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February 11, 2011

VIA E-MAIL (reg.review@nigc.gov) ONLY

Lael Echo-Hawk
General Counsel
National Indian Gaming Commission
1441 L Street N.W., Suite 9100
Washington, DC 20005

Re: Response to the NIGC's November, 2010 Federal Register "Notice of Inquiry and Request for Information; Notice of Consultation"

Dear Ms. Echo-Hawk:

Forman & Associates, Attorneys at Law, is legal counsel to the Cahuilla Band of Indians, the Colusa Tribal Gaming Agency of the Cachil Dehe Band of Wintun Indians of the Colusa Indian Community, the Morongo Band of Mission Indians, and the Sycuan Tribal Gaming Commission of the Sycuan Band of the Kumeyaay Nation, all in the State of California. Our clients have requested that we submit the following comments on their behalf.

INTRODUCTION

By Notice published in the Federal Register on November 18, 2010, the NIGC announced its intention to conduct a comprehensive review of all regulations promulgated to implement the Indian Gaming Regulatory Act ("IGRA"). Although the NIGC's Notice announced a "comprehensive review of all regulations," the Notice actually specifies only a few regulations of particular interest to the NIGC. Because the NIGC intends that its review of existing regulations will be "comprehensive," the comments set forth below will address those regulations that are of particular concern to the undersigned, including regulations that have not been specified in the NIGC's notice.

Part 502, Definitions of this Chapter.

1. Net Revenues: The NIGC should consider separate definitions for Net Revenues – management fee and Net Revenues – allowable uses.

2. Management Contract.

A. The definition of "management contract" should not be expanded to include any contract with a fee based on a percentage of gaming revenues. Such an expansion would introduce needless and burdensome delays and costs into the process of procuring gaming equipment, and would serve no useful purpose.

B. The undersigned agrees that there is a need to more clearly and narrowly define the permissible elements of compensation under a management contract so as to protect vulnerable tribes from overreaching by gaming developers.

2. Sec. 502.7, Electronic, computer or other technologic aid: As currently written, the definition of "Electronic, computer or other technologic aid" has been the source of confusion and controversy, not so much because of the existing definition's language, but because of the way that individual Commission members and/or staff, without legal justification and in ways that have prevented judicial review, have imposed their own additional classification criteria so as to significantly reduce the economic utility of electronically-aided Class II games to tribal gaming operations. In addition, and with particular reference to California, the unilateral imposition of these limiting criteria have resulted in conflicts between tribes and states concerning tribal compliance with the terms of Class III gaming compacts.

Although tribal gaming agencies retain the authority to determine what is a permissible electronic, computer or other technologic aid to a Class II game and what is a Class III gaming device, state gaming agencies often look to the NIGC as the ultimate authority on this issue. In particular, the State of California has on several occasions cited a letter from a former NIGC Chairman as authority for the contention that particular equipment that a tribal gaming agency had classified as a permissible electronic, computer or other technologic aid to a Class II bingo game actually constituted a Class III gaming device, operation of which allegedly violated a tribe's compact.

Therefore, the undersigned recommends that the NIGC add the following subsection (d) to its existing definition as the four factors that, if satisfied, will conclusively determine that equipment is a permissible electronic, computer or other technologic aid to a Class II bingo game:

(1) The electronic player interface receives game determinations from the server to which it is attached;

(2) A minimum of two players must be present to initiate a game;

(3) The math of the game is derived from a bingo ball drop;

(4) If the electronic player interface is disconnected from the server, the game cannot be played.

Adding those factors would ensure that electronic, computer or other technologic aids would be properly classified in a manner that is consistent with IGRA and controlling case law, and would enable tribal gaming agencies to make their classification decisions without having to worry about being second-guessed by the NIGC, or putting their tribal governments at risk of being accused by states of violating the terms of compacts.

Because this issue currently is the subject of a number of tribal-state disputes in California and elsewhere, the undersigned recommends that the NIGC assign a high priority to this issue.

Sec. 543.6(b), Charitable Gaming Operations.

25 U.S.C. Sec. 2710(b)(4) provides in relevant part that a tribe may license or regulate,

... class II gaming activities owned by any person or entity other than the Indian tribe and conducted on Indian lands, only if the tribal licensing requirements include the requirements described in the subclauses of subparagraph (B)(i) and are at least as restrictive as those established by State law governing similar gaming within the jurisdiction of the State within which such Indian lands are located. No person or entity, other than the Indian tribe, shall be eligible to receive a tribal license to own a class II gaming activity conducted on Indian lands within the jurisdiction of the Indian tribe if such person or entity would not be eligible to receive a State license to conduct the same activity within the jurisdiction of the State.

(B) (i) The provisions of subparagraph (A) of this paragraph and the provisions of subparagraphs (A) and (B) of paragraph (2) shall not bar the continued operation of an individually owned class II gaming operation that was operating on September 1, 1986, if—

(I) such gaming operation is licensed and regulated by an Indian tribe pursuant to an ordinance reviewed and approved by the Commission in accordance with section 13 of the Act,

(II) income to the Indian tribe from such gaming is used only for the purposes described in paragraph (2)(B) of this subsection,

(III) not less than 60 percent of the net revenues is income to the Indian tribe, and

(IV) the owner of such gaming operation pays an appropriate assessment to the National Indian Gaming Commission under section 18(a)(1) for regulation of such gaming.

A number of tribes in California and elsewhere desire to support charitable or other non-profit organizations licensed under state law to conduct bingo games for charitable purposes to operate bingo games on their Indian lands. However, requiring such organizations to pay at least 60% of their net revenues over to the tribe exercising jurisdiction over the lands on which the games would be played not only would deprive the organizations of much of the economic benefit of the games, but also may require the organizations to violate the state laws applicable to such organizations (for example, California law prohibits a charity operating a bingo game from paying more than 20% of its net revenues as overhead).

Section 543.6(b) of the NIGC's regulations permits the exemption of charitable gaming operations from the application of the NIGC's Minimum Internal Control Standards if certain conditions are satisfied. One of those conditions is that the annual gross gaming revenue cannot exceed $2 Million.

In a state where compacts have conferred upon the state jurisdiction to enforce the state's gambling laws against gambling activities conducted by persons or entities other than the tribe itself, and assuming that a tribal government desires to authorize a charitable or other non-profit organization to operate bingo games on tribal lands in strict accordance with state law (and subject to state regulation), tribal sovereignty and self-determination, the principles underpinning IGRA, would be advanced by the NIGC's adoption of a regulation specifically allowing tribal governments to permit the operation of bingo games by charitable or other non-profit organizations eligible and licensed under state law and regulated by state licensing authorities.

Part 514, Late Payment System in Lieu of NOV for late submission of fees.

The undersigned supports the creation of a late payment system in lieu of issuing NOVs for late submission of fees due to inadvertence, excusable neglect or circumstances beyond a tribe's control.

Part 518, Self-Regulation of Class II Gaming.

The undersigned understands the need for the NIGC to be satisfied that an applicant for a certificate of self-regulation has demonstrated the capacity to implement effective self-regulation. However, the existing regulation unnecessarily intrudes into areas of tribal government outside the area of gaming regulation, and to that extent should be revised to limit the NIGC's inquiry into the tribe's self-regulatory capacity, rather than into other areas of tribal governance. A Tribal Advisory Committee would be of assistance to the NIGC in revising this regulation.

Part 523, Review and Approval of Existing Ordinances or Resolutions.

This Part should be deleted as obsolete. Given its irrelevance, it should not be given high priority.

Part 531, Collateral Agreements.

Because collateral agreements often are integral to the relationship created by a management agreement, the Commission should consider whether it has the authority not only to require the submission of collateral agreements, but also to approve them. So doing would greatly reduce the risks to both tribes and would-be management contractors, thus reducing tribal vulnerability to overreaching by developers and financiers.

The undersigned regards this issue as one of fairly high (but not necessarily the highest) priority, and recommends formation of a Tribal Advisory Committee to assist the Commission in its analysis.

Part 533, Approval of Management Contracts.

The NIGC's proposed revisions to this Part may prove useful, but the undersigned does not regard them as warranting high priority or the convening of a Tribal Advisory Committee.

Part 542, Class III MICS.

The undersigned recommends retention of the NIGC's existing Class III MICS as a regulation. If so retained, the NIGC's MICS not only would continue to set a clear industry-wide standard, but also would set a clear standard for compact compliance, particularly in circumstances under which states have agreed to accept the NIGC's MICS and MICS compliance audits in lieu of state-imposed MICS or compliance audits. Revisions to the NIGC's MICS

should be undertaken through a legitimately-constituted Tribal Advisory Committee, selected by tribes on a statewide basis with representation on the TAC to be apportioned in accordance with the number of tribal Class III gaming operations in each state. This is a high-priority issue.

Part 543, Class II MICS.

Tribal Gaming Agencies should be given the opportunity to provide comment on the NIGC's proposed revisions to its existing Class II MICS in advance of public meetings. Input from accounting practitioners can be provided through TGAs. A legitimately constituted TAC, with representation proportionate to the number of Class II gaming operations or activities in each state, would be of assistance to the NIGC in the ongoing administration of the regulation.

Part 556, Backgrounds and Licensing.

The undersigned supports promulgation of a regulation formalizing the pilot NOR program as a matter of moderate priority, through standard notice and comment rulemaking. The undersigned also supports promulgation of a regulation, through standard notice and comment rulemaking, allowing tribes, at their option, to submit fingerprint cards for vendors, consultants and other non-employees having access to the gaming operation.

Part 573, Enforcement.

The undersigned supports promulgation of a regulation that would permit the withdrawal of a NOV after issuance, either at the discretion of the Chairman or by a vote of a majority of the Commissioners.

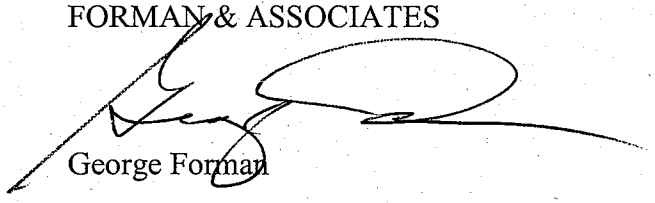
Sole Proprietary Interest Regulation.

Adoption of a regulation that clearly defines the standards for determining whether an agreement violates IGRA's requirement that a tribe have the sole proprietary interest in its gaming operation, and establishing a process by which a definitive determination on this question can be obtained quickly, would be very helpful in the negotiation of management, consulting, development and financing agreements. This is an issue of high priority that can be accomplished through standard notice and comment rulemaking.

The undersigned appreciates the opportunity to offer these comments, and looks forward to working with the NIGC as it proceeds with its comprehensive regulatory review.

Very truly yours,

FORMAN & ASSOCIATES



George Forman