CHEYENNE & ARAPAHO TRIBES OF OKLAHOMA
EXECUTIVE BRANCH

JANICE PRAIRIE CHIEF-BOSWELL
GOVERNOR
OFFICE OF THE GOVERNOR
Executive Branch
P.O. Box 38
Concho, OK 73022
Telephone: (405) 422-7743
Fax: (405) 422-8227

VIA HAND DELIVERY AT NORMAN OKLAHOMA CONSULTATION

January 18, 2011

Lael Echo-Hawk,
Counselor to the Chair
National Indian Gaming Commission
1441 L Street NW, Suite 9100
Washington, DC 20005

RE: National Indian Gaming Commission Regulations

Dear Ms. Echo-Hawk:

Thank you for undertaking a long-overdue review of the National Indian Gaming Commission ("NIGC") regulations, and for consulting with the tribes in accordance with Executive Order 13175 and the agency's consultation policy before determining the changes that should be made. In response, the Cheyenne and Arapaho Tribes ("Tribes") present the following comments and suggestions and look forward to working with the NIGC as it updates its regulations.

Changes to the regulatory definitions and provisions may have more impact than appears at first glance, including the possibility that a violation of a new term or requirement could result in an NIGC enforcement action. A Notice of Violation ("NOV") from the NIGC could not only result in a civil fine assessment from the agency, but could also affect the terms on which lenders and businesses extend credit or enter into contracts with a tribe as well as frighten away potential customers through bad press. Therefore, all changes for which the NIGC intends to move forward should be carefully assessed through negotiated rulemaking. This would allow all tribes the opportunity for meaningful participation. The current Tribal Advisory Committee system is not preferable because it severely limits the extent and quality of input that may be received from the vast majority of tribes.

I. Definitions

(a) Net Revenues

The NIGC is considering changing the definition of "Net Revenues" in its regulations into two (2) definitions, one (1) for the calculation of the management fee for management contractors and another for the definition of allowable uses of the revenues. Because NIGC is constrained by the definition of Net Revenues in its authorizing statute, it would be unlawful for the agency to make either of these changes.

The Indian Gaming Regulatory Act ("IGRA") defines Net Revenues as "gross revenues of an Indian gaming activity less amounts paid out as, or paid for, prizes and total operating expenses, excluding management fees."[1] In accordance with IGRA, the current regulation provides that Net Revenues "means gross gaming revenues of an Indian gaming operation less (a) Amounts paid out as, or paid for, prizes; and (b) Total gaming-related operating expenses, including all those expenses of the gaming operation commonly known as operating expenses and non-operating expenses consistent with professional accounting pronouncements, excluding management fees."[2]

Most companies calculate net revenues in accordance with Generally Accepted Accounting Principles ("GAAP"), which allow additional deductions of complimentary sales, interest, and depreciation from gross sales when calculating net revenues. While it would ease accounting to use the general GAAP standard for calculating net revenues, Congress provided a set definition in IGRA and, pursuant to federal law; an agency's regulations are limited to interpreting and implementing an act in accordance with the terms of that act and other applicable law. The NIGC should not, and cannot, change this regulation unless Congress amends the IGRA.

As to the second proposed definition of Net Revenues, which would include a calculation of cash flow before allowing the Tribes to allocate monies left over after consideration of loan payments, reserves, and depreciation, this suggestion constitutes a violation of tribal sovereignty. Indian tribes have a right to rely on their own accountants and decisions of acceptable cash flow methods rather than have a single standard handed down to them from the federal government. The differing circumstances of each tribe necessitate that each come up with its own acceptable method of apportioning monies to urgent needs. In addition, pursuant to IGRA, tribes who wish to provide per capita payments to their members, are required to submit revenue allocation plans to the Department of Interior for approval. Thus, any approval for the use of cash flow for the purpose of providing per capita payments is not within the jurisdiction of the NIGC.

We welcome an advisory bulletin on suggested factors for tribes to consider when determining what portion of net revenues should remain with the gaming operation as reserves or be applied to its expenses and financing needs before allocating monies in accordance with IGRA. A regulation on this matter, however, would expose tribal governments to enforcement action by the NIGC for violation of federal law. Budgeting matters are an inherent sovereign function and should not be subject to review and policing by the great white father.

---

[1] 25 U.S.C. § 2703(9).
[2] 25 C.F.R. § 502.16.

Moreover, it is likely a Notice of Violation brought to enforce the regulation would result in a Hearing Officer or federal court determining that the regulation is *ultra vires*. Therefore, the imposition of these new regulations would constitute a waste of agency resources. The NIGC is funded exclusively from tribal gaming revenues and the government should use these funds cautiously and in accordance with its Congressional mandate.

(b) Management Contracts

The proposed definition of Management Contract seeks to address a troubling situation wherein, through a series of agreements, tribes receive less income from a gaming establishment than the manager. The IGRA does not specifically define "management contract," but 25 U.S.C. § 2711(a) clarifies that the NIGC Chairman may approve management contracts "for the operation and management" of the gaming facility. A definition setting out the maximum acceptable compensation to a management contractor from all revenue sources related to the Tribe might be appropriate. Any violations of such a regulation should be enforced solely against the company rather than a victim tribe.

In addition, the NIGC should not attempt to broaden the definition of "management contracts" to include those contracts which are clearly not management contracts such as slot leases, loan and development contracts and non-gaming contracts. However, the NIGC should review non-management contracts to ensure that they do not contain "default" provisions whereby the contractor would, by "default", become the manager of the gaming facility or alternatively place the gaming facility into receivership.

II. Fees

The NIGC regulations currently require submission of fees twice yearly based on a calendar year. It would be more convenient for tribes to submit payments based on their fiscal year as this would eliminate the need to conduct a separate audit or an audit adjustment in order to calculate NIGC fees. If the agency moves to such a method of collecting fees, it might be best to require an initial notification from each tribe of its fiscal year start date and continuing notification within 60 days of any changes to the fiscal year.

The Tribes are concerned the NIGC's suggested alteration of the method by which the agency's fees are calculated could contravene the IGRA. The Act specifies at 25 U.S.C. § 2716(6) that gross gaming revenues, for purposes of fee calculation, "shall constitute the annual total amount of money wagered, less any amounts paid out as prizes or paid for prizes awarded and less allowance for amortization of capital expenditures for structures." While the change in calculation might make the fee easier to calculate, it certainly runs afoul of the NIGC's statutory mandate.

As for fingerprint processing fees, these should be included in the calculation of net revenues because they are statutorily-required operating expenses. These fees should be adjusted on an as-needed-basis only if the Federal Bureau of Investigation raises the rates charged to the NIGC, and therefore the Tribes, for utilizing the service.

Altering the NIGC's current approach to late payment of fees would be commendable, as the current use of NOVs overly penalizes tribes for minor functionarys' failure to submit a payment on time. This can occur innocently after a change in government leadership or employee turnover. Treating an easily-fixable oversight with the same level of severity as operating gaming without a facility license, defrauding a customer, or allowing individuals without approved management contracts to manage the gaming[3] is overly punitive. An NOV can degrade a tribal facility's bond ratings, loan percentage rates, and business reputation. New regulations should allow a warning notice to the Tribe, followed by assessment of a minimal late fee. Only in cases where two (2) or three (3) fee payments have gone completely unpaid, or the tribal governing body has officially resolved or publicly stated its intention not to pay NIGC any fees for an IGRA facility, should a NOV be considered, and then only after negotiations with the Tribe, on a leader-to-leader government consultation basis, have failed.

III. Self-Regulation

The Commission's regulations setting out the process for self-regulation do require updating. The information requested from the Tribes at 25 C.F.R. § 518.3 violates the Paperwork Reduction Act, 44 U.S.C. § 3501 *et seq.*, by requiring the Tribes to submit information already collected or generated by the federal government. Other requested information, such as a list of current employees and division heads, funding for the tribal regulatory body, and organization charts, are not clearly related to the NIGC's review. Now that the Tribes are required to obtain an annual mandatory Minimum Internal Control Standards ("MICS") audit[4] of their class II gaming as well as an annual financial audit,[5] the NIGC should be able to rely solely upon these and a review of NOVs issued by the agency over the last three years. Such a system would allow a tribe to submit solely a tribal resolution requesting self-regulation to trigger the NIGC to review the request.

The NIGC may wish to alter 25 C.F.R. § 518.9, which effectively nullifies lesser oversight theoretically provided by a certificate of self-regulation. The agency's interpretation of its enforcement powers in § 518.9 resulted in a regulation removing the statutory protections from unwanted government interference in the affairs of a self-regulated tribe and amendment should be considered to best honor the intent of IGRA.

At the same time, updating this set of regulations should be a lesser priority for the agency than the other considered changes. Almost every gaming operation now offers both Class II and Class III gaming, making the potential impact quite minimal. In fact, only two (2) out of approximately 250 gaming tribes have obtained certificates of self-regulation. This is because the financial effects resulting from waiver of fee requirements are minimal and because the amount of NIGC oversight removed is almost nil due to continuing IGRA requirements regarding licensing and enforcement that the NIGC cannot alter without a statutory change. The Tribes would support the NIGC if it chose to request that Congress allow self-regulation of Class

[3] 25 C.F.R. § 573.6.
[4] 25 C.F.R. § 542.3(f) (also known as "agreed-upon procedures").
[5] 25 U.S.C. § 2710(b)(2)(C).

III gaming, as well and amended the IGRA to allow lesser federal oversight of self-regulated operations.

IV. Review and Approval of Ordinances and Regulations

The Tribes have no objections to removal of Part 523, Review and Approval of Existing Ordinances and Regulations. For newly submitted ordinances reviewed under Part 522, the NIGC should remove regulatory provisions which it no longer utilizes, including the submission requirements of 25 C.F.R. § 522.2(d) requesting copies of all tribal gaming regulations.

V. Management Contracts

The NIGC should expand its authority over collateral agreements to management contracts. As the Tribes' trustee, the agency should review all documents related to a management contracts under consideration by the NIGC to ensure that the Tribes are getting at least the percentages of net revenues required by Congress in the IGRA, that they do not contain default provisions giving more management control to the manager, and that such contracts do not violate the "sole proprietary interest" requirements of the IGRA. The updated regulations should specify that failure to turn in all collateral agreements between the parties, including the principals of the management contracts, will automatically nullify the NIGC Chairman's approval of the management contracts. Further, updating the regulations to include disapproval for the two (2) reasons proposed in the Notice of Inquiry (failure to meet submission requirements and or failure to contain regulatory requirements necessary for approval) may be unnecessary as management contracts with these failings have never been approved by the NIGC Chairman.

VI. Proceedings Before the Commission

The current regulations for service, at 25 C.F.R. § 519.3, do not contain standard methods for ensuring that the document sent by the NIGC arrived, and was received by the other party. The NIGC regulations should require that service by mail be made by certified mail, return receipt signed by the exact individual requested. In addition, however, if the mailing is to any party other than the individual specified as an agent for service of process in the tribal gaming ordinance, the designated tribal agent for service of process must also receive a copy of the document for service to be effected. All service by mailing should be considered complete not upon mailing, but upon the NIGC's receipt of the post office's return receipt slip. Service by facsimile should not suffice, nor should place a copy in a conspicuous place. The whole point of the service requirement is to ensure that the other party has notice of the proceedings.

Due to the multiple layers of tribal governments, similar to the tripartite system utilized by the federal government, there may be confusion or dissension amongst the different branches as to the submission of gaming ordinances or management contracts. Topics on which appeal to the Commission are available should therefore include approval of gaming ordinances and management contracts and their amendments. The sole point of appeal of these should be

whether or not the ordinances or contracts were validly enacted and submitted pursuant to tribal law, or whether or not subsequent tribal actions have resulted in the document being superseded or repealed.

VII. MICS

The Tribes have a gaming compact with the State of Oklahoma that incorporates the NIGC MICS. Therefore, whatever action the NIGC takes, it must not endanger the relationship between the Tribes and the State nor alter the obligations agreed to by both in the gaming compact. Any and all changes to the MICS, including a consideration of whether they should become optional recommendations, should be undertaken through the negotiated rulemaking process to ensure that tribal suggestions are treated with the utmost respect and due consideration. The negotiated rulemaking process should be between Indian tribes and the federal government in accordance with the Federal Advisory Committee Act, with possible industry advisor input allowed if needed. The general public should not be allowed to participate until public meetings are held, later in the process.

A guiding principle to be followed during this process is that tribal sovereignty to make regulations and requirements and be ruled by them should always be preferred to imposition of new rules by the federal government. The differences in size, location, and individual laws of each tribe may make the single MICS standard result in gaming being economically and logistically unviable. This should not be taken lightly.

The NIGC should not begin consultations with a prepared draft as this curtails the feedback which will be received and limits discussion. No new regulations should be considered without tribal consultations, and, if there is a consensus that a regulatory solution to the problem is needed, the NIGC should solicit comments and drafts. Consultation must be meaningful, however, not just part of a list of NIGC action items and tribal concerns that might be discussed during a half hour meeting of the NIGC Commissioners and Tribal leaders. The NIGC should create a website forum for tribal comments to inspire other suggestions from the tribes and agency employees. Only after consultation meetings dedicated to only one topic, such as MICS revisions, based on website suggestions, should any drafting be undertaken. After that, the negotiated rulemaking process should continue pursuant to the Negotiated Rulemaking Act, 5 U.S.C. § 561 *et seq*.

VIII. Background Investigations and Licensing

As almost all tribes now use the background investigation pilot program, which reduces the paperwork and manpower needed to conduct licensing investigations, the "pilot" program should be formalized. The default method for submitting licensing information to the NIGC should be submission of only the suitability report, with the licensure decision noted thereon, and more documentation should be required only if a tribe has serious deficiencies with its licensure process such that an NOV has been issued and a set term of additional supervision and document submission has been agreed to in a settlement or imposed as a civil enforcement mechanism.

It would be very helpful if the Commission could renegotiate its Memorandum of Understanding with the Federal Bureau of Investigation ("FBI") to allow fingerprint checks of potential and current employees and vendors that do not fall in the categories of primary management officials, key employees, or management contractors. This would greatly enhance the Tribes' ability to ensure that no bad elements have any possible access to the gaming operation or funds. If the NIGC does reach agreement with the FBI and implement such a program, any related regulations should not mandate that such checks be made, but rather allow the tribes to use the system or not at their discretion. The fingerprint fees charged for these individuals should be the same as the fee charged for statutorily-required checks. We appreciate the NIGC's willingness to proactively assist th etribes in checking backgrounds of all employees and vendors as thoroughly as possible.

IX. Facility License Notifications, Renewals, and Submissions

The Tribes do not believe any modifications to this regulation are needed.

X. Inspection and Access

The Tribes do not believe the NIGC needs to revise these regulations. Records in the hands of third parties may be obtained through already extant litigation methods if truly necessary. In addition, NIGC regulations already allow the agency to take enforcement action if the records it seeks are truly within its purview. *See* 25 C.F.R. § 573.6(9). The NIGC has from time to time overreached in its requests for records, such as in the *Colorado River Indian Tribes* matter, and the tribes should be able to protect governmental documents and people's personal information from unauthorized and *ultra vires* federal government review.

XI. Enforcement

It would be helpful for the tribes if a NOV were expunged automatically after a number of years. The only effect closed NOV files have for tribes is that theNIGC utilizes past NOVs to calculate civil fines for new violations, examines the NOVs issued against that tribe in the last five years. 25 C.F.R. § 575.3(c). Therefore, if the NIGC opts to expunge NOV files, five (5) years would be an appropriate period for removal.

There is an issue of utility for other tribes and the industry in knowing how strenuously the NIGC enforces various violations, as demonstrated by its focus on past errors. Other tribes would like to learn from past mistakes and also be able to calculate potential civil fine impositions and negotiated settlements assessed in past actions. Perhaps past NOVs could be posted on the website for violations more than five years old with the tribal identifying information removed.

XII. Potential New Regulations: Tribal Advisory Committee

There is no need for Tribal Advisory Committee ("TAC") regulations. The TAC process, as discussed above, reduces the ability of all tribes to provide meaningful input and be fully

involved in a regulatory process that could result in millions of dollars of implementation costs. In order to avoid unfunded mandates and allow for a truly free and open discussion of regulatory initiatives, the NIGC should only promulgate new regulations through the negotiated rulemaking process.

XIII. Potential New Regulations: Sole Proprietary Interest

The NIGC appears to have claimed potential violations of the sole proprietary interest requirement when it sees agreements, or series of agreements, indicating that the tribes have unwittingly entered into bad deals, especially when the other parties would end up receiving the majority of profits from the operation. Rather than pursue this tactic, which is based on flimsy legal citations to what constitutes a sole proprietary interest based on tax law, the NIGC should rather speak up as a trustee. Tribal governments, like any others, vary in sophistication and can be targeted by bad elements. The NIGC should allow the tribes freedom to make what it considers poor business decisions as their own sovereign right. However, if the deal appears to shock the conscience, the NIGC should step in as trustee to inform the tribes of the issue.

If the NIGC determines the matter is egregious enough that it must step in, the NIGC should take some method of final agency action to challenge the agreement as trustee. Final agency action, as opposed to a legal advisory opinion, would be subject to court review and allow finality. This option might require revision of the statute at 25 U.S.C. § 2714 to allow for APA review of the final agency action or could potentially fall under other Department of the Interior regulation such as 25 C.F.R. 2.3, if amended to include NIGC decisions.

XIV. Potential New Regulations: Communication Policy

Because the NIGC often communicates with the tribes at all levels of government, from agency employees speaking to tribal employees on daily operational matters to formal communications between government officials, regulations standardizing communication might end up stifling, rather than expanding, communications. Should the NIGC determine that regulations are needed, these should clearly specify the types of communications involved and clarify that all other types of communication may proceed without regard to the new rules. Otherwise, the simple scheduling of a site visit or a tribal query on how to interpret a rule or regulation could be considered consultation and be subject to inappropriate limitations and procedures.

The IGRA requires each approved tribal gaming ordinance contain a point of contact for federal notices. If a tribe requires that further tribal entities be contacted regarding fees or a NOV, the federal government should allow the tribes to use this existing mechanism to communicate its preferences. New regulations should not be considered unless necessary.

XV. Potential New Regulations: Buy Indian Act

The Tribes support a new regulation requiring the agency to give preference to Indian-owned businesses when obtaining goods or services.

XVI. Other Regulations

The Tribes agree no revision is necessary and provide no further comment.

XVII. Conclusion

The Tribes look forward to an early opportunity to comment on the decision to go forward with development of any new regulations, preferably before they are drafted, in order to provide more specific input.

Sincerely,

Janice Prairie Chief-Boswell

Janice Prairie Chief-Boswell, Governor