were conducted pursuant to tribal ordinances that had been approved by the Secretary of the Interior. The U.S. Supreme Court determined that California's statutes regulating bingo and card games were not criminal/prohibitory in nature, but rather, these statutes were civil/regulatory and, therefore, did not apply to activities on Indian Reservations. Further, the U.S. Supreme Court found that the application of state and county ordinances to the gaming activities on the Indian Reservations had been preempted as a matter of Federal law.

The U.S. Supreme Court's decision in *Cabazon* stands for the principal that Tribes have the authority to conduct gaming activities on reservations unfettered by any State or County regulation. The decision recognized the important federal principles of tribal self-governance and self-determination and found that these Federal principles preempted the application of California civil statutes.

The Indian Gaming Regulatory Act (the "IGRA")

Congress enacted the Indian Gaming Regulatory Act, Public Law 100-497 in 1988 (IGRA). The IGRA specifically designates Tribal governments as the primary regulator of games. Congress concluded that Tribes are the primary regulators of gaming on their lands and as such are to have maximum flexibility in making regulatory determinations.

Guiding Principles

It is the view of the GPTCA that the NIGC must focus its review on supporting the primary regulator – the Tribes. The IGRA makes it abundantly clear that Tribes had and retain the role as primary regulator of gaming on Indian Lands. All federal regulation should be complimentary and supportive of this regulatory framework. It is our observation that previous Commission regulations have exceeded the Commission's authority by interposing detailed regulatory methods on Tribal gaming commissions. Rather, the NIGC would better serve Indian country by identifying core regulatory goals through which Tribal regulators could best safeguard the interests of Tribes and the gaming public in maintaining the integrity and security of the each gaming operations. Tribal regulators should be free to choose from a range of methods to effectively address the circumstances of their own facilities – both as to size, location, and available resources.

The NIGC regulations should deal with fundamental fairness, due process, and protection of individual and Tribal rights in the context of fulfilling regulatory oversight, enforcement, and approvals. These issues should be a guiding post for any changes or additions to NIGC regulations. A new paradigm with the NIGC providing oversight and fundamental due process would have the effect of making the work of the NIGC complementary and collaborative with Tribes. To ensure that this new paradigm is understandable and can withstand the test of time, it would be good practice to adopt formal, procedural rules. The underlying principle should be the guarantee of due process. The NIGC should adopt process and procedures requiring it to conduct regular periodic meetings where a record is made and final agency action is taken. The NIGC should also adopt rules and procedures requiring a written record be maintained of all meetings, formal and informal, and be made available to the affected parties.

As a matter of policy and process, we urge that the Commission respect the sovereignty of Tribes, the primacy of their regulatory bodies, and the expertise that tribes have developed in the years of operating and regulating their gaming facilities. We suggest that any evaluation of specific regulatory provisions engage Tribal regulators and operators to the fullest extent possible, with the goal of achieving the best information available for the decision process. In the past, the NIGC has been reluctant to acknowledge the expertise of the Tribal gaming industry and has not always accepted or fully implemented considered comments.

Priorities:

1) Class II regulations

The GPTCA is aware that the previous Commission spent great energy and effort to promulgate Class II Technical Standards (25 C.F.R. § 547, in effect) and Class II MICS (15 C.F.R. § 543, effective date postponed). We commend the previous regulatory process to the extent it included Tribal Advisory Committees. The technical and practical expertise needed to address this vital area will be substantially enhanced through the continued input from the informal tribal gaming working group. Many of the comments of the previous tribal gaming working group were

implemented in the final drafts of the Technical Standards and MICS, respectively, but many suggestions were summarily discarded. Because some members of the GPTCA continue to experience difficulties in the renegotiation of Class III compacts, it is a priority that the availability of a strong Class II alternative be maintained. This means more than theoretical bargaining power and may turn out to be the only option available for economic development for many Tribes.

It is therefore a priority that some aspects of the Technical Standards and MICS receive further attention to ensure that they are consistent with best practices of Class II technology and regulation and to reflect technological advancement in the time elapsed since the regulations were drafted. We urge that the process for review and revision of this extremely important area be carried out in a manner to utilize all possible expertise and resources. If the NIGC were to employ a Tribal Advisory Committee in this process, the selection of Tribal Representatives should ensure expertise in relevant technological issues and include experienced class II regulators and operators. The Committee process should be designed to be open to those interested in facilitating the broadest possible exchange of expertise and comment as part of a Tribal consultation process before draft regulations are published.

2) Class III MICS

The GPTCA believes that NIGC Class III MICS pose significant problems. As a foundational matter, the Tribe is concerned that the NIGC comply with the jurisdictional limitations recognized in Colorado River Indian Tribe v. NIGC, 466 F. 3d 134 (DC Cir. 2006). It is clear that this decision imposed limits on the NIGC's authority to enforce any class III MICS, and that limitation should be reflected in the Commission regulations. It is our view that Class III MICS can serve as guidance, generally, to Tribes seeking to develop their own class III regulations. We recognize that there may be benefit should the NIGC compile tribal class III regulations and make those available in a clearinghouse to Tribes. Tribes have chosen to adopt NIGC Class III MICS either through compact provisions or Tribal ordinance, but the GPTCA firmly believes that the determination to do so is one belonging to the Tribe as sovereign, and cannot be imposed by the NIGC.

The existing Class III MICS (25 C.F.R.§ 543) should be reviewed and revised. Even if the NIGC Class III MICS are advisory only, they should incorporate the best possible model. The GPTCA believes that the best process would be one that takes full advantage of the expertise generally developed beyond that possessed by NIGC. As with the Class II regulations the NIGC should utilize a Tribal Advisory Committee in a process that encourages the broadest possible use of all expertise available – beyond the NIGC and beyond TAC membership – to achieve the best possible regulatory model to assist tribal regulators in protecting the integrity security of class III gaming operations. Because of the range of size and resources available to Tribes, evaluation of class III MICS should encourage tiered regulation and avoid burdening modest facilities by mandating that all facilities use only the most sophisticated and expensive means of compliance. It is our recommendation that the MICS set forth regulatory goals and provide examples or guidelines for compliance, perhaps by the use of bulletins rather than by regulation.

3) Gaming Facility License Regulations

The NIGC's Gaming Facility License Regulation (25 C.F.R. Part 559) should be withdrawn as improperly promulgated, both as to procedure and substance. At a minimum, the enforcement of these regulations should be suspended until a thorough review and revision with Tribal consultation takes place. The Gaming Facility License Regulations were imposed without meaningful Tribal consultation and with a breadth that exceeds the Commission's authority under the IGRA. The rules mandate tribal action not authorized by IGRA and are an improper intrusion into the Tribe's obligation to license its own facilities. The NIGC should engage in consultation with Tribes specifically addressing the appropriate

scope and contact of any Facility License regulation, and should not attempt to expand its own statutory authority. Once such

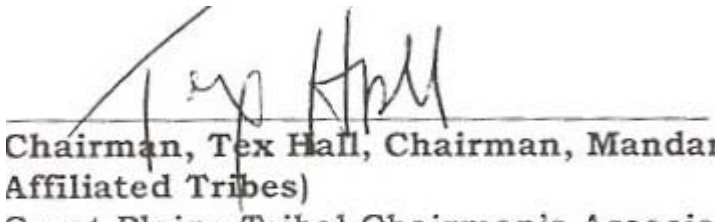
consultation has focused the inquiry and if the Commission considers creating new regulations, it is our view that the best process is negotiated rulemaking with Tribes.

The NIGC NOI has raised many potentially divisive and controversial questions. Having raised these particular areas for possible regulatory action, if the NIGC decides not to proceed or otherwise set an issue aside, a clear statement of the reasons for such decision is needed to maintain continuity for Tribes and others affected.

As the Commissioners have noted in the public consultations, time is too limited to accomplish a complete range of regulatory reform. The GPTCA believes that the areas noted above are most urgent priorities for Commission attention.

Finally, the GPTCA urges the NIGC to be guided by the recognition that the regulation of Tribal governmental gaming is a manifestation of Tribal sovereignty and not solely dependent upon federal controls. The GPTCA looks forward to working with the NIGC to maintain and improved the regulation of Tribal governmental gaming.

Respectfully Submitted,



Chairman, Tex Hall, Chairman, Mandan, Hidatsa and Arikara Nations
Affiliated Tribes)
Great Plains Tribal Chairman's Association