



St. Regis Mohawk Tribe

Ms. Tracy Stevens, Chairwoman
National Indian Gaming Commission
1441 L Street, NW, Suite 9100
Washington, DC 20005

Chief Monica M. Jacobs
Chief Mark H. Garrow
Chief Randy Hart
Sub-Chief Pamela D. Brown
Sub-Chief Stacy A. Skidders
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VIA Email: reg.review@nigc.gov

Re: Notice of Inquiry—Comments on Regulations to Implement IGRA

Dear Chairwoman Stevens,

The St. Regis Mohawk Tribe is pleased to have the opportunity to assist the Commission in developing your regulatory planning and review schedule, as well as establishing the Commission's priorities over the next several years. We believe that true consultation only occurs when federal agencies begin the process early, and respond to the issues raised by Tribes, rather than imposing priorities upon the Tribes, as has been done by previous administrations. The St. Regis Mohawk Tribe sees this consultation process as a show of this Commission's commitment to true consultation and we look forward to working with you as you develop and amend the NIGC's rules and regulations to better respond to the changing operational and regulatory environment in Indian Gaming.

As the Commission is aware, the St. Regis Mohawk Tribe currently operates two gaming enterprises, the Class III Akwesasne Mohawk Casino and the Class II Mohawk Bingo Palace. These facilities provide a crucial funding source for the St. Regis Mohawk, providing essential services for the tribal members. With shrinking funding from the Federal Government and State of New York, gaming revenues provide our members with additional health services, funding for continued education, policing, heating assistance and many other services. We do not currently provide per capita payments to our membership as all gaming revenue is returned to the community and members through tribal services.

The St. Regis Mohawk Tribe has established the St. Regis Mohawk Tribal Gaming Commission. With a staff of 28, the St. Regis Mohawk Tribe spends in excess of \$2.5 Million per year on

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spend over \$4 Million this year for state gaming regulators in our Class III facility. Both the Tribal Gaming Commission and New York State Racing and Wagering maintain a 24 hour regulatory presence in our Class III gaming operation, while the Tribal Gaming Commission alone regulates our Class II facility. Over the years we have developed a professional, well trained Tribal Gaming Commission, whose priorities are to protect the assets of the Tribe and the regulatory integrity of our operations.

The St. Regis Mohawk Tribe believes that gaming regulations must be dynamic, and never static and that Tribal Gaming Commissions must maintain the ability to adjust control standards to meet technical improvements and changes in gaming operations and gaming devices, while providing clear rules and regulations that are easily interpreted and implemented by our gaming operations. Therefore, the National Indian Gaming Commission's regulations must be written such that Tribal Gaming Commissions are able to quickly respond to technical developments and improvements in operations, without having to wait for the federal regulatory process to play catch up, as we've witnessed in the past.

The St. Regis Mohawk Tribe supports the Commission's efforts to ensure that the IGRA is applied in such a manner that promotes the "principal goal of Federal Indian policy...to promote tribal economic development, tribal self-sufficiency, and strong tribal government." 25 USC 2701(4).

A. Part 502-Definitions of this Chapter

(1) Net Revenues. We agree that Net Revenues, as defined by the Indian Gaming Regulatory Act is inconsistent with Generally Accepted Accounting Principles and, has at times created confusion to both our auditors and our lenders. However, the St. Regis Mohawk Tribe cautions the Commission that any proposed changes to regulatory definitions must be consistent with the definitions contained in the IGRA.

(a) Net Revenues – management fee. To the greatest extent possible, the NIGC should keep all financial terms and definitions consistent with Generally Accepted Accounting Principles. When the NIGC is required to apply terminology or accounting principles not in keeping with the norm, (as is the IGRA definition of "net revenues") then the agency must properly define what the deviation is and should point out the deviation from GAAP. This is a definition that must receive consideration.

(b) Net Revenues – allowable uses. We believe the existing law clearly sets forth the allowable uses of Net Revenues and oppose any definitional change that goes beyond that set out in the IGRA. Changes, such as those proposed, which would further limit a Tribe's sovereign right to determine their own spending priorities goes beyond the National Indian Gaming Commission's regulatory oversight responsibilities. Adoption of such additional restrictions on a Tribe's ability

to make business decisions clearly oversteps the regulatory parameters set forth by Congress in the Indian Gaming Regulatory Act and as such, an amendment to include such additional parameters should not be considered.

(2) Management Contract. The definition of management contracts should not be expanded to include contracts based on a percentage of gaming revenues. Contracts should be evaluated on the basis of what the contract itself provides. The majority of slot machine lease agreements simply provide gaming devices. Particularly in the Class II area, gaming device lease agreements are the norm, as many tribes choose not to invest the capital necessary to purchase machines that could be rendered obsolete by the next Class II gaming opinion issued by the National Indian Gaming Commission. Imposition of additional federal regulatory requirements on both Tribal Gaming Operations and on gaming device vendors, would likely result in a reduction the number of available vendors, due to the expense of complying with the management contract approval process and an increase of leasing costs to Tribes. Further, the ability to lease gaming devices, rather than purchasing them, allows a Tribal Gaming Operation greater flexibility in determining their capital budgets and limits the requirement to obtain financing to purchase machines. It also gives smaller gaming operations the ability to maintain state of the art gaming devices on their gaming floor, without the capital outlay necessary to purchase these devices. To expand the definition of “management contract” would, in our opinion expand the authority of the NIGC into business decision-making that is clearly the responsibility of the Tribe and its Gaming Operation management.

The NIGC also requests comment on whether a definition for acceptable compensation to a manager contractor is necessary. It has been the experience of the St. Regis Mohawk Tribe, in negotiating such agreements, that a clear definition of what is an “acceptable management fee” is necessary. However, the NIGC should also recognize that some management contractors provide additional services, such as financing and development services, which should be taken into consideration when developing such a definition. Further, the types of reimbursement and compensation should be more clearly defined, and to the extent practicable, upper limits set on these as well.

B. Part 514 – Fees

We believe that the NIGC should change the fee reporting period to the Tribe’s gaming operation fiscal year, and require payment based on the fiscal year.

Furthermore, in the NIGC *Notice of Inquiry and Request for Information; Notice of Consultation*, comments are made regarding a possible late payment system. We must point out at 514.1 (c)(8) states *The Commission may assess a penalty for failure to file timely a statement* (emphasis added), also 514.1(e) that states *Failure to pay fees, any applicable penalties, and*

interest related thereto may be grounds for: (1) Closure, or (2) Disapproving or revoking the approval of the Chairman of any license, ordinance, or resolution required under this Act for the operation of gaming (emphasis added). Clearly the NIGC has discretion in this matter and we believe that no further changes be made. The NIGC must realize any issuance of a Notice of Violation (NOV) may increase borrowing costs when a tribe is looking for financing.

We wish to make comment on 514.1(f) that states *To the extent that revenue derived from fees imposed under the schedule established under this paragraph are not expended or committed at the close of any fiscal year, such funds shall remain available until expended to defray the costs of operations of the Commission*, we are concerned with these fees that are not expended. If the NIGC has collected fees from tribes, and these collective fees are greater than the NIGC expenses for the year, then there should be an agreed upon dollar limit to what is carried forward, and such carry forward unexpended fees must be used for the good of the tribes, not committed to many NIGC programs or projects. We must remind the Commission that any fees not expended should be returned to Tribes. IGRA was created to benefit Tribes by creating a means of raising revenues for Tribal programs, not to sit unused in an account at the NIGC.

C. Part 518 – Self-Regulation of Class II

The St. Regis Mohawk Tribe has not utilized Part 518. Additional information should be given to demonstrate the benefits of obtaining certification of self-regulation. This is not a regulatory priority for the St. Regis Mohawk Tribe.

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

We would have no objection to elimination of this Part, if there are no tribes affected. This is not a regulatory priority for the St. Regis Mohawk Tribe.

E. Management Contracts

(1) Part 531 – Collateral Agreements

We believe that the current definition of management contracts, which includes collateral agreements only if they provide for the management of all or part of a gaming operation is sufficient and additional regulation in this area is unnecessary. In the example given in the NIGC preamble, we believe that if a tribe enters into a management contract and collateral agreements that pay in excess of 80% of gross gaming revenue resulting in a net loss for a tribe, then the tribal officials responsible for this agreement should be dealt with by the tribe itself. Tribes have the right to govern their own affairs. Our comments in Section A (2) above would address the concerns addressed above. Our main concern with expanding NIGC authority over

additional, non-management business relationships of the Tribe is the additional costs that will be incurred should the definition be expanded to include any contract entered into by the Tribe. These include not only the costs incurred to obtain “management contract” approval, including licensing of companies and individuals, but also the financing, legal and other costs involved in requiring the submission of documents that are not, in any way management contracts.

(2) Part 533 – Approval of Management Contracts

Although offensive to our belief in tribal sovereignty, the “trustee standard” of review is required by the IGRA. Additional guidance on the application of this standard of review would be helpful. As it stands, undefined, we believe that it allows for very broad discretion for the NIGC to disapprove Management Contracts without providing adequate substantiation for the decision, resulting in an unfair situation where an affected Tribe would find it difficult to challenge such a decision. It has been the experience of the St. Regis Mohawk Tribe that the dialogue between the NIGC staff and tribes regarding acceptable and unacceptable provisions in management contracts is often made much more difficult by a lack, on the part of NIGC staff to provide clear substantiation for decisions they make that a certain provision is unacceptable; particularly when that same provision has been approved in previously approved management contracts. This often results in an unproductive back and forth between the NIGC, the Tribe and the Management Contractor that results in delays and additional costs to Tribes pursuing approval of Management contracts.

(3) Part 537 – Background Investigations for Persons or entities with a Financial Interest in, or Having Management Responsibility for, a Management Contract

The NIGC preamble mentions if a contractor (a management contractor) should be required to submit the Class II background information when the contract is only for Class III gaming. Clearly, the IGRA in Section 2705 provides the power of the Chairman to approve management contracts for Class II gaming and Class III gaming as provided in sections 2710 (d)(9) and 2711 of this title.

The NIGC promulgated regulations found at 25 CFR Part 533.1 that states *Subject to the Chairman’s approval, an Indian tribe may enter into a management contract for the operation of a class II or class III gaming activity.* Clearly the Indian Gaming Regulatory Act gives the Chairman of the NIGC the authority to approve management contracts for Class II and Class III gaming, found in Section 2705(a)(4). What is also clear, the NIGC did not include Class III gaming in promulgating regulations regarding the conduct of background investigations in section 537.1(a). We believe this should be of a low priority for the NIGC and could be rectified through the standard notice and comment process for amendment.

F. Proceedings Before the Commission

We consider the existing NIGC regulations mentioned in the preamble, 25 CFR part 519; 25 CFR part 524; 25 CFR part 539; 25 CFR part 577 to be adequate in governing proceedings before the NIGC. We do not recommend the NIGC make the process more comprehensive, detailed and formal. We believe this will only add to the complexity of the process and to the length of time required to complete the process, and we also believe it only would require a Tribe utilize legal counsel or outside counsel, ultimately adding to a Tribe's expenses.

G. MICS & Technical Standards

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

The decision of the United States District Court for the District of Colombia, in Colorado River Indian Tribe v. National Indian Gaming Commission, made the determination that the NIGC does not have the statutory authority to regulate Class III gaming. IGRA clearly limits the NIGC's oversight of Class III Gaming to the approval of tribal gaming ordinances and management contracts for tribal Class III facilities. While we understand the necessity of minimum internal control standards in the gaming industry, we believe the NIGC must change the MICS to a recommended guideline. Updates to the recommended guidelines could continue to be maintained through a Tribal Advisory Committee, or independently through the various regional tribal gaming associations.

As the primary regulator of Class III gaming, the St. Regis Mohawk Tribal Gaming Commission is fully capable of effectively regulating the Class III gaming enterprise of the St. Regis Mohawk Tribe. It is time that the NIGC recognize this and take steps to remove Part 542.

This should be addressed through the notice and comment.

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

We strongly encourage the NIGC continue to move all Class II control standards from part 542 into 543. This should be a priority of this administration and it should proceed utilizing a Tribal Advisory Committee, as it has so far.

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

We believe that the Technical Standards have greatly assisted our Tribal Gaming Commission in regulating Electronic Class II gaming machines. However, we do believe that some of the sections, specifically 547.5(c), are over reaching and go beyond what IGRA defines and requires for a Class II game.

The St. Regis Mohawk Tribe has participated in the Tribal Advisory Committee process in the past and has found it to be a successful way of beginning the tribal consultation process. Participants could be nominated from the industry and the Commission should choose participants looking for representation from a cross-section of the industry and from each region of the country, as well as various size gaming operations.

H. Backgrounds and Licensing

(1) Part 556 – Background Investigations for Licensing

The St. Regis Mohawk Tribal Gaming Commission has taken part of the NIGC's pilot program for at least the last 6 years. We believe that it is a better way of conveying licensing information between the Tribal Regulatory Authorities and the NIGC and encourage the NIGC to formalize the program through the normal notice and comment rulemaking.

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

The St. Regis Mohawk Tribal Gaming Commission began background investigations of the Class II gaming vendors doing business at the Mohawk Bingo Palace in 2009, formalizing the application, background procedure and contracting with a company to provide criminal background checks. Should other Tribal Regulatory Authorities see the need to investigate Class II gaming vendors, and we encourage them to, they have the ability to conduct such backgrounds without the need of the NIGC. Tribal Regulatory Authorities are the primary regulators of Indian Gaming, as promulgated in the Indian Gaming Regulatory Act, if they see a need for Class II Vendor Licensing, they should be encouraged, through NIGC training, to perform this task to properly regulate gaming in their jurisdiction.

Part 559 – Facility License Notifications, Renewals, and Submissions

The St. Regis Mohawk Tribe has adopted and enforces building code requirements, as well as its own health and safety standards, that meet or exceed state and federal standards. These requirements are unnecessary and redundant. No further regulations are necessary in this area.

J. Sections 571.1 – 571.7 – Inspection and Access

The Indian Gaming Regulatory Act provides the NIGC with clear authority to examine all papers, books and records respecting gross revenues of class II gaming conducted on Indian lands and any other matters necessary to carry out the duties of the Commission under this chapter [25 U.S.C. 2706(b)(4)]. The NIGC also has the enforcement powers necessary to require cooperation of the Tribes in accessing these records. We do not believe further clarification is necessary.

K. Part 573 – Enforcement

We believe that since the NIGC has the ability to issue a Notice of Violation (NOV) then the NIGC also has the ability to withdraw such NOV. However, we believe that any such withdrawal of a NOV must be documented, recognized as setting precedence in such matter, so that a withdrawal may be exercised for similar circumstances in the future. We do not see this as a priority and will hope the NIGC would not deem this as an issue and the NIGC should withdraw an NOV at their discretion.

V. Potential New Regulations

A. Tribal Advisory Committee

As stated above, the St. Regis Mohawk Tribe has participated directly in the Tribal Advisory Committee process. However, that participation was marred by the Commission's attempt to utilize the Tribal Advisory Committee's participation in development of regulations as an alternative to tribal consultation. The St. Regis Mohawk Tribe believes that the Tribal Advisory Committee process should be utilized by the NIGC whenever proposed changes to existing regulations or adoption and development of new regulations would have more than a minimal affect on Tribes, Tribal Gaming Operations or Tribal Gaming Commissions, both from a cost perspective and a tribal sovereignty perspective.

We believe that it should be clear that the Tribal Advisory Committee does not replace tribal consultation as required by Executive Order, nor do the Committee members represent the tribal governments they work for in any official capacity, other than as a representative to the Committee. Most often, the best Committee representative is, in fact, not a tribal leader, but an experienced operator or regulator.

While we do not believe that a formal regulation must be adopted regarding the roles and responsibilities of the Tribal Advisory Committee, we do believe that the Commission should provide clarification as to the goals and purposes of each Tribal Advisory Committee and the method by which participants will be chosen.

B. Sole Proprietary Interest Regulation

As discussed above in our comments regarding Part 553, the NIGC, over time and at times, over a short period of time, has changed its position on various issues. While the St. Regis Mohawk Tribe does not believe additional regulation is necessary, we do believe that the NIGC should

develop a process whereby Tribes have access to all determinations made by the NIGC that a certain provision, or contractual relationship constitutes a violation of the sole proprietary interest requirement and, when requested by a Tribe, provide a written opinion as to the basis of this determination. This would greatly assist Tribes, Management companies, banks and other commercial institutions in drafting agreements that would both protect the Tribe's interest in maintaining sole proprietary interest and the commercial partner from legal challenge later.

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

The St. Regis Mohawk Tribe has a government to government relationship with the United States. As an agency of the United States, all formal communications directed to the St. Regis Mohawk Tribe from the NIGC should be addressed to the St. Regis Mohawk Tribal Council.

D. Buy Indian Act Regulation

We can only encourage the NIGC to "Buy Indian" and ask why the agency has not made this a practice as of yet? We do not believe this should rise to the level of a regulation and is better handled in the NIGC's actions.

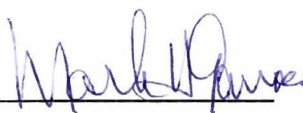
VI. Other Regulations

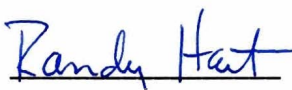
We have no comments to provide on Parts 501, 503, 513, 515, 517, 522, 531, 535, 571 and 575 mentioned at the end of your preamble.

In summary, we welcome the opportunity to assist the National Indian Gaming Commission in your regulatory review. We look forward to working with all of the new Commission members to ensure the continued success of the Indian gaming industry.

Sincerely,

Chief Monica M. Jacobs


Chief Mark H. Garrow


Chief Randy Hart