

To: National Indian Gaming Commission

From: CAPT (Ret,) Sam Horton MD, Chairman Fort Sill Apache Gaming Commission

Steve York, Fort Sill Apache Gaming Commission

Rick Grellner Esquire, Fort Sill Apache Tribe

Date: February 11, 2011

Re: **FINAL COMMENTS** - Framework for evaluating the NIGC Notice of Inquiry and Request for Information

<u>NIGC Regulation</u>	<u>Title</u>	<u>Comment</u>
502.15	Management Contract This is NOT a priority item.	(1) Should the definition be expanded to include any contract that pays a fee based on a percentage of gaming revenue? a. NO. This would be an improper and unauthorized expansion of the NIGC's approval powers. Further, fees paid, as a percentage of gaming revenue does not by itself constitute a management contract. The NIGC should follow IGRA in all its considerations. Since the NIGC approves management agreements below, equal, to and above and above 30% of net revenue (up to 40% of investment depending on investment) for a period of between zero and seven years, respectively, without said amount violating the "sole proprietary interest" requirement in IGRA, the fact a contract is merely a percentage contract does not necessarily violate the sole proprietary interest provisions of IGRA. However, if a contract has a term that is based on a specific period of time and is not an "at will" contract (authorization terminable upon demand), then the fact that the net revenue amounts exceed 30%, makes the agreement a violation of the sole proprietary interest in IGRA. This is true because IGRA, by implication, does not authorize contracts above such amounts. Therefore, any contract that is time based that exceeds 30% of net revenue, or 40% of net revenue in the case of a large investment, and five to seven years, respectively, even though it may not meet the definition of a management agreement, violates sole proprietary interest. (2) Should the calculation include reimbursement of expenses and development and other nongaming management fees – "acceptable compensation"? a. NO. This proposal makes no sense because the reimbursement of expenses would not qualify as compensation under GAAP and general business principles. The jurisdiction of the NIGC to approve agreements does not extend to agreements that are not collateral to a management contract. To do so would represent to me that the NIGC was not following the directions provided in IGRA.

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		(3) Having raised this particular area for possible regulatory action, if the NIGC decides to proceed or otherwise set this aside, a clear statement as to the reasons for such decision is advisable. (4) The NIGC needs to make a statement on how Gaming Tribes will benefit from this.
502.16	Net Revenues This is NOT a priority item.	(1) Should the definition of “Net Revenues” be revised to be consistent with GAAP? a. While it might be good practice to the extent consistent with §2703 (9) to conform calculations to GAAP, the statute defines Net Revenue and <u>the NIGC does not have authority to change the definition.</u> b. The NIGC needs to explain to Tribes how this benefits Tribes as change is not disclosed besides reflecting GAAP. (2) Should there be a separate definition for “allowable uses”? a. <u>There is no statutory authority to expand the definitions under IGRA. The NIGC should not be able to arbitrarily create a new definition.</u> b. The existing Bulletin (05-1) defining Net Revenue should be withdrawn because it is overreaching and outside the authority of the NIGC. (3) The NIGC owes the Tribes a clear reason(s)/explanation for why such a decision is advisable or needed to maintain continuity for the Tribes.
514	Fees -- Priority for late payment procedure system This is NOT a priority item.	(1) Fiscal vs. Calendar year for fee calculation? a. Tribes should be allowed to elect either method. Fiscal year calculations should accommodate Tribal business practices. b. IGRA outlines the collection of fees quarterly and allows Tribes freedom to adopt system that fits their need. (2) Implementation timeframes? a. The current NIGC regulations clearly explains how to calculate fees, as fees are based on last year revenues, it is based off IGRA on a quarterly basis which covers both fiscal and calendar year. (3) Should the definition of “Gross Gaming Revenues” be revised to be consistent with GAAP? a. The statute defines Gross Revenue and the NIGC does not have authority to

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		change the definition. b. Prior to NIGC, all tribes were covered by A-133 that does not have GAAP requirements. IGRA allowed for Tribes to following normal accounting used by Tribes. (4) Fingerprint fees? a. This is a useful service provided to the Tribes. The NIGC should allow Tribes, if their NIGC approved Ordinance requires the Tribal Gaming Authority to do background checks via fingerprinting on vendor representatives and their primary management officials. A primary IGRA function is to keep corruption out of gaming. b. IGRA requires a law enforcement agency to run background checks, the NIGC currently uses FBI to fulfill the law. If FBI has concerns about meeting their mission as members of working group they should consult with both the NIGC and the Tribes. The NIGC should take a lead in this effort. c. There is no need to do this by regulation; rather a Bulletin that sets out the process, procedures, and fees is all that is needed. The Bulletin can be updated and revised as needed. (5) Late payment system vs. NOV? a. A late payment system is preferable over the current practice of issuing an NOV. The NOV should be retained as a final action if necessary. The late payment system should include a grace period before assessing late penalties etc. A revised regulation must clearly state with supporting guidance given via Bulletins. b. This area is of great interest to Tribes. A late payment system that is comprehensive and clear with due process protection would be a great step forward in the relationship the NIGC has with Tribes. c. IGRA allows Chairman the flexibility to do what is best for NIGC and Tribes. All the Tribes are asking for is fairness in its dealings with the NIGC. d. The NIGC should allow and make possible Electronic Transfer for payment of

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		fees. The Mineral Management Service(MMS) in the DOI allows all royalties under its systems. The fees paid by Tribes at best are a royalty. This is a win-win situation for both the NIGC and the Tribes as the funds would be automatically transferred and be available vs. being lost in the mail or mishandled on either end and resulting in unnecessary fines or posturing.
518	Self Regulation of Class II <u>THIS IS A PRIORITY ITEM.</u>	(1) How can this section be made to be less burdensome to comply with and should it be revised? a. The NIGC should revise these regulations so as to make certain the steps to Self Regulation as clear as possible and not punitive in nature. The current §518 is not consistent with the Statute §2710(c)(4). b. The factors should be those contained in §2710(c)(4) and be weighted to take into consideration years of operating with integrity, honesty, and the implementation of a comprehensive Tribal regulatory group. The independent audit conducted by the Tribes CPA should serve as the basis for the accounting/process review and determination of financial soundness. Self-regulation is a hallmark of sovereignty and ought to be supported and encouraged by this §518 not suppressed. c. It is suggested that the NIGC adopt a negotiated rule making process for amending these provisions so as to give Tribes a full voice and to create a transparent process and record. d. Having raised this particular area for possible regulatory action, if the NIGC decides to proceed or otherwise set this aside, a clear statement as to the reasons for such decision is advisable and needed to maintain continuity for Tribes. e. IGRA needs to be followed as to the fees(25% of 1%) being collected from Self-Regulation. Current regulations at time do not met requirements of IGRA.
519	Service	See §539 below

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523	Review and Approval of Existing Ordinances or Resolutions This is NOT a priority item.	(1) Should this section be eliminated because it only applied to ordinances enacted prior to January 1993? a. No, IGRA requires the Chairman of the NIGC to approve or disapprove ordinances. I do not think the date of 1993 makes an ordinance less effective. As the Tribes are the Primary Regulators and have to follow all laws and regulations, so must then the NIGC follow IGRA.
524	Appeals	See §539 below
531	Collateral Agreements This is NOT a priority item.	(1) Should the NIGC consider whether or not it has the power to approve collateral agreements to determine if the cumulative effect of such agreements violates the sole proprietary provisions of IGRA? a. Yes. In order to determine if a set of agreements violate sole proprietary interest test as outlined in 502.15 (i.e. any time based set of agreements exceeding 30% and 40% of net revenue, and five to seven years, respectively) such agreement(s) need to be required to be submitted so that the NIGC can review. The NIGC currently has the authority to require submission and review of all documents that are collateral agreements to a Management Contract. It is unlikely that a regulatory definition will anticipate all of the possible circumstances and conditions under which future management contracts might be negotiated. It may be a better practice to eliminate or revise current bulletins dealing with topic taking into account the effect of the submissions already acted upon by the NIGC and the practice and body of law that has developed as a result. (2) Sole Proprietary Interest has historically been a lightning rod for both Tribes and non-tribal interests when attempting to form business relationships. The Ad Hoc nature of the historical NIGC approach has not brought clarity, thus leaving the field open and subject to uncertainty. The most visible result to date is the decision and fallout from the Lac du Flambeau case. a. The NIGC has taken on a burden since this case of issuing declination letters specific to each set of agreements presented. Unfortunately, these decisions

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		are not available to the public, so guidance is again lacking and the void continues. b. Having a definition would in some ways help the market place, but also runs the risk of shutting the door on many business deals that, given specific risks and other business factors, will likely not fit into the definition or exceptions. A regulation by its nature must be definite, even with exceptions, and as such cannot take into account the limitless permutations business risk and reward can come up with. Therefore, the desire for a definition comes with a cost, one that Tribes and the market likely will not find acceptable. If a new definition was to be designed, the NIGC is not the correct venue in which to develop it. c. Given the above the following suggestions may form the basis for a solution that will address both long and short term needs: i. Make all declination, rejection, or approval letters available to the public (with appropriate redactions). ii. Make all declination, rejection, or approval letters final Agency Action so that the parties have recourse and so that a body of jurisprudence may develop. iii. Perhaps limiting the review and potential regulation to a definition of “Primary Beneficiary” would be helpful and give enough guidance for the development of a jurisprudential approach. It would also necessarily involve a statement on the limits of “revenue sharing” in light of the Rincon Case and the decision by DOI disapproving the Habematolel Pomo of Upper Lake compact. iv. Begin a process of comprehensive review of the topic, conducted in conjunction with Tribes. The review would take into account Tribal experience, experts in the evaluation of risk/reward and economics, business experience, and the NIGC history of advisory opinions, among other factors. The goal should be to develop guidelines to be

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		published in a Bulletin. d. One more observation - the development of strict criteria for sole proprietary interests published, as a regulation would be a continuation of the paternalistic policies of the federal government toward Tribes. Regardless, if the NIGC wants to pursue this it must be done in conjunction with Tribes. e. IGRA makes it clear on priority interest and sets 70-30 or 60-40 in two sections of IGRA. One deals with Management agreements and other with individual run operations. The Creek Court took up issue between Tribe and Communities in 2009 and the court held firm to IGRA.
533	Approval of Management Contracts This is NOT a priority item.	(1) Should this section add standards for the trustee standard as a basis for disapproving management contracts? a. The trustee standard within the federal government has proven to be at best a moving standard cloaked in the sole discretion of the delegated administrator. At worst, the trustee standard has been used as a shield for misuse, misappropriation, misanthropy, and out and out thievery toward Tribes. As such, any attempts to codify this standard are fraught with dangers and may be viewed through a less than welcome perspective. b. If the desire to give notice to Tribes and the market that a trustee standard will henceforth be an additional factor in the approval of a management contract, it would be preferable to do so by issuing a Bulletin. i. Set forth factors that make up the trustee standard for the NIGC Chairman. ii. Give examples of how these factors may be applied iii. This is necessary for Tribes and business to apply the standard to future transactions. c. This would be a continuation of the paternalistic policies of the federal government toward Tribes (2) Suggest that two(2) grounds for disapproval be added – (a) not submitted in accordance with the requirements of §533 and (b) submission does not contain

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		requirements of §531. a. If the submission does not fully meet the requirements of §533 or §531 then it should be held and no work be done for a specified period of time, with notice to the submitting parties. If the time period expires with no action by the submitter's then disapproval can be the result. b. This should be clarified via a Bulletin. c. IGRA sets forth your standard as Trustee, as it sets the Standard at 70-30 or 60-40% for five or seven years, respectively or any subset thereof, if contracts meet definition and Tribes and parties agree, NIGC can offer suggestions but cannot refuse approval, if standards meet and are agreed to.
537	Background Investigations for Persons or Entities with a Financial Interest in, or having Management Responsibility for, a Management Contract This is NOT a priority item.	(1) Should changes be made to clarify the submission requirements for Class II and Class III background investigations? a. Yes. b. Any changes to §537 it should be to make definitions and disclosures as consistent with other agency's rules as possible. For example, the SEC and other financial regulatory agencies have disclosure thresholds and requirements; NIGC should to the extent possible and consistent with IGRA mirror those other agency requirements.
539	Appeals This is NOT a priority item.	(1) Should the NIGC consider more comprehensive and detailed procedural rules addressing (a) service of process and computation of time - §519; (b) intervention by 3rd parties; (c) motion practice and briefings; and (d) the nature of written submission in enforcement appeals. a. Yes. It would be good practice to formally adopt procedural rules. The underlying principle should be the guarantee of due process. The NIGC should adopt process and procedures that require it to conduct regular periodic meetings where a record is made and final agency action is taken. b. The NIGC should also adopt rules and procedures that require a written record be maintained of all meetings and available to the affected parties. This record would also be available for formal proceeding and litigation.

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542	Class III MICS <u>THIS IS A PRIORITY ITEM.</u>	(1) Should this section be struck and replaced with recommended guidelines? a. There is a diversity of opinion on this issue. Some Tribal-state compacts make reference to §542 and as such are part of regulatory framework approved in the compact. This is where the argument has most strongly been made that §542 must be updated. b. There is a view that §542 can be updated by: i. Stating clearly that the provisions are advisory only but those specific Tribes may choose to adopt the regulations along with NIGC oversight by written agreement. This would require continual updating and revision of §542 with a time frame of every 3 to 5 years. ii. Another view is that §542 state the above with the addition that the provisions will be issued as guidelines in a Bulletin. The Bulletin will be regularly updated based on input from Tribes and other affected parties.(Tribes adopt standards consistent with IGRA.) A Bulletin vs the issuance of regulation would allow much more ease in changing advisory information in a world that can alter itself virtually overnight. iii. Yet a third view that §542 and its future amendments should be issued pursuant to DOI regulations as part of the compact approval process wherein the states and the tribes are allowed to either opt in or opt out of the regulations as additions to the compact upon completion and submission of the negotiation process. (2) What are the implications? a. This process envisioned in (1)(b)(ii) above would more closely resemble the way that Nevada works with the industry to keep rules current and relevant. b. Standards could be submitted to the Tribal Gaming Regulatory Authority that meet the needs of State Compacts and Industry Standards.

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543	Class II MICS <u>THIS IS A PRIORITY ITEM.</u>	(1) Should these regulations be reviewed and revised and how? a. Yes. b. A first step in the process should be to withdraw the current §543 regulations and/or suspend any enforcement of the regulations. The current §543 is in need of total replacement. c. Tribes, as Primary Regulators, should develop Tribal Internal Controls which would cover all aspects of gaming to protect the Tribal assets. This could be done utilizing the NIGC MICS Standards as a guide. As Class II is an important asset to all tribes and we know what areas require we should submit suggestions that best reflect that duty. There are areas yet uncovered by the NIGC MICS some items such a Security. The current NIGC MICS and check lists are currently used more as a punitive device than advisory one. The NIGC product should be more proactive – a guide for the tribes to use. (2) What is the appropriate starting point for this review (which document/draft should be used)? a. The Tribal Gaming Working Group has identified the last published NIGC draft used by the last Tribal Advisory Committee as the starting point. b. A broad approach to IGRA and a standard can be used to fulfill this requirement. The NIGC needs to look to primary regulators for guidance as they fulfill their role daily.
547	Class II MTS for Gaming Equipment <u>THIS IS A PRIORITY ITEM.</u>	(1) Should these regulations be revised and if so, what process should be used? a. Yes b. The current §547 is in need of revisions and clarifications. c. Tribes have formed a working group that is preparing a revised §547 to be adopted by Tribes and to be recommended to the NIGC. d. Tribes are writing Class II standards that fulfill Class II in all aspects. The NIGC should look at this concept.

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556	Background Investigations for Licensing This is NOT a priority item.	(1) Should the pilot program for submission and processing of fingerprints through the NIGC be formalized with regulations? a. Yes and No b. The pilot program has been a success in Tribal and NIGC cooperation. It is also a necessary and vital enforcement tool used by Tribal Gaming Regulators. c. The NIGC continued facilitation of fingerprinting resources of the FBI is vital and should be made a part of the regulatory framework of the NIGC.
New	Fingerprinting for non-Primary Management Officials or Key Employees This is NOT a priority item.	(1) Should the fingerprinting process be expanded to include vendors, consultants, and other non-employees that have access to the gaming operations? a. Yes, if requested by Tribes. This cannot be a mandate from the NIGC; Tribes must request such fingerprint requests on a case-by-case basis and be consistent with Tribal regulations or ordinances. b. This will require close cooperation between the NIGC and Tribes in order to be certain the procedural requirements of the FBI are adhered to as well as the NIGC and Tribal regulations. c. If the NIGC has approved a Tribal Gaming ordinance that requires background checks on specified individuals and the Tribes have paid the NIGC for the service then the NIGC should honor the request. If the FBI has an issue with this then the NIGC should aid in the clarification of the issue with the FBI.
559	Facility License Notifications, Renewals, and Submissions This is NOT a priority item.	(1) Should the section be revised and if so, what process should be utilized? a. Yes. b. There is a view that the current §559 is outside the authority of the NIGC and has great potential to create another CRIT like situation if and when enforcement actions are taken. c. It is the view of some that §559 should be withdrawn and/or enforcement suspended until such time as substantial revisions or replacement can be agreed upon with Tribes. d. Any revisions or replacement should not required elected governments to take any actions, etc. A comprehensive review and rewrite is required so as to

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		address the limits of the NIGC's authority to order Tribal governments to act. e. It would be preferable, after review, that the regulation be substantially revised and the issuance of a series of Bulletins to cover best practices would result. f. Having raised this particular area for possible regulatory action, if the NIGC decides to proceed or otherwise set this aside, a clear statement as to the reasons for such decision is advisable and needed to maintain continuity for Tribes.
571	Inspection and Access This is NOT a priority item.	(1) Should this section be revised to clarify access to papers, books, and records, including at sites maintained or owned by 3rd parties? a. Yes. The CRIT case has established some limits that must be recognized. b. Other types of enforcement actions and requests for information under for example, §2715 require a clear set of criteria and procedural rules so as to protect Due Process. c. IGRA allows for Chairman to subpoena any information he needs to make decision.
573	Enforcement This is NOT a priority item.	(1) Should there be a process for withdrawing a NOV after issuance? a. Yes b. It is the view of some that the Chairman possesses the power under the various provisions of IGRA that authorize the issuance of an NOV. If the Chairman has the discretion to authorize, then it follows that the Chairman may withdrawal using that same discretion. This would be analogous to the power to enter into a settlement agreement. (2) Under what conditions and circumstances is it appropriate to withdraw an NOV? a. This would be at the discretion of the Chairman. b. Prior to a hearing before full Commission. c. After full commission meets and does not reach same conclusion as Chairman.

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New	Tribal Advisory Committee This is NOT a priority item	(1) When should a Tribal Advisory Committee (TAC) be formed? a. When requested by Tribes and when the Chair needs comprehensive advice on a given topic. (2) Should a regulation be adopted or a policy statement made? a. Policy statement along with plans for complying or exempting from FACA. (3) Is financial cost a relevant factor in determining whether or not to form a TAC? a. Yes, but a minor factor (4) The Executive Order – Improving Regulations and Regulatory Review – issued on January 18th and the Presidential Memoranda issued on the same topic on the same day should be used in the development of any policy relating to TAC formation and utilization.
New	Sole Proprietary Interest This is NOT a priority item	a. See comments above. b. IGRA has established the interest as 70-30 and 60-40% for a time based agreement that is between five and seven years respectively. No other Standard exists.
New	Communication policy or regulation indentifying when and how the NIGC communicates with Tribes This is NOT a priority item	(1) Should there be a regulation that sets a process for determining how and with whom the NIGC communicates at a Tribe? a. After extensive consultation with Tribes, the NIGC should use policy statements and Bulletins b. It is likely that there will not be a one fits all answer. Tribes and Tribal governance process are varied based on culture and practical considerations. The NIGC must be prepared to adapt to Tribes not vice versa. The NIGC is funded by the Tribes to help the Tribes. (2) What types of communication, and what protocols should be included? a. Decide after consultation with the Tribes (3) If so, what process should be used? a. Decide after consultation with the Tribes

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New	Buy Indian Act This is NOT a priority item	(1) Should the NIGC adopt a “Buy Indian” regulation consistent with 25 U.S.C. 47? a. Yes – simple and straightforward b. The Act was passed in 1910, and sister agencies(i.e. BIA, IHS, etc) have overlooked it until 2010. I suggest the NIGC follow the three criteria(at least 51% American Indian owned, American Indians involved in the daily management of the business and that American Indians are the recipients of the majority of the funds accrued earnings) that is the basis of the Act.