

# Elk Valley Rancheria, California



2332 Howland Hill Road  
Crescent City, CA 95531

Phone: 707.464.4680

Fax: 707.465.2638

[www.elk-valley.com](http://www.elk-valley.com)

February 8, 2011

**VIA ELECTRONIC MAIL ONLY**

[reg.review@nigc.gov](mailto:reg.review@nigc.gov)

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

Re: Notice of Inquiry; Elk Valley Rancheria, California Comments

Dear Ms. Echo-Hawk:

The Elk Valley Rancheria, California, a federally recognized Indian tribe located in Del Norte County, California, responds to the National Indian Gaming Commission's November 18, 2010 Notice of Inquiry.

Before proceeding to the Tribe's specific comments, the Tribe wants the National Indian Gaming Commission ("NIGC") to know that it wholeheartedly supports and strives for strong regulation of Indian gaming with individual tribes as the primary regulator of tribal government gaming. The Tribe and the State of California entered into a tribal-state gaming compact that recognizes the role of tribal regulators and the Tribe, itself, has appropriated valuable Tribal funds to ensure that Tribal regulators efficiently and effectively regulate the Tribe's casino. The Tribe has the highest incentive to effectively regulate its tribal government gaming operation and ensure that its games are fair and honest. We hope to work cooperatively with the NIGC as we have done in the past to ensure that our gaming operation is safe and operates in a manner that is appropriate for all interested parties and consistent with the sovereign status of the Tribe.

As the NIGC is aware, one of the primary statutory purposes of the Indian Gaming Regulatory Act ("IGRA") is to develop tribal economies to provide funds for tribal governmental purposes. With that in mind, the NIGC should be ever mindful of the costs of regulation and the alternatives available to the NIGC and tribes to achieve regulatory goals. Costs of regulation versus the regulatory necessity of any given regulation should be balanced.







## Part 502 - Definitions

- Net Revenues – The definition of “net revenues” should be modified. The definition has been the source of much confusion among tribes, management companies, and accountants. We recommend modifying the definition to more accurately reflect generally accepted accounting principles while simultaneously respecting tribal determinations regarding fiscal prioritization, i.e., the NIGC should not interfere in tribal financial determinations except as expressly authorized in IGRA.
- Management Contract – The definition of management contract should not include slot machine lease agreements, loan or development agreements. Slot machine lease agreements between tribal casinos and manufacturers should not be included in any such regulation to the extent that the slot machine lease agreements are directly with reputable manufacturers. Such agreements are common within the casino industry and are an accepted way of providing otherwise unattainable games at rural facilities.
  - The Tribe understands that, at times, developers and would be management contractors attempt to use gaming device lease agreements as a method to avoid background investigation as well as potential regulatory caps on fee sharing that would otherwise apply under a management agreement. It is unclear whether new or modified regulations are appropriate to address this issue, however, the Tribe believes that a simple amendment to include lease agreements generally will be counter-productive to the tribal government gaming industry.
  - The NIGC may wish to address whether it can review a “non-management” contract such as a third party gaming device lease agreement to ensure that provisions in those contracts do not provide management authority to the third party in the event of default or other circumstance. Such reviews protect both tribes and contractors.

## Part 514 – Fees

- Fee calculation should be completed on a calendar year basis in order to foster uniformity. While we understand that fiscal year and calendar year may be different, our casino is required to file other documents on the basis of a calendar year and our accounting systems allow us to easily calculate and remit the required fees on a calendar year basis.
  - The definition of gross gaming revenues may need to be reviewed and modified to ensure consistency the generally accepted accounting principles.
- 



- 
- The NIGC should not adopt a “ticket” system and should not utilize the NOV process for late payment issues. The NOV process should be reserved for substantive violations of IGRA that are repeated or of such significance to warrant such action. Instead of issuing a NOV or “ticket” the Tribe recommends that the NIGC consult with tribes and provide an opportunity to “cure” any purported deficiency prior to proceeding to a “ticket” or NOV.

#### **Part 518 – Self-Regulation of Class II**

- The current self-regulation system is burdensome and outweighs the potential benefit of achieving self-regulation status. The Tribe recommends that the NIGC streamline the process and ensure that tribes can utilize the self-regulation status consistent with self-government, sound regulation, and public policy.
  - Presumably, the burden of compliance should be substantial compliance. Other qualifying criteria is specified in other NIGC regulations and is already obtained and/or possessed by the NIGC in the form of Agreed Upon Procedures reports, independent audits, MICs compliance reviews, facility licensing certifications, and key employee licensing applications and records. Further, the public notice requirement is unnecessary.

#### **Part 523 – Review & Approval of Existing Ordinances or Resolutions**

- This Part should be eliminated as out dated.

#### **Part 531 – Management Contracts**

- Collateral Agreements. The Tribe recommends that management agreements and all collateral agreements thereto be reviewed simultaneously to determine whether the agreements are consistent with the IGRA.


#### **Part 533 – Approval of Management Contracts**

- The NIGC should not deny or otherwise reject tribal submission of a management agreement for failure to comply with a technicality. Instead, the NIGC should work cooperatively with a tribe to address any purported deficiencies that are identified in writing by the NIGC.

#### **Part 537 – Background Investigations re Management Contracts**

- The NIGC has authority to conduct background investigations of persons involved in management contracts, e.g., financial interests, primary management responsibility, etc.





The NIGC as the national agency with information collected from a variety of sources is in a unique position to assist tribal gaming agencies with the conduct of background investigations and to alert tribes to potentially unsuitable persons or entities.


### **Proceedings Before the Commission**

- The Chairperson of the NIGC should not be allowed to participate in hearing or deciding appeals with the full Commission when those appeals involve the Chairperson's decision, e.g., disapproval of a gaming ordinance. Such participation is contrary to due process as the Chairperson makes the initial decision and is not an impartial arbiter on appeal of his or her decision.
- Additional regulatory guidance regarding motion practice would be helpful.

### **Part 542 - MICS & Technical Standards**

- The Tribe supports the NIGC's Class III Minimum Internal Control Standards and believes that Part 542 should be retained in order to comply with the Tribe's tribal-state compact and NIGC approved tribal gaming ordinance.
- While federal courts have determined that the NIGC lacks authority to enforce such MICS with regard to Class III gaming, those MICS provide a set of guidelines that are objective and tribes can choose to utilize, as appropriate.
- We recommend retaining the MICS. Maintaining and updating the MICS does not, in and of itself, authorize oversight and enforcement by the NIGC for tribes that do not have compacts or ordinances that expressly grant such authority to the NIGC or otherwise set the MICS as the regulatory standard.
- The NIGC should proceed with its pending update of Part 542.

### **Part 543 – Class II MICS**

- These discussions require more input from Indian country. A tribal advisory committee is one method of seeking that input as long as the committee members are representative of Indian country – not just large gaming tribes.
  - However, the current state of Class II gaming, e.g., one-touch versus two-touch, is in question and we encourage the NIGC to act to avoid unnecessary litigation with states and stagnation of the Class II gaming industry.
- 





**Part 547 – Minimum Technical Standards for Gaming Equipment Used with Play of Class II Games**

- These discussions require more input from Indian country. A tribal advisory committee is one method of seeking that input as long as the committee members are representative of Indian country – not just large gaming tribes.

**Part 556 – Background Investigations**

- The pilot program should be formalized and made available broadly.


**Fingerprinting of Non-Primary Management Officials**

- Such an option should be made available for tribes to utilize on an individual basis, i.e., at the tribe's option.

**Part 559 – Facility License Notifications, Renewals & Submissions**

- The Tribe supports the underlying concept of this regulation. However, this issue is addressed in the Tribe's tribal-state compact as Congress intended when it passed IGRA. Congress determined that the subject of the Proposed Regulations, i.e., the assurance of environmental and public health and safety is properly a subject of tribal-state compact negotiations. *See* 25 U.S.C. § 2710(d)(3)(C)(vi). Likewise, it is doubtful that under the CRIT decision, the NIGC has authority to enforce such a regulation.
- The Tribe operates its casino pursuant to its 1999 tribal-state compact with the State of California. The Tribe is legally bound through its tribal-state compact, Tribal law and federal law to protect the environment and public health and safety. The Tribe is concerned that the NIGC continues to attempt to impose environment and public health and safety standards upon the Tribe as a general fix to a limited problem. It appears that in California, the NIGC is attempting to solve a problem that does not exist. Further, there is a significant question as to whether the NIGC has statutory authority to require the Tribe to perform the functions described in the existing regulations.
- Section 10.1 of the Tribe's tribal-state compact provides that the Tribe will not conduct Class III gaming in a manner that endangers public health and safety, or welfare. The Tribe, pursuant to its 1999 tribal-state compact, is required to and has adopted various standards, including:
  - Food - Pursuant to §10.2(a), the Tribe has adopted food and beverage handling standards, which allow for inspections of the facility and training of employees to






meet the locally applicable standards or the standards of the Public Health Service.

- Water – Pursuant to §10.2(b), the Tribe has adopted federal water quality and safe drinking water standards applicable in California. Those standards allow for testing of water quality and inspection by proper authorities.
- Construction and maintenance – Pursuant to §§ 10.2(c) and 6.4.2, the Tribe adopted building and safety codes to address the construction, expansion, modification, renovation of the gaming facility and to ensure that the standards either meet the building and safety codes of Del Norte County or the Uniform Building Codes. Further, such standards require inspections and appropriate certifications.
- Law enforcement and security – California is a Public Law 280 state, thus, law enforcement is the responsibility of the State of California in Indian country. However, the Tribe has entered into two separate Memoranda of Understanding with the County of Del Norte to address this issues – including ensuring the payment of fees to the County of Del Norte in lieu of various taxes for such services and for cross-deputization of Tribal law enforcement officers.
- Emergency preparedness – The Tribe has entered into a Memorandum of Understanding with the County of Del Norte regarding the continued provision of emergency services. Further, the Tribe has entered into a Memorandum of Understanding with the Crescent Fire Protection District and Del Norte Ambulance to ensure that emergency services remain available at the Elk Valley Casino and throughout the Reservation.
- With that said, the Tribe continues to comply with both its compact and the NIGC regulations as promulgated and will continue to do so.

### **Inspection & Access**

- This section doesn't seem to require revision.


### **Part 573 – Enforcement**


- The NIGC should provide a process to lead up to a NOV so that it is not a surprise to a tribe. Likewise, the NIGC should have a process to withdraw a NOV, if appropriate. Presumably, the Chairperson would be vested with that authority and would exercise it reasonably to ensure that tribes are not unfairly treated or subjected to an NOV that with notice and opportunity to cure could be avoided.
- 





## Potential New Regulations

- Tribal Advisory Committee
    - The Tribe is interested in learning more about the concept underlying NIGC's proposal to form a tribal advisory committee. Such a committee conceivably could provide useful input and perspective that might otherwise be lacking. Representatives on the committee would presumably represent each of the BIA regions and should include representatives of tribes with varying gaming operations, e.g., small and large. We anticipate that many tribes will be cautious and skeptical about the formation of and participation in any such committee based upon the historical interactions between tribes and the NIGC on several issues, including Class II gaming. Further, we anticipate that a concern will be expressed that the existence of any such committee is not a substitute for true government to government consultation with individual Indian tribes.
    - The NIGC should be careful to avoid a simple "advisory committee" that does not simply have other stakeholders or industry representatives.
  - Sole Proprietary Interest Regulation
    - This area has more recently seemingly raised issues in Indian country, especially as developers and would be managers seek to avoid the NIGC's background and approval processes. A properly drafted and constrained regulation may be appropriate to provide guidance, but should allow tribes to obtain goods and services deemed necessary by a tribe. Likewise, it should not include gaming device lease agreements directly between a manufacturer and a tribe.
    - Finding a balance between tribal sovereign rights and authority to pursue economic development and business decisions and NIGC regulatory oversight will be tricky.
  - NIGC Communication Policy
    - The policy, if any, should strive for comprehensive and timely information sharing. We doubt that the NIGC can satisfy all tribes' respective needs in a regulatory format and may find that the task is more trouble than it is worth. It may make more sense to simply implement a system that provides dual communication to the tribal regulatory body and the chairperson of the tribe.
- 

- 
- Buy Indian Act Regulation
    - The Tribe encourages the NIGC to utilize native businesses whenever possible.

#### **Other Regulations**

- Privacy Act & FOIA
  - The Tribe requests that the NIGC review its policies regarding privacy and FOIA, especially with regard to records retention regarding casino audits. The Freedom of Information Act (“FOIA”) specifically exempts this information from public disclosure. 5 U.S.C. Section 552(b)(4) states that FOIA does not apply to “trade secrets and commercial or financial information obtained from a person and privileged or confidential.” NIGC’s policies should be consistent with federal law and protect financial information received from tribes. Documents relating to tribal audits should not be treated any more public than audits of NIGC, which will be destroyed after 10 years. Other resources are available to researchers that do not include the disclosure of confidential information. Therefore, tribal financial information submitted to the NIGC should not be transferred to the federal archives and made available to the public. Rather, those records should remain confidential and to the extent deemed unnecessary by the NIGC, should presumably be destroyed rather than made public.

Thank you for consideration of the Elk Valley Rancheria, California’s comments. Please contact the undersigned if you have any questions.

Sincerely,



Dale A. Miller  
Chairman

cc: Elk Valley Tribal Council  
Elk Valley Tribal Gaming Commission

