Forest County Potawatomi Gaming Commission
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February 7, 2011

VIA EMAIL (reg.review@nigc.gov),
MAIL TO FOLLOW

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

Re: National Indian Gaming Commission Notice of Inquiry

Dear Ms. Stevens:

We write in response to your Notice of Inquiry seeking comments regarding potential revisions to existing National Indian Gaming Commission ("NIGC") Regulations, or potential creation of new Regulations.

We had the honor to attend a consultation with you and the other Commissioners in Rapid City, South Dakota, on February 1, 2011. This response is based on our review of your proposals and our consideration, as well as what we saw and learned during the consultation.

It is clear that all Tribes are different, and the issues they face are different. This was abundantly clear in Rapid City as the concerns of the South Dakota Tribes are dramatically different from those of us in Wisconsin. Because we cannot speak for other Tribes, our comments reflect the experiences of the Forest County Potawatomi Community ("FCPC").

We will address the items noted in your Notice of Inquiry ("NOI") using the same basic organization as contained therein.

1. Definitions (25 C.F.R. § 502).

   a. Net Revenues.

      NIGC regulations should be amended to make clear that the term "net revenues" is defined in a manner consistent with Generally Accepted Accounting Principles ("GAAP"). This is not clear from the current definition. Until approximately nine

months ago, the FCPC and the State of Wisconsin were in extended negotiations and disagreement in part over the definitions of "net revenue" and "net win." It would have hastened the settlement resolution of this dispute had it been clear in the NIGC regulations that "net revenue" was defined to be consistent with GAAP. This amendment is of moderate importance.

The NIGC also questions the need to amend the definition of "net revenue" to further specify the allowable uses by Tribes of the net revenues from Tribal gaming, as laid out in IGRA (25 U.S.C. § 2710(b)(2)(B)). The terms laid out in IGRA are clear and unambiguous, and have not presented a problem for the FCPC. NIGC regulations in this area would only limit the Tribe's ability to use its own money. Therefore, the FCPC Gaming Commission opposes attempts to further define "net revenue" in the area of allowable uses of net revenues from gaming.

b. Management Contract.

The NIGC questions whether it should adopt regulations to expand the definition of "management contract," including, for example, any contract that provides for payment of a fee based on a percentage of gaming revenues. Since the adoption of IGRA, most managers have moved away from "management contracts," as defined in IGRA. Therefore, there are very few such contracts being evaluated by the NIGC. Such management arrangements are now handled in other ways, such as service contracts, consulting agreements, etc. In addition, "management contracts" are of less importance to Tribes than they were 20 years ago, as most Tribes have developed the internal capacity to manage their own operations. The FCPC Gaming Commission opposes any revisions to the definition of "management contract." Any such revisions would only provide the NIGC with control over business agreements for which it currently lacks jurisdiction. The FCPC runs sophisticated gaming operations and does not need federal regulatory oversight to advise it on the types of business arrangements into which it should enter. This is a medium-priority issue.

2. Fees (25 C.F.R. § 514).

The NIGC is considering revising regulations regarding the timing of fees paid to the NIGC. The NIGC proposal would move the payment of NIGC fees from a calendar year to a fiscal year. The NIGC proposal to move to a fiscal year would match the Tribe's fiscal year and would be of assistance from an accounting perspective. This proposal is a good, common-sense idea and the FCPC Gaming Commission supports it. This is a low-priority issue.

The NIGC also questions whether fees paid to the NIGC for fingerprint processing should be included in the computation of the statutory limitation on fees paid by Tribes. To the extent that the FCPC pays fees to the Federal Bureau of Investigation ("FBI") or the NIGC to process fingerprints, it appears wise to include that in the amount collected by the NIGC, which is subject to a statutory limitation. This is a low-priority issue, as it does not really impact the FCPC.

The NIGC also is considering using a "late payment system" in lieu of a "Notice of Violation ("NOV")" if fees are submitted late. This appears to be a "user-friendly" change, which the FCPC Gaming Commission supports. This is a low-priority issue.

3. Self-Regulation of Class II Gaming (25 C.F.R. § 518).

Experience in the national Indian gaming community has shown that the process for obtaining Class II self-regulation certification is overly burdensome and the burden of completing the process outweighs any benefits. Any revisions to regulations which will make obtaining self-regulation certification less burdensome should be supported by the FCPC Gaming Commission. Similarly, a process that would allow for Class III self-regulation certification should be considered by the NIGC. Anything that will reduce the amount of federal and state regulation is good. This is a moderate-priority issue.

4. Review and approval of existing ordinances or resolutions (25 C.F.R. § 523).

This provision applies only to ordinances enacted by Tribes prior to January 22, 1993. As such, it is obsolete and irrelevant. The FCPC Gaming Commission should support the NIGC's consideration of a cancellation of this regulation.

5. Management Contracts (25 C.F.R. §§ 531, 533 and 537).

As mentioned above, the FCPC no longer has any management contracts, as currently defined by the NIGC. The proposed NIGC revisions, like the revisions to the definition of "management contract," would only expand the NIGC's jurisdiction over financial arrangements and expand its regulatory authority. The FCPC Gaming Commission opposes these changes, as they would only provide the NIGC with the authority to second-guess FCPC's business decisions. This is a moderate-priority issue.

6. Proceedings before the Commission.

The NIGC proposes to add a series of procedural rules to govern situations where the NIGC alleges that a Tribe has violated the terms of IGRA or the regulations. The FCPC Gaming Commission supports providing more detailed and comprehensive procedural rules for the benefit of Tribes. Licensees have due process, so should Tribes. This is a moderate-priority issue.

7. MICS and Technical Standards (25. C.F.R. §§ 542, 543 and 547).

In the *Colorado River Indian Tribe ("CRIT")* case, the United States District Court for the District of Columbia ruled that the NIGC lacks the authority to impose Class III MICS on Tribes. Nevertheless, several states, including Wisconsin, require the Tribes to develop Class III MICS that are "at least as stringent as" the NIGC Class III MICS. (*See* Forest County Potawatomi/State of Wisconsin Compact, Sec. XXXIV.C.) Because the FCPC Tribal MICS are evaluated in comparison with Class III MICS adopted by the NIGC, it is in the FCPC's best interest to have current and up-to-date NIGC MICS. Therefore, the FCPC Gaming Commission supports the revision and updating of Class III NIGC MICS. Because of the *CRIT* case, however, we recommend that the standards be considered "recommended guidelines," rather than required MICS. Also, the FCPC Gaming Commission supports the involvement of a Tribal Advisory Committee ("TAC") to participate in the revision process for the updated Class III MICS/Recommended Guidelines. This is a high-priority issue.

The NIGC is also requesting Tribal input on a process for revising Class II MICS and for revising Technical Standards for Class II games. This issue has been the subject of significant debate in the

Tribal gaming industry and the FCPC Gaming Commission does not support opening these issues again at this time.

8. Backgrounds and Licensing (25 C.F.R. § 556).

The NIGC questions whether a Pilot Program to simplify the reporting of background investigation results should be made permanent. This Pilot Program allows Tribes to send a list of employees they have licensed or denied, along with a one-page Notification of Results. Anything that will simplify the work of the background investigators should be made permanent and the FCPC Gaming Commission supports the NIGC's attempts to formalize this Pilot Program by revising its regulations. This is a high-priority issue.

The NIGC also questions whether it should adopt regulations to allow Tribes to submit fingerprint cards to the NIGC in connection with vendors, consultants and other non-employees whom the Tribes wish to license. This is an issue which the FCPC Gaming Commission brought to the attention of the NIGC several years ago. It is the policy of the FBI, as set forth in a letter to the NIGC, dated November 26, 1997, to only allow Tribes to have access to fingerprint data and criminal history information ("CHI") in connection with background investigations for individuals seeking Tribal gaming licenses, as key employees or primary management officials. These two categories of employees are specifically identified in IGRA and the appropriate NIGC Regulations as persons to be licensed by the Tribes. It is the FBI's policy that access to federal CHI for background investigation and licensing purposes is only possible if authorized by a specific federal law or by a state law approved by the United States Attorney General. In the area of Indian gaming, federal law (IGRA) only authorizes access to CHI for key employees and primary management officials. Therefore, access to federal CHI for other types of background investigations, such as vendors and consultants, is only permissible under federal law (P. L. 92-544) when specifically authorized by a state statute.

Access to federal CHI for vendor background investigations is not specifically set out in IGRA or federal regulations. Wisconsin Law (Wis. Stat. Sec. 569.04) authorizes the State Department of Administration to take fingerprints and to submit those fingerprints to the FBI for any employee of a Tribal gaming operation and for gaming vendors. However, "gaming vendors" is specifically defined in State statute (Wis. Stat. Sec. 569.04(1)) as those vendors providing

goods or services which are "unique" to gaming.[1] Section VII of the Forest County Potawatomi/State of Wisconsin Compact requires the State to investigate and certify all vendors who provide goods and services to the Tribe "which are unique to the operation of gaming." Pursuant to Wis. Stat. Sec. 569.04, the State is authorized to obtain FBI fingerprint data and CHI on all such vendors providing goods or services which are "unique to the operation of gaming." Neither Wisconsin law nor the Compact address the licensing, fingerprinting or obtaining of CHI related to the background investigation of vendors who are providing goods or services that are *not* "unique" to gaming. The Potawatomi vendor licensing program licenses all vendors, including those that provide goods or services that are not "unique" to gaming. It is this group of vendors for which the Potawatomi seeks access to CHI from the FBI.

On February 26, 2008, representatives of the FCPC Gaming Commission traveled to Washington, D.C., for the specific purpose of gaining access to FBI CHI in connection with the licensing of vendors. We met with Tracy Toulou, Director, Office of Tribal Justice, Department of Justice, and with NIGC Chair Phil Hogen, Commissioner Norman De Rosier and two NIGC attorneys. Despite a favorable and encouraging response and a promise to address the problem, to date there has been no change in federal law, procedures, regulations or agreements to give Tribes access to federal fingerprint and CHI data in the case of non-employee vendors and consultants. This access is crucial. This is not exclusively a Potawatomi concern. Chair Hogen stated that other Tribes had brought this issue to the NIGC's attention. The FCPC Gaming Commission strongly supports revisions to regulations to allow for this procedure. This is a top-priority matter.

9. Facility License Notifications, Renewals and Submissions (25 C.F.R. § 559).

The FCPC Gaming Commission believes that 25 C.F.R. § 559.5 should be revised either by removing it or by providing that the section applies only if health and safety concerns are not addressed in the Compact between the State and the Tribe. Environmental health and safety concerns are inherently local in nature. They are not amenable to a federal standard or to federal oversight. For example,

[1] Section IX. of the Forest County Potawatomi/State of Wisconsin Compact requires background investigations of all employees, not simply key employees or primary management officials. Section IX.E of the Compact also requires the State to release to the Tribe all criminal history information on such employees. The State gets access to this CHI from the FBI through Wis. Stat. Sec. 569.04 (*see* above).

Sec. XIV of the Forest County Potawatomi/State of Wisconsin Compact is devoted entirely to Public Health and Safety and requires the Potawatomi to comply with specified Wisconsin State laws. It also requires the Tribe to engage a State-certified inspector to conduct regular health and safety inspections. In addition, the Cooperation and Jurisdiction Agreement which covers the Tribe's Milwaukee properties (Potawatomi Bingo and Casino and the Concordia College Trust Property) requires compliance with Milwaukee Code Standards for Health, Safety and the Environment. The addition of federal environmental health and safety issues and a new reporting requirement, as reflected in 25 C.F.R. § 559.5, only add a needless layer of regulation and do not enhance the safety of Potawatomi gaming facilities. This is a high-priority issue.

10. Inspection and Access (25 C.F.R. §§ 571.1 – 571.7).

On occasion, NIGC investigators have been denied access to casinos and their records. The current regulations are clear that the NIGC has the right to access all records of a Tribal gaming enterprise, regardless of whether those records are stored on- or off-site. This is not an issue for the FCPC. Therefore, the FCPC Gaming Commission sees no need for revisions to the regulations.

11. Enforcement (25 § 573).

The NIGC questions whether a regulation should be added to allow the NIGC to withdraw a Notice of Violation after it has been issued. There is nothing in the current regulations that would prevent the NIGC from withdrawing a Notice of Violation. For that reason, and because this has not been an issue for the FCPC, the FCPC Gaming Commission sees no need for revisions to the regulations.

A. Potential New Regulations.

The NIGC questions whether it should adopt regulations regarding:

a. TACs;

b. Sole Proprietary Interest;

c. Communication Policy identifying when and how the NIGC communicates with Tribes; and

d. Buy Indian Act.

As to Tribal Advisory Committees, these have proven to be a valuable tool for the NIGC, but they need to be flexible to meet the specific needs of the issue of the NIGC and of the Tribes. As such, the FCPC Gaming Commission opposes a significant new regulation on this issue. A detailed, new regulation runs the risk of undermining the flexibility necessary in order to provide for meaningful TACs. If any new regulation is to be adopted, it should be limited to language laying out the authority to establish TACs, the authority given to individual TACs, the use to which TAC recommendations would be given and the methodology for appointing TAC members. This is a medium-priority issue.

IGRA requires that Tribes have "the sole proprietary interest and responsibility for the conduct of any gaming activity." 25 U.S.C. § 2710(b)(2)(A). This language is clear and a new regulation is not necessary in order to make the regulation more understandable. To the contrary, a new regulation could make these commonly understood terms less understandable.

Through Executive Order and NIGC policy, the NIGC regularly communicates with Tribes. Regulations setting forth the process for communication are unnecessary and counter-productive, as the appropriate and proper method for effectively communicating with various Tribes varies tremendously from Tribe to Tribe, and a single regulation will not enhance communication.

The NIGC is considering adopting a regulation to require the NIGC to give preference to qualified Indian-owned businesses when purchasing goods or services under the Buy Indian Act. Such a regulation is not necessary, as the Buy Indian Act (25 U.S.C. § 47) speaks for itself and the NIGC does not need a regulation to adopt the Act for its own internal purchasing.

B. Other Regulations.

The NIGC Notice of Inquiry lists 11 other current regulations which the NIGC believes do not require revision. There are no bases for concluding that any of these 11 current regulations need revision. Therefore, the FCPC Gaming Commission opposes any revisions in these sections.

The San Manuel Band of Mission Indians Gaming Commission's written comments observed, however, that in the area of civil fines, the NIGC has in the past obtained civil sanctions in a way that would permit the payments to operate for the benefit of the Tribe in question. (Civil fines generally are payable to the United States Treasury and do not benefit the individual

Tribe.) The San Manuel suggestion has merit and the NIGC should continue to pursue civil sanctions where appropriate in a manner that benefits the payer Tribe. These practices, however, do not require revisions to the regulations.

If you have any questions, please do not hesitate to contact me.

Sincerely,

Kenneth George, Jr.
Chairperson
Forest County Potawatomi Gaming Commission

cc: Laeo Echo-Hawk, NIGC (via email: reg.review@nigc.gov)
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