



Ho-Chunk Nation Gaming Commission

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February 11, 2011

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

Via Email to: reg.review@nigc.gov

Re: Notice of Inquiry and Request for Information on regulations to implement the IGRA

Dear Chairwoman Stevens:

On behalf of the Ho-Chunk Nation ("Nation"), the Ho-Chunk Nation Gaming Commission ("Commission") is submitting the following comments in response to the Notice of Inquiry published in the Federal Register on November 18, 2010 as 75 Fed. Reg. 70680. We understand that the National Indian Gaming Commission's ("NIGC") Notice of Inquiry seeks comments and information that will assist the NIGC in understanding the need to revise any or all of the regulations within the jurisdiction of the NIGC and which implement the Indian Gaming Regulatory Act ("IGRA").

Consistent with the format of the NIGC's Notice of Inquiry, the Commission offers the following comments:

Regulations Which May Require Amendment or Revision

A. 25 CFR Part 502 – Definitions of this Chapter

(1) Net Revenues

The Nation reiterates its prior assertion that the NIGC should identify difficulties associated with the current definition, as well as tangible benefits that would be derived from implementing a bifurcated definition tailored to "management fees" or "allowable uses." Moreover, any definition should be careful not to borrow from commonly used terminology that states or corporate participants in the gaming industry use, as opposed to tribes – for the restrictions on the uses of net revenues are unique to tribes.

In addition, to the extent the NIGC seeks to define by regulation a term that is already defined by statute, in 25 U.S.C. §2703(9), there is a risk of overstepping the NIGC's authority. Perhaps tribes have expressed a need for clarification and the sort of direction that a refined definition may provide. But a regulation that attempts to define the appropriate uses of net revenues may, in fact, go beyond the scope of what the IGRA provides at §2710(b)(2)(B). Accordingly, the Ho-Chunk Nation Gaming Commission does not offer specific comment on the "management fees" or "allowable uses" aspect of this proposal.

In terms of priority, this is low on the list for the Ho-Chunk Nation. But it will rise up the list of the NIGC takes steps to define "net revenues" in a way that limits tribes' allowable uses.

(2) Management Contract

Here, the NIGC appears to suggest a broadening of the definition of “management contract” under the IGRA. Of course, if this definition expands, then so too does the category of such tribal agreements that the NIGC gains authority over which to approve. This appears to increase the degree and extent of NIGC regulation over tribal contracting and business decisions. Certainly, the NIGC is placed in the position of a “trustee” when it comes to reviewing such contracts for tribes (see 25 U.S.C. §2711(e)(4)); but expanding the scope of the NIGC’s jurisdiction in this area may run contrary to the spirit of the IGRA – to promote “tribal economic development, self-sufficiency, and strong tribal governments.” See 25 U.S.C. §2702(1).

This is not a high priority matter for the Ho-Chunk Nation, in terms of necessary change.

B. 25 CFR Part 514 – Fees

The NIGC’s imposition of a fee should acknowledge the various ways in which tribal business operations and budget cycles are established. For purposes of the Ho-Chunk Nation’s interests, an annual fee that was consistent our fiscal year would be acceptable (June to July of each year). However, whatever proposal the NIGC implements should provide tribes maximum flexibility and advance notice of any effective date, in order to accommodate tribal practices.

The highest priority aspect of this category is the need to move away from the NIGC’s current practice of issuing a Notice of Violation (NOV) to tribes. The NIGC should provide some form of warning or advance notice prior to the imposition of any fine or penalty.

C. 25 CFR Part 518 – Self Regulation of Class II

This regulation should certainly be revised. It is burdensome, as the NIGC suggests in its Notice of Inquiry. Moreover, it is inconsistent with the IGRA. Section 2706(b)(1)-(4) of the IGRA describes the power and authority of the NIGC with respect to tribal Class II gaming. Tribes are the primary regulators of Class II. However, the Part 518 regulations go beyond these limitations. As such, they should be revised through notice and comment opportunity.

D. 25 CFR Part 523 – Review and Approval of Existing Ordinances or Resolutions

Not a high priority item for the Ho-Chunk Nation, but if there is no need for this regulation, then it should be eliminated.

G. MICS & Technical Standards

(1) Part 542 – Class III Minimum Internal Control Standards (“MICS”)

As the NIGC is well aware, a U.S. District Court held that the Class III minimum internal control standards are beyond the statutory authority of the Commission. That decision was upheld on appeal on October 20, 2006 by the U.S. Court of Appeals for the District of Columbia. The Court of Appeals found that Congress has never amended the IGRA to confer express power on the Commission to regulate Class III gaming. See *Colorado River Indian Tribes v. National Indian Gaming Comm.*, 2006 WL 2987912 at *3 (C.A. D.C., 2006).

Regardless of the CRIT ruling, the Ho-Chunk Nation has operated with Class III MICS for several years. The Nation’s Gaming Commission has adopted tribal Class III MICS that are just as stringent as the NIGC Class III MICS. The Ho-Chunk Nation operates Class III gaming pursuant to its gaming compact with the State of Wisconsin, which refers to NIGC Class III MICS. However, it states that the tribe follow all areas subject to the MICS established by the NIGC. In light of the CRIT ruling, the NIGC’s Class III MICS arguably do not apply in the Ho-Chunk Nation’s situation.

Regardless, the Nation realizes the importance of MICS and how critical they are to protect tribal

gaming revenues, to ensure that gaming is conducted fairly and honestly, and that tribes are the primary beneficiaries of the operations. Also, the Nation's Commission appreciates that tribal circumstances differ in various states.

The Nation would consider this a higher priority item for the NIGC to address. Perhaps a National Tribal Advisory Committee or Regional Tribal Advisory Committees should be gathered in order to advise the NIGC and provide recommendations, while the NIGC stays any enforcement of the Class III MICS.

(2) Part 543 – Class II Minimum Internal Control Standards

The current Class II MICS in Part 543 should be revised. The NIGC should withdraw the current regulations and establish national or regional tribal advisory committees and/or work with the Tribal Gaming Working Group on revising such standards.

The Ho-Chunk Nation has established its own Class II MICS, which is consistent with the manner in which tribes are meant to be the primary regulators of Class II gaming under IGRA. For example, the NIGC was given certain powers related to Class II gaming, such as reviewing and approving management contracts, review of background investigations of certain gaming employees and management entities, establishing fees, issuing notices of violation and assessing civil fines, and granting certificates of self-regulation. The NIGC is also given the authority to “monitor class II gaming conducted on Indians lands.” See 25 U.S.C. 2706(b)(1). Coupled with the NIGC's authority to monitor is the NIGC's authority, under 25 U.S.C. 2706(b)(10), to “promulgate such regulations and guidelines as it deems appropriate to implement the provisions of the [IGRA].”

It can be said that the NIGC has some regulatory role with respect to Class II gaming, but the legislative history of the IGRA makes clear that this role does not extend to developing and imposing detailed regulations for Indian gaming in place of tribal government decisions on necessary regulations. If the NIGC is asserting regulatory jurisdiction with the proposed regulations under the authority of §2706(b)(10), any such regulations cannot go beyond monitoring. Instead, the NIGC's role is limited to overseeing the tribes' own regulatory efforts and approving Class II tribal gaming ordinances.

Other than debates in the U.S. Senate and House, Senate Report 555 is the only formal legislative history on IGRA. Very early in S. 555, the primacy of the tribal role in Class II gaming is stated: “S. 555 recognizes the *primary tribal jurisdiction* over bingo and card parlor operations although *oversight* and certain other powers are vested in a federally established National Indian Gaming Commission.” Senate Report at 3. The language here sets out clearly the congressional intent that tribes would retain their inherent rights to regulate Class II gaming. The Commission's role was to be primarily one of oversight to see that the tribe implemented the minimum Federal standards set out in its gaming ordinance under § 2710(b)(2). The Commission was given certain other powers in relation to Class II gaming, such as management contract review and approval, establishment of fees and assessment of fines, and granting certificates of self-regulation. Yet, Congress drew a line and emphasized the primary role for tribes: “Class II continues to be within tribal jurisdiction but will be subject to oversight regulation by the National Indian Gaming Commission.” Senate report at 7. Viewed in this light, the NIGC should bear in mind that any proposed regulations should not intrude upon tribal sovereignty by usurping the role of tribal governments as the primary regulators of tribal gaming under the IGRA (25 U.S.C. 2710(b)(1)).

Statements by congressional leaders at the time of IGRA's enactment also confirm the intention that tribes retained the sovereign right to regulate Class II gaming. Senate Indian Affairs Committee Chairman Inouye, who managed the bill on the Senate floor, clarified the congressional intent with respect to the NIGC's limited regulatory role. He stated: “[T]he committee has attempted to balance the need for sound enforcement of gaming laws and regulations, with the strong Federal interest in preserving the *sovereign rights of tribal governments to regulate* activities and enforce laws on Indian lands.” Congressional Record, September 15, 1988, p. S24022. (emphasis supplied.)

The Vice-Chairman of the Indian Affairs Committee, Senator Daniel Evans, also evidenced his

understanding of the limited scope of the NIGC's role. In discussing the amendment to the Federal criminal code made by Section 23 of S. 555, he noted

It is my understanding that this language (Section 23 of the IGRA) would, for purposes of Federal law, make applicable to Indian Country all State laws pertaining to licensing, regulation, or prohibition of gambling *except class I and II gambling which will be regulated by a tribe* and class III gambling which will be regulated by a tribal-state compact.

Congressional Record, September 15, 1988, p. S 24025.

Before enactment of the IGRA, no agency of the federal government had clear statutory power to impose its regulations on conduct of otherwise legal gaming activities by Indian tribes in Indian country. Rather, tribal governments retained this inherent sovereign right. If IGRA had conferred that authority on the NIGC, it would have abrogated that right. However, Congress made clear its understanding that tribal rights not expressly abrogated were not intended to be affected by the legislation. As Senator Evans said, "If tribal rights are not explicitly abrogated in the language of this bill, no such restriction should be construed" and "this law should be considered within the line of developed case law extending over a century and a half by the Supreme Court, including the basic principles set forth in the *Cabazon* decision." Congressional Record, September 15, 1988, p. S24027. Indeed, Chairman Udall repeated the same understanding when he said:

Mr. Speaker, while this legislation does impose new restrictions on tribes and their members, it is legislation enacted basically for their benefit. I would expect that the Federal courts, in any litigation arising out of this legislation, would apply the time-honored rule of construction that ambiguities in legislation enacted for the benefit of Indians will be construed in their favor.

Congressional Record, September 26, 1988, p. H 25377.

(3) Part 547 – Minimum Technical Standards for Gaming Equipment Used with the Play of Class II Games

The Ho-Chunk Nation previously commented on the NIGC's proposed Technical Standards for Class II gaming set forth in Part 547. To provide context, the Nation resubmits those comments herewith (and to the extent aspects of Part 547 were adopted at the objection of the Nation, the tribe re-asserts its position):

Section 547.4 -- How do I comply with this part?

The NIGC sought to improperly add a new requirement that the testing laboratory test to new minimum probability standards of Proposed 547.5(c), which as discussed below, the Nation asserted they were either not necessary or feasible. Accordingly, the Nation did not support this new requirement.

The NIGC had also improperly added a new requirement not in the Tribal Advisory Committees' draft that the testing laboratory must test to "applicable provisions of Commission regulations governing the classification of games... ." To the extent this provision referred to the existing Class II regulations, it was inappropriate for the NIGC to grant the authority to determine whether a game meets the legal definition of Class II or Class III to a testing laboratory. First, Tribal Gaming Regulatory Authorities are the primary regulators of Class II gaming under the IGRA, and it is inconsistent with the IGRA for the NIGC to transfer the authority to make that determination to a testing laboratory. Second, the testing laboratories are expert only in technical matters and do not have the requisite legal expertise to determine whether a game meets the definition of Class II or Class III under the IGRA. When a game is submitted to a laboratory, it can only determine whether a game is technically played in a manner consistent with technical standards. Laboratories simply do not have the capacity to take the next step and render any conclusion as to whether or not a game meets a legal standard. That determination must be left to the Tribal Gaming Regulatory Authorities in the first instance.

The NIGC also proposed changing a requirement regarding the independence of testing laboratories that was patronizing and unwarranted. The Tribal Advisory Committees' draft standard would have required that testing laboratories be independent from the tribe or tribal gaming regulatory authority. This requirement would ensure there would be no way for a tribe to improperly influence the result of a test lab. The NIGC had taken this requirement a step further and mandated that the tribe could not own or operate a testing lab. This would effectively preclude a tribe from using its own testing lab even if that lab were independent from the tribe. This was a patronizing requirement that appeared to assume that tribal governments are incapable of ensuring the independence of a tribally owned enterprise. This was inappropriate and unwarranted, and failed to consider situations where tribes already have their own test labs up and running that produce quality results and employ tribal members.

The suitability determinations proposed by the NIGC also rendered it more difficult for tribal laboratories to certify games. The NIGC added provisions requiring tribes to conduct the same kind of background investigations applicable to management contracts for all testing laboratories that have not been determined to be suitable by any other gaming jurisdiction in the United States. This improperly gave non-tribal test laboratories a leg up on tribal testing laboratories, as non-tribal test laboratories already have suitability determinations from other jurisdictions that have nothing to do with tribal gaming.

One of the most significant changes the NIGC proposed in this section was to remove a permanent exemption for existing player interface hardware. The Tribal Advisory Committees' standards contained a provision permanently exempting existing hardware player station "boxes" from compliance with the rules, reasoning that the cost of replacing existing boxes would be prohibitively high, and that in any event, market forces would require their eventual replacement. This permanent exemption for existing boxes would not have had any effect on game play, as the Class II box is a dumb terminal that cannot play the game without being connected to the system. Accordingly, exempting existing hardware would not delay compliance with the most critical aspects of the new standards. It had been suggested by the manufacturers that failing to include this exemption would have imposed enormous costs that could not be justified by the benefits of the proposal regarding hardware. The player station box is the most expensive part of existing systems, yet the standards that apply to hardware provide the least protection to tribal assets. Further, even hardware for games previously approved by the courts would be rendered unlawful. Accordingly, it appears that providing a permanent exemption is warranted.

Section §547.5 -- What are the rules of interpretation and of general application of this part?

As mentioned above, the NIGC proposed a new minimum probability requirement to the Tribal Advisory Committees' draft that would for the first time establish minimum probability odds for prizes. The new requirement would set minimum probability odds of 50,000,000-to-1 for all progressive prizes, and 25,000,000-to-1 for all other prizes.

These requirements were unnecessary, arbitrary, and placed tribes at a competitive disadvantage with states. There is nothing in the IGRA that calls for setting minimum odds for winning Class II games, and the NIGC failed to articulate a reason for including such a provision in the proposed regulations. Even if such a requirement were warranted, the levels chosen by the NIGC were completely arbitrary. Note that state-run lotteries generally have odds of at least 250,000,000-to-1, which in some states compete directly with tribes. There was no basis for the NIGC to impose a comparative disadvantage on tribes through higher probability odds. Consistent with the IGRA framework, this is an issue to be determined by tribal regulators and not the NIGC.

Section 547.7 -- What are the minimum technical hardware standards applicable to Class II gaming systems?

The only material change made in this section by the NIGC is that it deleted language in the standards for financial instrument storage components to apply to components that are operated under the direct control of gaming employees or agents rather than to components that are designed to be operated in such a manner.

The deletion of the "designed to be" language changes this provision from a technical standard that requires equipment designed for a certain purpose to meet certain requirements, to an operational control (*i.e.*, a MICS) that requires equipment used in a certain manner to meet certain requirements. In order to fit more appropriately in the technical standards, the "designed to be language" should be reinserted.

Section 547.8 -- What are the minimum technical software standards applicable to Class II gaming systems?

The NIGC changed the requirements for bingo games to also cover "games similar to bingo." These Technical Standards were designed with bingo games in mind, and the MICS which complements these technical standards was specifically drafted only to cover bingo games. The new requirements make little sense as they were intended to cover bingo games. For example, Proposed 547.8(d)(4)(vi)(B) would require games similar to bingo to display "The identifier of the bingo game played." It is difficult to see how this would be accomplished in the case of a game similar to bingo. This section should be revised to clarify that it only applies to games of bingo.

The last game recall provisions were altered by the NIGC to require not only that a gaming system be able to recall last game information, but also that it must be able to recall any alternative video display the system provides. This requirement will cause many more problems than it is designed to solve. The alternative display is not legally relevant to the outcome of a game of bingo, and in fact cannot have any relevance to the outcome of a game and still be Class II. Although the NIGC appears to believe that requiring the display of such information will actually help resolve patron disputes, the opposite is true. Often, a malfunction will occur in the alternative display itself, and even if such a malfunctioning display can be recalled, a faulty display will only further confuse the patron and/or unnecessarily motivate them to continue to pursue a challenge. Requiring those legally immaterial results to be displayed in a federal regulations will only grant them the appearance of relevance they lack, and make it all the more difficult for tribes to explain that it is the result of the bingo game that counts, and not the alternative display. Granting the imprimatur of relevance to the alternative display will only blur the line between Class II and Class III gaming and erode the integrity of the bingo game. Ho-Chunk argued for the deletion of this requirement.

The Nation also opposed the new requirements for pull-tabs, which effectively imposed classification requirements on pull-tabs. The new provisions would have required that pull-tabs use tangible pull-tabs. There is no requirement that pull-tabs be tangible. Although certain courts have held that to be the case for pull-tabs, the rationale in those decisions has been overturned by more recent decisions allowing the use of electronic cards for bingo.

Section 547.17 -- How does a gaming operation apply for a variance from these standards?

The NIGC deleted a critical provision from the variance provisions in the Tribal Advisory Committees' draft standards. In order to avoid undue delay and ensure that the denial of a variance could be challenged in court, the Tribal Advisory Committees' draft provided that the Commission would have thirty days to consider the appeal of a denial or the IGRA's decision would be upheld. The NIGC deleted this provision, and effectively granted itself an indefinite time period in which to consider an appeal. The Commission should not be able to review an appeal indefinitely and avoid finality of its action.

J. 25 CFR Parts 571.1 to 571.7 – Inspection and Access

Although the Nation may generally have a degree of reluctance in supporting measures which may be viewed as expanding NIGC regulatory authority, especially when such measures may involve an "extra-territorial" aspect, it is also recognized that the Commission's role in the prevention and detection of wanton behavior and undesirable activity should not be unduly limited or be subject to outright obstruction by the transfer of relevant documents to an off-site and "off-limits" location.

In terms of priority, this is low on the list for the Ho-Chunk Nation.

K. 25 CFR Part 573 – Enforcement

The Nation supports the concept of a permitted withdrawal of a NOV in the current regulatory environment. However, should the process by which the NOVs are issued, at least for instances which do not involve gross negligence or egregious activity, be suitably modified to include a “ticket” or notification system, then the need to promulgate an additional regulation concerning the withdrawal of a NOV might be eliminated. .

As the Nation believes that potential changes in regulations concerning NOVs should primarily focus on the prevention of the issuance of such NOVs which might later be subject to a prospective withdrawal, in terms of priority, this is low on the list for the Ho-Chunk Nation.

Potential New Regulations

A. Tribal Advisory Committees

The Nation supports the use of Tribal Advisory Committees (“TAC”) to assist and provide a method by which tribal officials and tribal management can influence NIGC policy. However, the previous methods by which the NIGC utilized TACs were cumbersome and inflexible – to the detriment of tribes, the NIGC and the tribal gaming industry. The NIGC should consider adopting new regulations to further refine how TACs can operate to the benefit of tribes and NIGC.

B. Sole Proprietary Interest Regulation

The Nation suggests that the NIGC consider a regulation that provides clarification and definition in this area. However, the Nation is concerned that the NIGC not go too far in taking on a role of overseeing the economic and financial decisions of tribes, to the detriment of their sovereignty. If the NIGC expands the definition of “management contract” and expands its role in making sole proprietary interest determination, the Nation suspects the NIGC may not be equipped to take on such a role (to say nothing of the problem with increased regulation of tribal financial decisions).

C. Communication Policy with Tribes

We appreciate the NIGC’s interest in expanding communication with tribes and tribal officials. The Nation does not believe that a regulation is needed in order to formalize the manner in which communication will take place. This would truly be difficult to define and encompass the wide variety of tribal points of contact. For instance, with the Ho-Chunk Nation, we are organized as a Legislative Branch, Executive Branch, Judicial Branch and General Council Branch. The Legislature is the governing body of the tribe. The President oversees the Executive Branch. The Nation’s Gaming Commission lies within the Legislative Branch and assumes the role of tribal gaming regulatory authority. From our vantage point, the NIGC should communicate with the Nation’s Gaming Commission, President and Legislature. But not every tribe is organized the same. Thus, it seems unworkable to regulate such a varied situation.

The Nation suggests that the NIGC focus on improving the mechanisms for communication to tribes and make information available for tribes as widely as possible. To the extent technology can be used to expand tribal participation, without requiring tribal officials to travel great distances, we encourage such action. The use of teleconferencing and webcasting might assist.

CONCLUSION

Thank you for the opportunity to comment and provide suggestions to the NIGC. We are encouraged by the NIGC's new leadership and approach to direct consultation with tribes. We also appreciate the manner in which the NIGC Commissioners and staff conducted the recent meetings with tribes and leaders.

Respectfully,

/s/

Daniel R. Blumer
Commissioner, Ho-Chunk Nation Gaming Commission

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