

Rincon Band of Luiseño Indians

PO Box 68 Valley Center, CA 92028 ♦ (760) 749-1051 ♦ Fax: (760) 749-8901



FORMAL SUPPLEMENTAL COMMENTS OF THE RINCON BAND TO THE NIGC REGARDING ITS NOTICE OF INQUIRY (NOI) CONCERNING ITS COMPREHENSIVE REVIEW OF ALL REGULATIONS PROMULGATED TO IMPLEMENT IGRA

February 11, 2011

The Rincon Band presented four overarching priorities during the Formal Consultation of January 11, 2011.

Priority #1: Adhere to the limits of NIGC's statutory authority as set out in IGRA and as articulated by the several court decisions in *C.R.I.T vs. NIGC*.

Priority #2: Deference and support of TGAs as primary regulators

Priority #3: Maintain the viability of a Class II gaming industry

Priority # 4: Sole proprietary interest

This Supplement provides responses to each of the questions raised in the formal Notice of Inquiry.

RINCON BAND RESPONSES TO SPECIFIC MATTERS IDENTIFIED IN THE NIGC NOTICE OF INQUIRY

RESPONSES TO SPECIFIC INQUIRIES:

Rather than repeat the NIGC's comments and questions, these answers and comments simply track the organization set forth in the NOI, beginning with Section IV. On each matter, the NOI seeks input as to the process for amending regulations, suggesting negotiated rule-making or advisory groups. The problem with both is that Tribes not selected in the process or unable to participate, are

Bo Mazzetti	Stephanie Spencer	Charlie Kolb	Steve Stallings	Kenneth Kolb
Chairman	Vice-Chairwoman	Council Member	Council Member	Council Member

excluded. The Band suggests circulating drafts for formal consultation sessions, then proceed with publishing the proposed rule and having further consultation during the formal comment period. This allows tribes to participate as they deem appropriate for the particular change or changes being considered.

IV. Regulations Which May Require Amendment or Revision

A: Definitions:

1. Definition of “net revenue”

The definition of “net revenue” should be clarified to include as an allowable operating expense in the calculation of net revenue machine lease payments, participation fees, and contributions to wide area progressives.

The current definition better reflects the reality that management fees are a cost of doing business even though not recognized as an expense under GAAP.

Both of these category of expenses should not be included as part of net revenue consistent with GAAP. The only reason to use GAAP is for convenience. GAAP’s function is to establish uniformity and consistency for purposes of financial audits. Those considerations do not overcome the policy reasons for the NIGC for using definitions that more accurately reflect the costs of business regarding Indian gaming.

A separate definition of “allowable uses” is not needed. The concerns about adequate reserves and cash flow can be satisfied by the Tribe in exercising its self governance under IGRA’s allowable use “to promote tribal economic development.” Any new definition carries the risk of unduly impeding on the Tribe’s self-governance.

2. Definition of Management Contract.

The definition of management agreement should be revised to make clear that collateral agreements can be made and are binding upon the parties before NIGC approval of the management agreement. No entity should be allowed to perform day-to-day decision making of a tribal gaming facility prior to NIGC approval, but other agreements should be valid. Many times, tribes are hindered from entering into finance and consulting agreements with desired contractual parties because of the collateral agreement rule. All that accomplishes is to restrict the Tribe’s ability to enter into contracts. It is an arbitrary restriction of the Tribe’s exercise of self governance. Collateral agreements should be required to be submitted with proposed management contracts to ensure full disclosure of all aspects of the relationship between the Tribe and the contracting entity, but that

can be accomplished without the current rule that voids collateral agreements unless and until the management agreement is approved.

Additionally, formal regulations regarding declination letters would provide the Tribes and contracting parties greater confidence that declination letters are meaningful and correct.

The suggestion of expanding the definition to include any percentage-based fee is not based in IGRA. If Congress wanted to provide NIGC with that authority, they would not have used the term “management contract.” If NIGC is inclined to fiat such authority, it should expect litigation and it should expect to lose. Further, if it pursues such approval authority, NIGC should be fully staffed in this regard so that it does not cause delay in tribal business decision-making,

The stated concerns in the NOI regarding aggregate fees (loans/expenses/ development fees, etc.) is valid, but that discussion is more appropriate in the context of “sole proprietary interests” and “primary beneficiary,” and not in the context of defining “management agreement.”

3. What of other definitions in need of change?

The definition of Class II gaming should be revised to mirror the definition in IGRA. Specifically 25 CFR 502.3(b) equates “Lotto” with “Bingo” when Congress clearly identified them as separate games. The current definition is an unauthorized amendment to IGRA and should be revised to reflect the language set forth in 2703(7)(A)(i)(III) “. . . including ... pull-tabs, lotto, punch boards, tip jars, instant bingo and games similar to bingo.

B. NIGC Fees

Basing fees on fiscal year rather than calendar year is appropriate and simplifies matters for Tribes. A two year transition should be practical for all tribes to adjust accordingly.

The Band has no position at this time on the issue of whether “gross revenue” should be redefined or whether fingerprinting fees should be included.

As stated in our Priorities, listed above, replacing the NOV and fines now used for late payment with a late fee makes sense by making the penalty more commensurate with the offense. Such an approach would be appropriate for late financial and compliance audits, as well. On all matters of NIGC enforcement an NOV should only be issued in instances of gross negligence or wanton behavior,

C. Self-Regulation Certification

The Tribe has no comment on this issue at this time, except that it should not be identified as a high priority issue.

D. Approval of Existing Gaming Ordinances.

Part 523 is obsolete and should be eliminated, but it also is not a priority.

E. Management Contracts

1. Collateral Agreements

The Comments regarding collateral agreements are addressed in the context of the definitions, above and the priority discussion regarding sole proprietary interests set forth in the Band's January 11 preliminary comments. The Band cautions NIGC not to compartmentalize just the management agreement and agreements collateral thereto. Over-reaching States taxing tribes in compact negotiations and over-reaching cities and counties in MOUs gouging tribes for services and mitigation also should be considered in determining whether the Tribe no longer has sole proprietary interests or is the primary beneficiary.

2. Approval of Management Contracts

The Rincon Band has no objection to the proposed additions for grounds of disapproval, but questions whether they are necessary and should not be considered a matter of priority.

3. Background Investigations of Management Contractors

The issue is likely moot in that most gaming facilities offer both Class II and Class III gaming. It would be a concern that a contract is structured to separate that line in order to avoid any NIGC background check. In most such circumstances, however, the State would then have the backgrounding authority, or oversight authority, per the compact such that the NIGC could/should coordinate with the State in question so that an unsuitable entity is not allowed to provide management services. To assert backgrounding authority over Class III only compacts also likely triggers litigation over the parameters of the *CRIT v. NIGC* litigation. Accordingly, the Band believes this issue is not a priority and encourages NIGC to address this issue through cooperation with the licensing authority of the State at issue.

F. Proceedings Before The Commission

Given the potentially grave consequences of an adverse decision by NIGC, refinement and development of rules that are designed to provide fairness and due process are welcomed and encouraged. This matter is worthy of priority because it allows this Commission to establish precedent for due process for future Commissions. The current structure of the NIGC renders tribes too vulnerable to future Commissioners who may be hostile to tribal interests. As indicated in the Tribe's priority discussions above, enforcement should only come as a last resort after attempts to work with the Tribe have failed, and in such event, the Tribe should have the ability to make its case in a fair and impartial forum.

G. MICS and Technical Standards

1. Class III MICS

This is perhaps the most important issue addressed in the NOI and the Band's view is set forth in Priority #1 in its Preliminary comments submitted on January 11, 2011. Since we provided our comments on January 14, we have heard a small but vocal group of tribes insists they want to see the Class III MICS continue in some form because they made some deal in a compact or state regulation. They made those agreements at their own peril knowing the NIGC did not have such authority, or at best, that the question was in serious dispute. This Commission should not perpetuate the problem. NIGC Class III MICS are illegal and have always been illegal.

Additionally, we challenge the allegation that some are at peril if the NIGC no longer promulgates Class III MICS. A number of tribal-state gaming compacts in North Dakota, Arizona, Oklahoma, Wisconsin, and Florida refer to the Class III MICS. That being said, the reference within those Compacts is not impacted by whether the Class III MICS exist or do not exist on a prospective basis. Many of these Compacts only refer to MICS as they existed at a date certain, thus if the Class III MICS were repealed today, they still would have existed on the date certain previously referenced. For example, the Arizona Form Compact refers to "minimum internal control standards of the Commission as set forth in 25 C.F.R. part 542 as published in 64 Fed. Reg. 590 (Jan. 5, 1999) as may be amended from time to time." For those Compacts, or other agreements with individual states, which refer to the Class III MICS as they existed on a date certain, a repeal would have no impact as such an action does not undo the fact that the Class III MICS were published and found in the CFR on a date certain.

Other Compacts refer to compliance with the Class III MICS that are found in the NIGC regulations (without a reference to a date). Our position is that even if the Class III MICS were to be repealed, it would not result in a violation of any of those "incorporation by reference" Compacts unless those individual Compact

require the Class III MICS to continue to be published. We are not aware of any Compact which has such a publication requirement.

The Rincon Band supports a short phase out period to allow those impacted tribes to reach amendments or other means to proceed in an environment of no NIGC Class III MICS. But the Rincon Band strongly opposes the perpetuation of illegal MICS simply because it inconveniences some tribes that have built a house of cards on a faulty foundation. They can transition into some other type of default MICS through a regulators organization, or amend their compacts, or defer to some other industry entity, or perhaps some other resolution outside of NIGC. Bottom line is that there are other ways to skin that cat rather than have NIGC continue to violate the clear orders of the federal courts.

Calling them guidelines rather than regulations does not work either. NIGC has a limited budget based on fees paid by the Tribes. The Rincon Band certainly objects in the strongest terms to having its fees be used by this NIGC for an improper and illegal purpose that should never have been pursued by former Chairman Hogan to begin with.

2. Class II MICS and Gaming Equipment Standards

The Rincon Band addresses this issue in the Priorities discussion of its preliminary comments submitted on January 11. This is the one area where a Tribal Advisory Group will likely be beneficial, but any work product that comes out of such a group and NIGC should be open to consultation and comment by all interested tribes through the routine process of publishing a proposed rule, consult and seek comment, before publishing any final rule.

H. Backgrounds and Licensing

1. Background Investigations for Licensing

Make the “pilot” program permanent. Do not delay or make it complicated with process. It is a farce to call it a pilot when it older than most tribal gaming facilities.

2 Fingerprinting

Being able to turn to the NIGC to process fingerprint cards beyond primary management officials and key employees can only be a good thing that enables tribes to make better informed and faster decisions. This is particularly important because many states deny or severely restrict tribes from the State’s resources.

The costs, however, should be borne by the participating tribes and not paid out of fees paid by other tribes.

I. Facility Licensing

As discussed in Priority # 1 in the January 11, 2011 preliminary comments, the current regulation should be revoked before it is struck down in what will be the progeny of the *CRIT v. NIGC* decision. It is paternalistic and illegal.

J. Inspection and Access

The Band acknowledges that effective regulation requires access to needed documents so long as chain of custody is maintained, access is limited to those who truly require access and confidentiality is strictly enforced.

K. Enforcement

Enforcement is discussed in the Priority's section of the Band's January 11, 2011 preliminary comments. A regulation clarifying that an NOV can be withdrawn is a reasonable proposal that should be implemented without delay.

V. Potential New Regulations

A. Tribal Advisory Committee

The Rincon Band opposes the concept as it will likely result in limiting access of tribes that wish to participate on issues of importance to that tribe.

B. Sole Proprietary Interest.

This issue is discussed at length in the priority section of the Band's January 11, 2011 preliminary comments.

C. Communication Policy

It should be up to the Tribe, as a matter of self-governance, to establish communication protocol with NIGC, and the NIGC should honor the wishes and direction of the Tribe's government.

Thank you for the opportunity to review the status of the current regulations and submit the Rincon Band's recommendations to clarify and improve them. We hope you will take the Band's comments today into serious consideration. The Rincon Band applauds your efforts to take on hard issues and

the Band looks forward to consulting with the NIGC on a government to government basis and commenting further as this process unfolds.

Respectfully submitted,

/s/

Scott Crowell
Attorney General
Rincon Band of Luiseno Indians