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A People of Vision

A Confederation of the Salish, Pend d' Oreilles and Kootenai Tribes

Tribal Gaming Commission

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

Re: NIGC Regulatory Review Comments

Dear Chairwoman Stevens,

The Confederated Salish and Kootenai Tribes, Tribal Gaming Commission (CSKT-TGC) the Gaming Regulatory Authority of the Tribes, would like to take this opportunity to provide comments to the National Indian Gaming Commission (NIGC) during its regulatory review process. The CSKT-TGC also recognizes and respect NIGC's support of tribal sovereignty and their role in the oversight of Indian gaming. In any effort by the Commission to revise existing rules or propose new one, it is important to recognize the sovereign powers of Indian tribes as self-governing entities. It is also, refreshing to work with a Commission that seems to recognize sovereignty and self-governing power of Indian Tribes.

Previous NIGC Chairs have tried to read out of the Indian Gaming Regulatory Act (IGRA) the underlying intent of Congress to protect and preserve this right of self-government in the area of tribal gaming activities. This oversight by tribal governments and the government-to-government relationship are important foundational concepts that should serve as the basis for the decisions that the NIGC makes relative to its interpretations of its mandate under the federal law. Overall, the CSKT-TGC believes that the NIGC should strive to ensure that its oversight is fair, reasonable, and consistent with the goals and purposes of IGRA.

Furthermore with the exceptions of one or two minor amendments, the IGRA language has not changed in all that time. The existing regulations cover nearly every aspect of the IGRA language. Chairwoman Stevens and her staff might better

identify, with more specificity, those parts of the existing regulations that they believe are not in accord with the letter or spirit of IGRA for Commission and tribal review.

Part 502 – Definitions

The Notice of Inquiry (NOI) suggests the need to review the definitions of Net Revenues and Management Contracts.

We see no need to change the existing definition of Net Revenues. However, some tribes have expressed concern about past efforts of the Commission to inject itself into the business decision-making process of the tribal gaming operations by attempting to disallow certain expenses on the grounds that such expenses reduced the net revenues accruing to the tribe. Indian tribes, either directly through the Council or through their gaming managers, may make stupid management and operation decisions which cost the operation money. The NIGC was not set up to substitute its business-making expertise (if any) for that of the tribe. An unwise gaming business decision by the governing body of the tribe is more appropriately corrected by the political process.

The Confederated Salish and Kootenai Tribes (CSKT) do not contract for the management of its gaming operations. So, in general, it probably would not be concerned with proposed changes to the regulation of management contracts. But that would be best left to CSKT to comment on the issue.

Part 514 – Fees

Under this part, the NOI contemplates changes in the existing regulations with respect to "calendar year" v. "fiscal year", GAAP definitions, fingerprinting processing fee, and late payment system for late fee submittals in lieu of enforcement actions. We do wonder about the fingerprinting processing fee. We don't know what this is all about. There is nothing in the existing part 514 about such fees.

Part 518 – Class II Self-Regulation

Section 11(c) (3) of IGRA provides that a tribe operating a class II facility can petition NIGC for a certificate of self-regulation. If a petitioning tribe meets the criteria set out in paragraph (4), the NIGC must issue such a certificate. If a tribe has received a certificate, it is no longer subject to certain Commission powers set out in section 7(b) (1), (2), (3), and (4). This would mean that the tribe would no longer be subject to (1) continuous monitoring of its facility by NIGC; (2) the authority of the Commission to inspect and examine its class II premises; (3) the authority of the Commission to conduct or cause to be conducted background investigations; and (4) the authority of the Commission to demand access to the records of the facility.

In its NOI, the Commission posits the question of whether this regulation is a "burden" or a "benefit". It was clearly intended it to be a benefit to well-performing class II tribes. However, the Commission, under past leadership, used this provision and its authority to promulgate regulations to impose upon petitioning tribe far more onerous requirements that those from which it would be relieved. The existing regulations are

clearly a burden to the tribes. We wonder how many tribes, in 22 years, have sought and received such a certificate. A reading of section 518.4 would probably discourage many tribes from seeking the certificate.

Part 523 – Review and Approval of Existing Ordinances or Resolutions -- Obsolete?

This part is obsolete. Whether it is revoked or left in place is immaterial.

Part 533 – Management Contracts: Approval of Management Contracts

As noted above, CSKT does not contract for the operation of its gaming facility. Therefore, any change in this respect probably would be immaterial to the Tribes unless they decided at some future date to do so. We would only note that the Commission, in the past, has attempted to bootstrap itself into more authority over contracts entered into by a tribe with respect to its gaming operation by asserting that they are "collateral agreement" amounting to management contracts.

Part 537 – Management Contracts: Background Investigations

Section 12 of IGRA gives the Commission authority to approve or disapprove tribal management contracts for class II gaming activity. Nowhere in section is 12 or any other part of IGRA is it given such authority for class III operations. The NOI posits the questions "Should a contractor be required to submit the class II background information when the contract is only for class III gaming?" The question the Commission should be required to address is, "What specific provision of IGRA empowers the NIGC to approve or disapprove tribal management contracts for its class III gaming?".

The NOI, in this part, further asks the questions "Should the regulations contain more detailed procedural rules?" We would answer the questions with questions: "Why?"

Section IV of the NOI raises a number of other regulatory issues.

With respect to MICS and technical standards, they first ask what should be done with the class III MICS. As you are aware, the Federal court has ruled that the Commission has no power to adopt, implement and enforce MICS against tribal class III operations. As far as CSKT-TGC is concerned, they should be revoked. However, as set out in the San Manuel comments, the class III compacts between the several California tribes and the State required the tribes to abide by the NIGC MICS. Perhaps the regulations should be amended to provide that the NIGC classes III MICS are guidelines only and not enforceable against the tribes, unless a tribe has specifically adopted them or the MICS are included in any tribal-state compact.

The NOI asks what should be done with the current draft of class II MICS. It also wonders what to do with technical standards regulations. There has been some question about whether NIGC has any more statutory power to impose MICS on class II

than it does on class III. In both of these areas, the Commission has may well have overstepped its authority under IGRA and has illegally invaded tribal sovereignty and the right of self-government.

The NOI wonders if the pilot program for background investigations for licensing should be formalized into regulations. We are not familiar with the pilot program. Section 11(b) provides that a tribe shall adopt a tribal gaming ordinance and that, if it meets certain standards, it "shall" be approved by the NIGC Chair. Section 11(b) (2) (F) provides that the ordinance must include an adequate system **(TRIBAL SYSTEM!)** for tribal background investigations and licensing. Once an NIGC Chair has approved such an ordinance, its further power over such subjects was intended to be limited to oversight of the tribe's compliance with its ordinance, including the background investigation and licensing provision. The Commission has used that provision to impose unauthorized, onerous requirements on tribes, such as those in section 556.4? Once it approved the ordinance, the Commission has no power to impose such requirement on the tribes.

Parenthetically, the Commission should address section 553.3(a). It requires the tribe to include on an application form for a key employee or primary management officer positions a notice regarding false statements. A false statement would be grounds for denying, or suspending or revoking, a TRIBAL license. A false statement would subject the applicant to Federal criminal prosecution under Title 18, section 1001, of the United States Code. Where, in IGRA or any other authority, did the Commission get the authority to subject applicants for employment with a tribal entity to criminal prosecution under a Federal criminal law? This entire part is questionable.

The next provision of the NOI relates to fingerprinting for non-primary management officials and key employees. There is no provision of IGRA which permits NIGC to require the tribes to do so and we cannot find a provision of the regulation which does so. The NOI wonders if there should be an option to allow tribes, at their discretion to submit finger prints to NIGC for vendors, consultants and other non-employees. As long as it is an "option" at the tribes' discretion", why not?

Part 559 – Facility License

Section 11(b) (1) of IGRA provides that a separate license issued by the tribe shall be required for each place, facility, or location on Indian lands at which class II gaming is conducted. Clearly, since IGRA requires it, the NIGC has the right to require that a tribe issue such a license.

Again, with hardly a hint of tribal outrage, the Commission, at least under past administrations, has used this simple little provision to make a wholesale, unauthorized invasion of the right of tribes to govern them. The Act requires a tribe to issue a separate license. It does not impose any time limit on the duration of the license. That would be a matter for a tribal governing body to determine. Section 559.3 imposes a three year limit on the effectiveness of a tribal license. Where did it get the authority to do this?

Section 559.5 imposes the most stringent requirement on tribes with respect to the licensed facility. Unless these requirements are included in the tribal gaming ordinance reviewed and approved by the Chair of NIGA, the Commission has no power to require that the tribes must meet such standards before issuing a tribal license.

The NOI suggests that it may be necessary to clarify the authority of NIGC to access records at off-site locations, including those owned by 3rd parties. Section 7(b) give the Commission certain specific powers with respect to class II gaming. These include (1) the right to monitor class II gaming activities on a continuing basis, (2) inspect or examine class II facilities, and (3) demand access to papers, books, and records of class II gaming activities. We cannot say that it does not have that authority with respect to records at off-site locations, including those owned by 3rd parties. However, IGRA gives the Commission no right of access to those locations. They may demand access to such records, but probably have no "right" of access to those premises as it does with respect to the gaming premises themselves. With respect to NIGC's rights regarding third parties, we have no comment.

The NOI asks if the Chair should have the right to withdraw a notice of violation (NOV). We would suppose so.

Finally, in section V of the NOI, the Commission wonders of further new regulations are needed with regard to tribal advisory committees, sole proprietary interests, and communication policy with various parties, and the Buy Indian Act. We would want to see further information on why such regulations are needed and, if further invasive of tribal sovereignty, under what specific authority the NIGC proposed to promulgate such regulations.

Thanks for your time and consideration and for allowing us the opportunity to have our concerns expressed.

Sincerely,

Lissa Peel

Lissa Peel, Chairman
CSKT Tribal Gaming Commission