

Rincon Band of Luiseño Indians

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OFFICIAL PRELIMINARY COMMENTS OF THE RINCON BAND OF LUISEÑO INDIANS TO NIGC REGARDING ITS NOTICE OF INQUIRY (NOI) IN ITS COMPREHENSIVE REVIEW OF ALL REGULATIONS PROMULGATED TO IMPLEMENT IGRA

PRESENTED AT THE FORMAL CONSULTATION IN SAN DIEGO, CALIFORNIA, JANUARY 11, 2011

INTRO:

Thank you for the opportunity to address the NIGC on the important issues identified in the published Notice of Inquiry. I am Scott Crowell. I am here today on behalf of the Rincon Band, which I have had the privilege and honor of representing for the past fifteen years. My comments today are preliminary. I say “preliminary” because frankly, the NOI covers such a large swath of issues that we are not yet prepared to answer many of the specific questions, although our remarks today will address several of them. Rincon will observe and listen to the consultation sessions such that we will then submit a more detailed written response at a later date, and perhaps submit additional comments at a later consultation session. I will focus my comments today on four priority issues, which the Rincon Band hopes that you take into consideration. I will spend most of my time, by far, on Priority #1 because it is the overarching concern of the Rincon Band as this process moves forward.

PRIORITY #1: Adhere to the Limits of NIGC’s Statutory Authority as set out in IGRA and as articulated by the several court decisions in *CRIT vs. NIGC*.

Historical Context: The Tribes had their issues with original NIGC Chairman Anthony Hope. He was certainly hostile to the Tribes and the present opportunity to revisit the definition regulations promulgated by the Hope Commission is welcome and overdue, but Anthony Hope got one key principal correct, which all subsequent Commissions (except possibly the Monteau Commission) got wrong, and which the Hogan Commissions got seriously wrong. The regulation of Class III gaming is to be governed by the compact agreements

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reached between Tribal and State governments at the negotiation table. It is NOT the province of the NIGC. The Hogan Commissions took a product of the NIGA/NCAI Task Force, which was inspired by the Tribes' self-governing desire to pursue the goal of self-regulation and to share resources and information amongst tribes, and converted those into NIGC mandatory regulations, with the ever-present threat of severe enforcement action in the form of large fines and closure orders. Tribes warned Mr. Hogan at the time that he was exceeding his statutory authority. He did it anyway. While imploring with tribes to refrain from suing over the regulations, he stated that this would be the outer boundaries of NIGC's encroachment into Class III gaming. C.R.I.T. sued the NIGC and Rincon weighed in as amicus beginning with the initial decision of the ALJ, along with a growing number of Tribes at the District Court and ultimately NIGA weighed in before the D.C. Appeals Court. It was my honor to co-author the NIGA amicus brief along with Frank Lawrence of the Holland & Knight law firm.

The Hogan Commissions: At every level of the litigation, the ALJ, the federal District Court and ultimately the D.C. Court of Appeals concluded that IGRA was straightforward in defining the parameters of NIGC authority and that did NOT include regulation of Class III gaming. The Hogan Commission was so frustrated with the bright line drawn by the Appeals Court, it filed a motion for reconsideration, alleging that NIGC could still assume the authority through other means, such as approval of gaming ordinances and incorporation into tribal state compacts, and possibly other avenues; MOTION FOR RECONSIDERATION DENIED. Despite that clear decision, the Hogan Commissions continued an illegal agenda of circumventing the decisions and direction of the federal courts. This includes the present practice of promulgating Class III MICS anyway albeit as a voluntary 'suggestion', approving ordinances that fiat regulatory authority to NIGC that is not based in the statute, and using tribal fees paid to NIGC for unauthorized and improper purposes related to the 'voluntary' Class III MICS. Hogan promised tribes that his intrusion into Class III regulation would end with the MICS, only to take two unsuccessful stabs, and then a third successful encroachment with a new regulation that places NIGC in the position to second-guess tribal governmental decisions regarding health, safety and welfare and empowering the NIGC to compel tribes to change their laws to meet NIGC's unqualified, paternalistic and arbitrary standards. These regulations go far beyond NIGC's authority under IGRA and far beyond the direction and decisions of the federal courts.

Former Chairman Hogan dismissed the Tribes' fears suggesting that, except in extreme circumstances, the NIGC would not actually use the self-appointed authority to compel tribes to adopt or amend laws in a long laundry list of areas: emergency preparedness (accidents, injuries, and medical emergencies, natural and other disasters, fire, and security threats); construction, maintenance and operations; drinking water and food; hazardous materials; and sanitation and waste disposal. That sounds hauntingly familiar to his statements that NIGC would not aggressively enforce the Class III MICS. Such a position is

scary in that he was not contemplating the enabling of potential abuses of future Commissions. We applaud the appointments of the Obama Administration to this Commission – we can lose sleep at night contemplating the would-have-been appointments of a McCain Administration. Our fears are well grounded. IGRA does allow the NIGC to require facility licenses; but that authority under IGRA does not empower the NIGC to impose its paternalistic governance preferences upon tribes.

It is refreshing that the NOI references the *CRIT* decision in its introductory statements. It is disappointing that the environment health and safety regulations (framed as a subset of facility licensing regulations) are not included in the laundry list of issues to review. The Rincon Band believes these regulations not only should be added to the list, but that the issue of establishing parameters of NIGC authority into class III games should be placed as the highest priority to be addressed by the NIGC first, going forward.

The NOI properly notes that the NIGC Class III MICS have taken on a life of their own. NIGC has approved ordinances expressly empowering the NIGC to promulgate and enforce them. Several compacts refer to the NIGC MICS as a base line for compact standards. I even gave prior testimony suggesting a level of tolerance to NIGC continuing down this road so long as it was clear that the MICS are purely advisory and that NIGC staff be limited to providing technical assistance. In hindsight, I was wrong. In hindsight, it is clear that the Hogan Commissions had a deliberate and zealous agenda to circumvent and riddle the bright line drawn by IGRA and the federal courts such that the NIGC is the overlord of Class III MICS. This Commission should run away from the agenda of the Hogan Commissions and stay clearly within the parameters of authority set by Congress. Those states and tribes that embraced NIGC Class III MICS in compacts and ordinances did so at their own peril. I often hear that NIGC had the authority to promulgate the MICS until it lost at the D.C. Circuit. That is pure nonsense. The Court ruled correctly: NIGC NEVER had such authority. Every tribal regulator and every tribal attorney who followed the issue knew that NIGC's legal position ranged from weak to meritless. Rincon proposes that NIGC establish a clear date to withdraw Class III MICS from its body of regulations, notices and Bulletins, providing those tribes with defective ordinances or compacts sufficient time to take corrective measures.

Rincon poses this question: If the NIGC is to take on the role as chief watchdog of the regulation of Class III gaming, then why do tribes need to negotiate compacts with states? Regulation of the games was intended by Congress to be the very crux of compact negotiations. That States have embraced the *Seminole* decision and used that leverage to extract gaming taxes and unreasonable encroachment on tribal self-governance, instead of seriously negotiating the manner in which class III games should be regulated, created their own problems by doing so. The States' bad behavior does not justify NIGC to fill what Commissioner Hogan perceived as a void in the compacts. If this

Commission in any way intends to follow its predecessors and go to Congress with an agenda of amending IGRA to empower the NIGC to regulate Class III games, it should at the same time advocate for removing states from the process altogether. Perhaps that is unrealistic or unreasonable, but no more so than subjecting Tribes to heavy paternalistic oversight by both the State Compact and the NIGC.

As you review the existing regulations, a question to address each and every time should be: to identify the express authority in IGRA for the regulation in question. The Class III MICS and the paternalistic “back-door” of the facility licensing regulations are only the most heinous examples of the over-reaching of prior Commissions. Rincon applauds the current NOI and consultation because it provides an opportunity to put Pandora back into its box.

PRIORITY #2: DEFERENCE AND SUPPORT OF TGA’s AS PRIMARY REGULATORS

The TGA is the primary regulator of tribal gaming. The tens of millions of dollars in authorized Tribal Commission budgets, the sheer manpower numbers, and the common presence of the most experienced regulators in the industry, quantify this basic fact. The Tribe itself has the highest incentive to ensure that the games are fair and honest. In the vast majority of circumstances, any Tribe out of compliance has the highest incentive to come in to compliance. Rincon encourages the NIGC to embrace a formal policy that ensures that the NIGC will take every effort to identify the problem for the TGA and/or Tribal Council, work with the Tribe to come in to compliance and only if those steps have been taken and have failed, then take action in the form of an NOV with attendant threats of fines and closures. I hear rhetoric that this is how the Hogan Commissions approached situations, but I know of too many circumstances where the NOV came as a surprise to the Tribe and forced the Tribes at issue to panic at the possibility of major fines and closure orders. Even though those situations were resolved with nominal fines, the heavy-handed threat has no place in proper government – to government dialogue. In this vein, Rincon supports the idea suggested in the NOI to clarify the NIGC’s authority to withdraw an NOV.

Additionally, Rincon supports the idea suggested in the NOI to replace the NOVs and fines associated in certain instances with a more routine late fee. The NOI suggests this be used in the context of late fees, but it should also be used with late audits. One gets the impression that NIGC in the recent past used the ability to smack a tribe for a late audit in order to rack up numbers for enforcement actions because they can then submit a scorecard to Congress that shows they are out there “regulating” tribes. Many in the news media then use those same numbers for sensational headlines that Tribes are doing a poor job in regulating tribal gaming. In many of these instances, the audit was only a few days or weeks late, and in many, if not most of those, the outside accounting firm

poorly managed its own time allocation, which is the fault of the accounting firm, and not the Tribe. Replacing the status quo with late fees would clearly place the issue of late audits in a more proper context.

PRIORITY #3: MAINTAIN THE VIABILITY OF A CLASS II GAMING INDUSTRY

The Rincon Band encourages the NIGC to maintain a vigorous position that ensures viable Class II games are available to tribes. The NIGC cannot look at this issue in isolation. Many Tribes, like Jena Choctaw of Louisiana and the Kickapoo Tribe of Texas cannot get viable compacts because States hide behind 11th Amendment immunity per the *Seminole* decision. Other tribes, including Rincon, before it prevailed in extensive litigation with California, are forced to accept only a very limited number of Class III machines. For Tribes in many states, a viable Class II game is the only real leverage the Tribe has to compel the State to negotiate in good faith.

In this regard, Rincon applauds the effort of the “TGWG” or Class II Working Group and Rincon looks forward to the Group’s testimony. To date, the Group has provided intelligent and thoughtful advice to the NIGC consistent with Rincon’s view that Class II devices must be maintained as a viable alternative for the many tribes confronted by recalcitrant states hiding behind 11th Amendment immunity. Fortunately Rincon and the other California Tribes have the luxury of a state statutory waiver in IGRA lawsuits, but most tribes are in states where an effective a waiver is not available. In this vein, even if the NIGC does conclude that games played by an non-compacted Tribe are not Class II, it should refrain from both threatening and taking enforcement action against such tribes. The Hogan Commissions made such threats, playing in to the State’s bad faith negotiations. Fortunately, the Hogan Commissions did not carry through with those threats, but the threats alone play in to the State’s hand at that negotiation table. This NIGC should revert back to the sound policy of the Monteau Commission where the message was clear that if a state was negotiating in bad faith and hiding behind 11th Amendment immunity, such State should not look to the NIGC to carry its water. The NIGC’s trust responsibility to tribes in these circumstances should be of paramount concern to the NIGC.

PRIORITY # 4: SOLE PROPRIETARY INTEREST

This is a sticky wicket – My initial flippant reaction was take it on if you know your going to get it right. We will listen closely to the testimony of the other tribes on this issue before formulating a formal response. The body of authority on this issue is primarily a series of NIGC opinion letters issued between 2004 and 2007, and some low level dicta in a few reported court cases. You likely know that the Schwarzenegger Administration here in California embraced an extortionist agenda for compacts wherein the gaming operations of many of the

signatory tribes pay far more to the State as a gaming tax than they pay to the Tribe to fund tribal programs and operations. "Sole Proprietary Interests" has been discussed in the context of management, development and finance agreements, but the issue is germane to assessing the legality of gaming compacts and county "MOU's" as well. All of these collectively or singularly could, and quite likely often do violate the "sole proprietary interest" restriction in IGRA. Many also likely violate the requirement that the Tribe be the "primary beneficiary" of the gaming operation as well. Defining "primary beneficiary" is not in your published NOI and it seems that if you are to address one, you should address both.

Our preliminary view is that this issue is best left for the courts to resolve and that the circumstances of whether these two rules are violated are going to be very very fact specific and circumstantially specific such that generalized regulations will not be helpful. Our view on this may change as we hear from other tribes, but this could get very messy.

Thank you for the opportunity. We hope you will take Rincon's comments today in to serious consideration. We applaud your efforts to take on hard issues and look forward to commenting further as this process unfolds.

Respectfully submitted,

/s/

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Rincon Band of Luiseno Indians