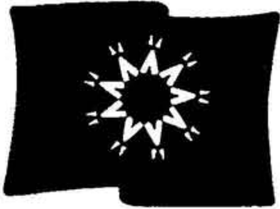

Oglala Sioux Tribe

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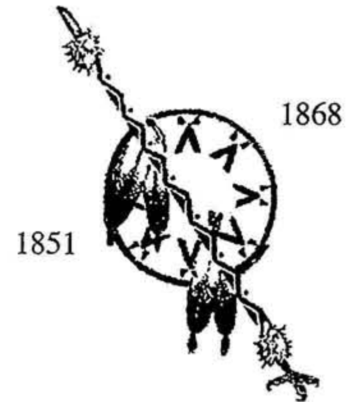


February 1, 2011

John Yellow Bird Steele

VIA HAND-DELIVERY

Chairwoman Tracie L. Stevens
National Indian Gaming Commission
1441 L St. N.W., Suite 9100
Washington D.C. 20005

Re: Commentary on Commission Regulations

Dear Chairwoman Stevens,

The Oglala Sioux Tribe would like to thank you for the chance to participate in this consultation and written comment period on the National Indian Gaming Commission (NIGC)'s regulatory scheme for the implementation of the Indian Gaming Regulatory Act. As you presumably know, the Oglala Sioux Tribe is the proud owner and operator of the Prairie Wind Casino and Hotel. The operations of these facilities have significantly strengthened the Tribe's economy and its position as a sovereign nation.

The Oglala Sioux Tribe would like to commend the NIGC's new Commissioners in their efforts to "reach across the table" to review with tribes the above-referenced regulations. However admirable this may be, we must remind the Commissioners that it will take some effort on the part of the NIGC to regain the faith and trust of the Oglala Sioux Tribe. It is an unfortunate reality that the decisions and actions of the past Commissioners have almost irreparably tarnished the relationship between the NIGC and the Oglala Sioux Tribe. This being said, we remain cautiously optimistic that the NIGC can work together with the Oglala Sioux Tribe and other Indian nations so that fair and workable regulations guided by the true spirit of IGRA can be promulgated to help promote and encourage tribal sovereignty rather than limit it through an outdated and overly paternalistic regulatory system. In furtherance of the Tribe's economic goals of self-sufficiency and as an exercise of its sovereignty, the Oglala Sioux Tribe hereby respectfully submits the following testimony and comments in response to the NIGC's November 12, 2010 Notice of Inquiry.

As an initial matter, please note that the Tribe understands that this review of the Commission regulations is not, and regrettably cannot be, a review of the entire Indian Gaming Regulatory Act (IGRA). It is worth noting, however, that - contrary to Congress's stated purposes of "promoting...tribal self-sufficiency, and strong tribal governments" - IGRA contains a number of provisions which impair sovereignty and result – at least for the Oglala Sioux Tribe

and other South Dakota tribes - in the unnecessary, unjustified, and unacceptable imposition of state laws and regulations on sovereign Indian nations. The State of South Dakota has repeatedly attempted to force state jurisdiction onto internal tribal affairs which relate to on-reservation, non-criminal activities – in spite of the express disclaimer of any jurisdiction over activities on Indian lands which is contained in the State's own constitution. To add insult to injury, there are yet other IGRA provisions which impose overly burdensome federal laws and oversight on tribes. *See, e.g.,* 25 U.S.C. § 2711 (Management contracts for class II gaming operations require approval by the NIGC Chairman). The Indian Commerce Clause of the U.S. Constitution authorizes the federal government to regulate commerce with Indian tribes. The framers of the Constitution included this language on the grounds that, as Indian tribes are sovereign nations, only the United States as another sovereign nation (and not individual states within the United States) could regulate commerce with tribes. Interfering with gaming activities in Indian country is therefore entirely beyond the reach of states pursuant to the U.S. Constitution. In addition, the scope of the federal government's authority to regulate activities involving Indian country is restricted to commerce with Indian tribes. As sovereigns, Indian tribes are entitled to reach agreements with other sovereigns through treaties. The United States therefore entered into a treaty with the Oglala Sioux Tribe (among many others) in 1868. Pursuant to that 1868 treaty signed at Fort Laramie, "no white person or persons shall be permitted to settle upon or occupy any portion of [Sioux Indian territory]; or without the consent of the Indians first had and obtained, to pass through the same." This treaty verbalizes what both the United States and Indian tribes knew to be an inherent if unspoken truth – that Indian tribes are independent, sovereign nations with whom the United States had been at war for its territorial encroachment, colonialism, and periodic senseless slaughter of Native lives and culture, and with whom the United States could only reach a nation-to-nation peace agreement by treaty. Granted, these basic fundamental principles have been skewed, manipulated, trampled upon, and occasionally wholly abrogated by the legislative and judicial lawmakers of the United States. However, the above-described state and federal intrusions into gaming activities on Indian lands undermine the federal trust responsibility and IGRA's express goal of promoting tribal sovereignty.

The Oglala Sioux Tribe, therefore, supports and urges the Commission to conduct an independent and thorough review of the regulations which implement IGRA to ensure that the Act is applied in a manner that does in fact promote the "principal goal of Federal Indian policy...to promote tribal economic development, tribal self-sufficiency, and strong tribal government." 25 U.S.C. § 2701(4).

We now ask that this new era of NIGC Commissioners, having displayed a promising start by initiating these consultations, take its next step towards promoting the intended goals of IGRA as well as tribal sovereignty by implementing the following recommendations.

Part 502 Definitions:

§502.15 Management Contracts: The NIGC requested comments on whether the definition of "management contract" should be expanded to include any contract, such as slot lease agreements, that pays a fee based on a percentage of gaming revenues. To expand the

definition of "management contract" would expand the NIGC's regulatory authority over gaming enterprises because all management contracts must be approved by the NIGC Chairwoman. The Tribe, having years of experience in running the Prairie Wind Casino, feels that such an expansion of regulatory authority is not necessary and would be an intrusion into tribal sovereignty. The Tribe and Casino can and should use their own business judgment to enter into contracts for the benefit of the Tribe and Casino. Thus, the Oglala Sioux Tribe does not recommend that the definition of management contract be expanded.

If a managing contractor needs to receive more than 30-40% of net revenues, the management contractor and Tribe should be afforded the opportunity and right to be able to work out separate contracts for "non-*gaming*" management fees. Alternatively, a contractor may separately contract with the Tribe for "non-*management*" services. The Tribe, however, should at its own discretion, have the ability to request an opinion from NIGC on the prudence of entering into a particular non-gaming management contract or non-management contract.

§502.16 Net Revenues - Management fee: The NIGC requested comments on whether the definition of "net revenues" should be changed to be consistent with the GAAP definition. Before we go further into this discussion, the Oglala Sioux Tribe respectfully reminds the Commission that any proposed changes to any regulatory definitions must be consistent with the definitions contained in the IGRA. Moreover, the end goal of these regulations should be to clarify and simplify the standards required of tribal gaming operations. The regulations must exist to assist the Indian gaming industry in fulfilling the goals of IGRA – not to create confusion and ambiguity in an already over-regulated Industry. The definition of "net revenues" should therefore correspond with the GAAP definition of "net income," which is reasonable. Better still, the Commission should base its regulations on "net income" as defined by the GAAP. The GAAP are, as they are appropriately named, generally accepted principles. They are used universally and provide a standard measure for accounting practices to facilitate information analysis and regulatory compliance. Deviation from the GAAP should occur sparingly, if at all. In addition, as management fees are an expense incurred by gaming tribes who wish to enter into management contracts for their gaming operations, management fees should be deducted from net income as an "operating expense." Certified public accountants and the tribes themselves should be consulted for further dialogue on these issues, keeping in mind the bigger issue of management fees.

§502.16 Net Revenues - Allowable uses: The NIGC requested comments on whether to add a new definition for allowable uses of net revenues that is based on cash flow. In other words, should NIGC require tribes to consider whether their gaming operations have enough cash flow to spend on allowable uses before committing to such expenditures? Again the Tribe believes that IGRA speaks clearly to this definition. Furthermore, the Tribe believes that it is capable of making this business decision with reasonable judgment and without NIGC oversight. Adding a new definition for allowable uses of net revenues is, therefore, unnecessary. Standard notice and comment rulemaking should be sufficient for this proposal.

Part 513 Debt Collection:

§513.5 – What is the Commission's Policy on Interest, Penalty Charges, and Administrative Costs? The Tribe encourages full disclosure of information to any debtor. Interest rates should be specified and an invoice detailing administrative costs should be included in any debt notice.

Part 514 Fees:

The NIGC requested comments on whether fees should be assessed on a calendar year basis or fiscal year basis. The current regulations assess fees on a calendar year basis. To change this may require a complicated transition. The Oglala Sioux Tribe would require the opinion of its accountants and financial advisors regarding whether such change would be practical and/or more beneficial, considering administrative costs of the change.

The NIGC requested comments on whether the regulations should adopt the GAAP definition of "gross gaming revenue." The Tribe in principle believes that conformity to the GAAP definition would be an exercise in best business practices. However, before commenting further, the Tribe would appreciate a report from a CPA analyzing this proposal and assessing whether the proposal would increase or decrease fees.

The NIGC requested comments on whether the regulations should specify that the Commission will use part of gaming fees for fingerprint processing fees. While the Tribe appreciates the Commission explaining its use of this part of the gaming fees, for purposes of transparency the Tribe would prefer that the Commission provide a public accounting of how the Commission uses *all* of the gaming fees and amend the regulations to identify the location of this public accounting.

The NIGC requested comments on whether the Commission should use penalties instead of issuing a Notice of Violation which could result in closure of the gaming operation. It would be helpful to specify under what circumstances the Commission would close an operation for failure to pay fees (after 60, 90, 120, etc days of non-payment?). *See § 514.1(e)*. Additionally, a modest late payment penalty should replace the current sanction of gaming operation closure as a more practical and reasonable penalty for late payments. Furthermore, the issuance of a late payment penalty should be preceded by a "notice of delinquency" providing time to cure before a penalty is imposed. In the event that a tribe is not in a financial position to cure the infraction within the specified time period, the Commission must dialogue with the Tribe to work out an agreed upon payment plan to bring the tribe into compliance.

Part 518 Self-regulation of Class II Gaming:

The importance of Part 518 cannot be overstated. Self-regulation has the potential to lower fees, further tribal self-sufficiency, and promote a tribe's sovereignty through class II gaming operations. However, the petition and annual reporting requirements are cumbersome and duplicative. They currently undermine the purpose of self-regulation. Furthermore, some of

the information requested is clearly outside the purview of NIGC review. The NIGC requested comments on how to address these issues. Streamlining the petition process and simplifying the annual reporting process would help. The Committee should consider which petition requirements are absolutely necessary for the Commission to make a determination about self-regulation (e.g. those that are necessary to determine the standard set forth in IGRA, 25 U.S.C. § 2710(c)(4)) and, assuming a petition is already on file with the Commission, what annual reporting requirements are, again, absolutely necessary.

Part 531 Collateral Agreements:

The NIGC requested comments regarding its authority, or lack thereof, to approve collateral agreements to a management contract. As the Commission has only been delegated authority to approve management contracts, collateral agreements are clearly beyond the scope of the Commission's purview. Tribes who are in the business of gaming should have the freedom – and do possess the knowledge, tools, and expertise - to evaluate their own collateral agreements and make business decisions accordingly, without seeking permission from the federal government. The Oglala Sioux Tribe, for example, utilizes a number of attorneys and gaming regulatory experts who are knowledgeable and experienced in this area and are able to guide the Tribe in making such determinations. Recognizing that not all tribes have access to such resources, the Oglala Sioux Tribe does agree that tribes should have the option to look to their trustee - the Commission- for help in this area. The NIGC should allow tribes to exercise an option to have seek NIGC evaluation and review of these contracts and agreements if they so choose.

Part 533 Approval of Management Contracts:

The Commission requested comments on its proposal to add two grounds for disapproval of management contracts under § 533.6(b). The Oglala Sioux Tribe stands fast to its position that as a sovereign nation, it should be the sole decider of any and all economic and business decisions. No regulatory agency should be able to exercise such dominion over a nation and its people. However, because the IGRA does give the NIGC the authority to approve management contracts for class II gaming activity, the Commission should exercise this authority cautiously and with utmost prudence. Only after such careful consideration is put into the review process should the Commission send return a submitted management contract. Even then, the Commission should afford the tribe reasonable opportunity to amend the offending document(s) for compliance with Section 2711 of IGRA.

This amendment should have a low priority. Standard notice and comment rulemaking should be sufficient for this amendment.

Part 537 Background Investigations for Persons or Entities with a Financial Interest in, or Having Management Responsibilities for, a Management Contract:

The Oglala Sioux Tribe reiterates its position on sovereignty in that tribes should have exclusive control over background investigations conducted in conjunction with both class II and class III gaming activities.

Part 542 Class III Minimal Internal Control Standards:

The Oglala Sioux Tribe believes that in light of the federal circuit court decision rendered in favor of the Colorado River Indian Tribes, the NIGC lacks authority to issue and enforce MICS for class III gaming. In *Colorado River Indian Tribes v. National Indian Gaming Commission*, 466 F.3d 134 (2006), the U.S. Court of Appeals for the D.C. Circuit was required to determine whether the Indian Gaming Regulatory Act gives the NIGC authority to promulgate regulations establishing mandatory operating procedures for class III gaming. That court held that the NIGC had no statutory basis empowering it to regulate class III gaming operations. *Id.* at 140. As support for this conclusion, the court cited both the text of IGRA, which makes clear the fact that class III gaming may be regulated concurrently by tribal-state regulation but not by tribal-state-Commission regulation, and the purpose of IGRA to ensure the integrity of gaming through the statutory basis provided by IGRA. *Id.* at 138-140. Finding no statutory basis authorizing the NIGC to regulate class III gaming, the court found such regulation by the NIGC unlawful. *Id.* at 140. Imposing mandatory MICS for class III gaming on tribes would be illegal and must occur under no circumstances.

For the above-stated reasons, we implore the Commission to cease any further attempts to enforce MICS for class III Indian gaming.

Part 543 Minimal Internal Control Standards for Class II Gaming:

It is the position of the Oglala Sioux Tribe that the MICS for class II gaming are in serious disarray and have the potential to cause confusion and difficulty in any attempt to comply with this sections requirements. Furthermore, we urge the Commission to remember the complexities of class II gaming regulatory procedures throughout its review process. Only through consultation with individual tribes can the Commission be sure to avoid promulgating regulations which are in fact more confusing and onerous than those the Commission wishes to amend.

Please know that the Oglala Sioux Tribe stands ready to work with the Commission on this particularly important issue.

Part 547 Technical Standards for Electronic, Computer, or other Technologic Aids Used in the Play of Class II Games:

The Oglala Sioux Tribe believes that technical standards for class II games are an area of continued and growing importance. It is, by its nature, a highly technical and ever evolving facet of the gaming industry. For this reason, the Tribe believes that before any standards are formally established, a working committee of tribal representatives, gaming industry experts and

consultants from recognized industry testing labs must be convened so that this array of complex issues can be addressed. Upon completion of the work by the working committee, the tribal representatives will be charged with the drafting of the new standards. Due to the dynamic nature of technology, these standards should be reviewed and updated every two years by a working committee as described herein.

Part 556 Background Investigations for Primary Management Officials and Key Employees:

The Oglala Sioux Tribe supports an amendment to permit tribes – at their option – to submit fingerprint cards to the Commission for vendors, consultants, and other non-employees who have access to the gaming operation of purposes of added safety and security precautions when deemed appropriate by a tribe,

Part 559 Facility Licensing:

Tribal nations each have developed their own set of comprehensive regulations regarding gaming facility licensing. Tribal requirements regarding renewals, notification and submission requirements are more than adequate to deal with gaming facility licensing on reservations. Furthermore, the Tribe believes the licensing of any new facilities should not require any further compliance with additional NIGC requirements.

Once again the Tribe restates its position regarding tribal sovereignty and believes that NIGC facility licensing requirements are overbearing and redundant in the light of existing tribal regulations. The Tribe further believes that to promulgate any additional regulation in this area would be a violation of the spirit and purpose of IGRA by diminishing tribal self-government and imposing new obstacles on an already over-regulated source of economic development for tribes.

Part 571 Monitoring and Investigations:

It seems unnecessary to amend this regulation because the regulation already states that "[i]f such papers, books, and records are not available at the location of the gaming operation, the gaming operation shall make them available at a time and place convenient to the Commission's authorized representative." § 571.6(b). If parties are denying access to the Commission and/or the tribe whose land the gaming is being conducted upon, then there should be a procedure established to ensure enforcement of this provision. The Oglala Sioux Tribe believes a procedure with potential penalties for non-compliance with this part of the regulations seems more palpable than an amendment to the regulations.

Part 573 Enforcement:

It does not, in the eyes of the Tribe, appear necessary to promulgate such a provision as described in the proposed regulations. Part 573 allows for a discretionary issuance of an NOV.

It does not require the Commission to give an NOV for any specific violation nor does it prohibit withdraw of an NOV. As stated, it simply allows for a discretionary issuance of an NOV only for certain violations - no more, no less. Thus it would be pointless to regulate the withdrawal of an NOV when the proposed regulation does not appear to prohibit its withdrawal. Should the Commission decide to regulate, the Chairwoman should not be given discretionary authority to determine the withdrawal of an NOV; rather, a simple majority of the Commission should be required for such an action.

Tribal Advisory Committees:

The Oglala Sioux Tribe remains cautious about participating in the Tribal Advisory Committee process and believes that a Tribal Advisory Committee has the potential – and likelihood - to bring more harm than good to the regulatory consultation procedure. Though some tribes have advocated that such committees have proven valuable because of their expertise and unique tribal perspectives, they rarely, if ever, represent the interests of all tribes. Instead, TAC's have a natural and obvious tendency to reflect only the perspectives of the individual tribes directly represented by a member on the TAC.

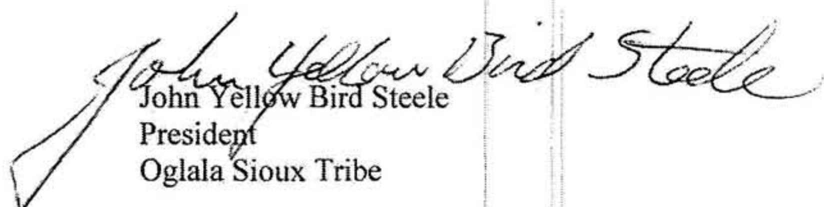
It is the Tribe's belief that the NIGC should consult with every tribe whenever possible. To that end, the Tribe advocates for more meaningful consultations on a region-to-region basis. Only through direct and meaningful dialogue with each tribe can the NIGC truly fulfill its trust duties to the tribes, and only through direct and meaningful dialogue with each tribe can the NIGC work to build a trusting relationship with tribes to promote tribal self-sufficiency and economic and tribal sovereignty.

Conclusion

The Oglala Sioux Tribe wishes to commend the new Commissioners in their efforts to open a meaningful dialogue with tribes and to help rebuild the bridges that were burned by past Commissioners. We hope that you will meaningfully consider and implement our comments in furtherance of your federal trust responsibilities and the purposes for which the Indian Gaming Regulatory Act was enacted.

It is our sincere hope that we as tribes can work together with the new Commissioners of the NIGC to make our tribal gaming enterprises succeed and our nations thrive.

Sincerely,



John Yellow Bird Steele
President
Oglala Sioux Tribe