



THE NAVAJO NATION

Post Office Box 7440
Window Rock, Arizona 86515
928-871-6352/6353/7000
Telefax: 928-871-4025

BEN SHELLY
President

REX LEE JIM
Vice President

February 10, 2011

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

RE: National Indian Gaming Commission Regulatory Review

Dear Chairwoman Stevens:

Thank you for the opportunity to allow the Navajo Nation ("Nation") to provide comments on possible amendments to the Commission gaming regulations. I am very pleased with the efforts to involve other Indian tribes in the process of revising and considering the promulgation of National Indian Gaming Commission ("NIGC") regulations.

I am also pleased with the recent Training and Technical Assistance survey distributed. We are a new gaming tribe with both Class II and Class III gaming and technical training is critical. We have in fact already submitted our response to the NIGC Training and Technical Assistance survey to assist you in prioritizing the type of training and technical assistance. We suggest that the NIGC also consider the location of assistance. As you know, many of the training occur in locales which are distant from Window Rock, Arizona. We encourage the NIGC to provide additional on-site training so we do not bear the financial burden of travel, and more importantly, to allow more of our personnel to take advantage of the offerings.

After review of the issues raised in the Notice of Inquiry ("NOI"), the Nation recommends that the issues raised below be made through the negotiated rule-making process. When drafting our comments, the premise is for the NIGC to avoid imposing further unnecessary regulations on tribes, and instead take this opportunity to provide more clarification on those subject matters that the NIGC has statutory authority to both promulgate and regulate.

Chairwoman Tracie Stevens
RE: NIGC Regulatory Review
February 10, 2011
Page 2

A. Part 502 - Definition of this Chapter

(1) Net Revenue

Net Revenue is defined in the Indian Gaming Regulatory Act ("IGRA") at 25 U.S.C. § 2703(9). The Nation's first concern or question, is whether the Commission has the authority to change this definition. The NOI provides for two new terms and definitions for the existing term "Net Revenues". Such a definitional change seems problematic as the term "net revenues" is already defined with the IGRA at 25 U.S.C. § 2703(9). We suggest that any revision to the term and definition must be consistent with the terms of the IGRA.

This is an issue that the Nation believes should be a low priority.

(a) Net Revenues - Management Fee

Aside from the above concern, the Navajo Nation would support a definition consistent with the generally accepted accounting principles (GAAP). This would certainly provide uniformity and be good business practice.

(b) Net Revenue - Allowable Uses

The Nation does not support the new proposed definition "Cash flow equals Net Income plus depreciation minus principal loan payments and reserve funding." The accounting and budgeting by tribes are inherent sovereign rights. This proposed definition violates our tribal sovereignty.

Additionally, we cannot support a change in the definition that could be used by future Commissions to take action in excess of that granted to NIGC within the IGRA. We are concerned that future Commissions would seek to use a "Net Revenues - Allowable Uses" definition as an illegitimate justification to audit tribal government expenditures. It is the Nation's position that the current definition provided for in IGRA is adequate.

(2) Management Contract

The Nation does not support the expanded definition identified within the NOI. The NOI inquires whether the NIGC should consider

Chairwoman Tracie Stevens
RE: NIGC Regulatory Review
February 10, 2011
Page 3

expanding the definition of "management contract" to include any contract that pays a fee based on a percentage of gaming revenues. In response, we encourage the NIGC to review 25 U.S.C. §§ 2710(d)(9) and 2711(a) which provide the general framework for the definition of management contract. These sections state that "[s]ubject to the approval of the Chairman" Indian tribes may enter into management contracts for the "operation of a Class III gaming activity" 25 U.S.C. §§ 2710(d)(9), 2711(a). The IGRA does not refer to payment of a percentage of gaming revenues as a prerequisite to meeting the requirements of the term management control. The operative condition for determining whether "management" is occurring is whether third party control over all or part of a gaming operation. If the NIGC determines that it is necessary to revisit this term and definition, we suggest that the definition of "management contract" must be consistent with the IGRA and existing case law interpreting the same.

As a practical matter, if the term "management contract" is expanded, there will be a direct negative economic impact on tribal gaming operations. If history is any guide, significant additional time will elapse before contracts such as slot lease agreements (assuming they fall within a new definition of management contract) will become effective, potentially resulting in a loss of significant revenues for a tribal gaming operation and the Nation. Additionally, it is the position of the Nation that the National Environmental Policy Act ("NEPA") will be triggered each time an Indian tribe requests that the NIGC approve a management contract, additional cost and time would be incurred by an Indian tribe during the time the NEPA process is undertaken. If anything we suggest that as a general matter that the NIGC should be working with Indian Country to develop a more efficient regulatory structure, rather than additional red tape.

This is a low priority.

B. Part 514 - Fees

- ◆ Revisions to base fees on the gaming operation's fiscal year

The Nation's "gaming operation" operates on a calendar year, so this is not an issue. Therefore, this is a low priority.

- ◆ Defining "gross gaming revenue" consistent with GAAP

Chairwoman Tracie Stevens
RE: NIGC Regulatory Review
February 10, 2011
Page 4

The Nation would support this change. However, this goes to the Nation's concern explained above on the ability of NIGC to properly amend this term. We feel this should be a low priority, compared to other issues.

- ♦ Late payment system in lieu of a Notice of Violation ("NOV") for submitting fees late

The Nation fully supports a late payment system, for submitting late fees. Our recommendation would be a development of an "interim remedies" process that the NIGC and individual Indian tribes will work through prior to the issuance of a NOV. The NOV process should be used for substantial violations of IGRA, such as operating a gaming facility without a license. An "interim remedies" would be a more efficient use of resources for both the NIGC and affected Indian tribes/tribal gaming operations.

Our recommendation for an "interim remedies" process would be an issuance of a warning notice provided to the tribe, followed by a meet and confer process, if the outstanding issue has not been resolved. If not corrected within a reasonable grace period, a fee would be assessed against the tribe. Certainly, if the non-payment is a repeated occurrence or found to be intentional, then a NOV could be considered. However, we recommend that before initiating the NOV process, consultation with the Tribe occur. In other words, the NOV should be issued, if clear the tribe will not comply, as a last resort.

Additionally, the NOI inquired where fines should be directed. We would support the direction of those monies for education and other avenues that met the policy objectives of the IGRA identified in 25 U.S.C. § 2702.

The Nation's position is this is a high priority.

C. Part 518 - Self-Regulation of Class II

We strongly encourage the NIGC to revisit 25 C.F.R. § 518 regulations. Although we are new to gaming, the self-regulation of Class II is something the Nation would be interested in pursuing, in the near future.

However, we question why there are only two (2) tribes with a certificate of self-regulation. First of all, the requirements are

Chairwoman Tracie Stevens
RE: NIGC Regulatory Review
February 10, 2011
Page 5

repetitive as to what is required to submit in other sections of the regulations. For example, list of current gaming division heads, history of gaming operations, list of current regulators, revenue allocation plans. In addition, the NIGC review appears to be repetitive, since the tribal MICS and annual audits contain most of the information requested. Additionally, some requirements listed are beyond what is minimally required in IGRA.

Second, there doesn't appear to be any real self-regulation considering all the other requirements set forth in IGRA, such as licensing, notifications, approval of gaming ordinances and amendments thereto and enforcement. These are inherently part of self-regulation. In the spirit of self-regulation, the only requirement for submission should be an annual report.

The Nation would also like to take this opportunity to recommend that self-regulation of Class be explored. This would be more economically feasible for tribes.

This would be a high priority for the Nation.

D. Part 523 - Review and Approval of Existing Ordinances or Resolutions

The Nation would support eliminating this Part. However, we would recommend to provide in clarification for submission of amendments to the tribal gaming ordinance.

This is a low priority. Clarification on submission of amendments to the tribal gaming ordinance, however, would be a high priority for the Nation. We would recommend this could be a new section in Part 522.

E. Management Contracts

These Parts are a low priority for a tribe, provided that the definition of Management Contract remains consistent with IGRA.

(1) Part 531 - Collateral Agreements

We support including collateral agreements as being approved with management contracts provided that such collateral agreements meet the definition of "management contract". If those collateral agreements do not meet the definition of "management contract,"

Chairwoman Tracie Stevens
RE: NIGC Regulatory Review
February 10, 2011
Page 6

then it does not appear that the NIGC has clear approval authority based in statute.

(2) Part 533 - Approval of Management Contracts

Assuming that the NIGC is seriously considering an expansion of the definition of the term management contract, we would encourage the NIGC to engage in additional government to government consultations with individual Indian tribes to develop coherent policy and regulations that are consistent with settled expectations and case law on the issue.

(3) Part 537 - Backgrounds on Management Contracts

No comment.

F. Proceedings before the Commission

◆ Comprehensive and Detailed Procedural Rules

This would certainly assist in providing direction for the tribes in the appeal process. The idea or recommendation is supported by the Nation. However, the Nation will certainly want an opportunity to further comment on any proposed rules the NIGC may propose. These appeal revisions are considered a low priority.

◆ Part 519 - Service of Process

The Nation would recommend instead of surface mail, certified mail with return receipt and hand delivery with certification of receipt. The other delivery options suggested within 25 C.F.R. § 519 are uncertain and can be easily subject to challenge in any administrative or judicial forum. The Nation would recommend those provision be stricken.

◆ Computation of Time

The current time periods, we feel is sufficient. These are decisions that must be made quickly.

G. MICS & Technical Standards

(1) Part 542 - Class III Minimum Internal Control Standards

Chairwoman Tracie Stevens
RE: NIGC Regulatory Review
February 10, 2011
Page 7

The Navajo Nation is concerned with potential revisions to this area. The issue is whether the NIGC should be concentrating its regulatory activities upon Class II or acting outside of its statutory powers and stepping into the Class III regulatory regime. As the NIGC is aware, the IGRA provides that tribal gaming agencies are the primary regulators for all gaming on tribal lands. The NIGC is given limited regulatory oversight over Class II gaming and the tribal-state compact process provides a mechanism whereby an individual Indian tribe and a state can develop an agreed upon regulatory scheme or tribal gaming taking place pursuant to a Class III tribal-state gaming compact. These principles are clearly stated within the IGRA, and confirmed within the *CRIT* decision. We quote here from the final sentence of the opinion of the United States Court of Appeals for the District of Columbia Circuit: "This leads us back to the opening question - what is the statutory basis empowering the Commission to regulate class III gaming operations? Finding none, we affirm." *Colorado River Indian Tribes v. National Indian Gaming Commission*, 466 F.3d 134, 140 (D.C. Cir. 2006).

With that said, the Nation would not support rescinding this Part. The Nation's compacts adopt the MICS, as do many other tribes. There are many unforeseen scenarios that arise, such as renegotiations of the compacts. Thus, the Nation would strongly oppose rescision of the MICS.

This would be a low priority for the Nation.

- (2) Part 543 - Class II Minimum Internal Control Standards and Part 547 - Minimum Technical Standards for Gaming Equipment Used with the Play of Class II Games

Our comments for both these Parts are the same. The Nation would support amendments to the Class II MICS. We would recommend that impacted tribal gaming regulators have an opportunity to comment or assist in the revisions of these two Parts, prior to public meetings.

This would be a high priority for the Nation.

H. Backgrounds and Licensing

- (1) Part 556 - Background Investigations for Licensing

Chairwoman Tracie Stevens
RE: NIGC Regulatory Review
February 10, 2011
Page 8

The Nation would support converting the pilot program into a regulation. This is a low priority.

(2) Fingerprinting for Non-Primary Management Officials or Key Employees

The Nation would not oppose adopting regulations for tribes to submit fingerprint cards for vendors, consultants and other non-employees that have access to the gaming operations on a daily vending basis. However, the Nation would insist this remain at the option of the tribes.

This is a low priority.

I. Part 559 - Facility License Notifications, Renewals, and Submissions

The NIGC's Gaming Facility regulations are not consistent with the NIGC's statutory authority. In light of the *CRIT* Decision, we encourage the NIGC to review this regulation in detail for compliance with the IGRA and the NIGC's very limited regulatory responsibilities related to Class III gaming.

More specifically, the Environmental, Public Health and Safety ("EPHS") certification is beyond NIGC's authority. The IGRA makes absolutely no reference to EPHS regulation or certification. In *Williams v. Lee*, tribes are granted with the inherent right to make its own laws and be governed by them. It is the Nation's position that EPHS certification is in direct conflict to tribal sovereignty and overreaches NIGC's statutory authority.

We strongly recommend striking Part 559.5 and those sections that are in excess of the NIGC's regulatory authority. This would be a high priority for the Nation.

J. Sections 571.1 - 571.7 - Inspection and Access

No Comment.

K. Part 573 - Enforcement

The Nation would fully support the NIGC to establish a process to withdraw a Notice of Violation ("NOV"). Our recommendation would be that once a Tribe is found to be in compliance the NOV

Chairwoman Tracie Stevens
RE: NIGC Regulatory Review
February 10, 2011
Page 9

should be lifted. If a repeated offense, a time penalty could be added to the compliance date, such as one (1) year. So, upon compliance the NOV be lifted would then be an automatic occurrence, it would not be at the discretion of NIGC.

We suggest that this issue should be addressed when the Commission is addressing "interim remedies," discussed above. This would be a medium priority.

V. Potential New Regulations

A. Tribal Advisory Committee

The Nation opposes creating a regulation for Tribal Advisory Committee(s). These are important issues and the Nation would like to ensure its involvement in these processes. We understand the practical aspect of this recommendation. However, we found it beneficial to hear the positions of all tribes whether we agree with them or not, each one is helpful and has their own unique experience and insight. We feel it is important for everyone to participate.

B. Sole Proprietary Interest Regulations

The Nation opposes a regulation for Sole Proprietary Interest. A tribe's ability and right to make business decisions and enter into contracts are part of each tribe's right of self-determination. Any regulations that would potentially infringe on tribal sovereignty should be avoided at all cost.

If the NIGC has specific concerns about the concept of Sole Proprietary Interest, we encourage the NIGC to reach out to individual Indian tribes on a government to government basis to explore this issue further.

C. Communication policy or regulations identifying when and how the NIGC communicates with Tribes

The Nation feels establishing a policy or regulations for communication between NIGC and the Tribes is unnecessary. The Nation has an internal policy on communication with the Federal Government. We feel this is strictly an internal issue.

Chairwoman Tracie Stevens
RE: NIGC Regulatory Review
February 10, 2011
Page 10

If other tribes feel this is necessary, then the Nation would recommend this be established as a policy. We feel it does not rise to the level of a regulation.

D. Buy Indian Act Regulation

This is a federal act. Our response is the NIGC is a federal agency and required to comply with its federal laws, including the Buy Indian Act. The Nation does not feel it is appropriate to create a regulation.

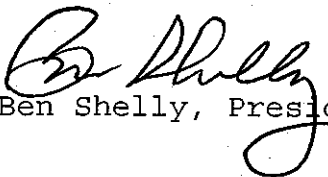
VI. Other Regulation

No comment.

In closing, I would like to thank again this Commission for this opportunity to provide comments. We look forward to continue working together on these important changes.

Sincerely,

THE NAVAJO NATION


Ben Shelly, President

xc: Carleen Chino, Executive Director
Navajo Gaming Regulatory Office