The SHOSHONE-BANNOCK TRIBES

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GAMING COMMISSION
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February 11, 2011

SBGC11 (NIGC)-3921

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

Subject: NIGC Comments

The Shoshone-Bannock Tribal Gaming Commission of Fort Hall, Idaho is pleased to provide the attached comments on the National Indian Gaming Commission's (NIGC) Notice of Inquiry relating to NIGC's regulations promulgated to implement the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2701 et seq.

A Notice of Inquiry was published in the Federal Register November 18, 2010, notifying the public that the Commission is conducting a comprehensive review of all regulations promulgated to implement the Indian Gaming Regulatory Act (IGRA).

Should you have any questions, please feel free to contact Marvin D. Osborne at (208) 237-8774, ext. 3024 or 3025.

Sincerely,

Lionel Q. Boyer, Chairman
Shoshone-Bannock Tribal Gaming Commission

Cc: file
Attachment: NIGC comments
Nathan Small, Chairman
Fort Hall Business Council
Jeanette Wolfley, Attorney
Office of Legal Counsel
Marvin D. Osborne, Executive Director
Shoshone-Bannock Gaming Commission

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Comments of the Shoshone-Bannock Tribes Gaming Commission
In Response to the National Indian Gaming Commission's
Notice of Inquiry and Request for Information

February 11, 2011

Madam Chair and Members of the Commission, the Shoshone-Bannock Tribes Gaming Commission (Gaming Commission) is pleased to provide the following comments on the National Indian Gaming Commission's (NIGC) Notice of Inquiry relating to NIGC's regulations promulgated to implement the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2701 et seq., and related procedures and actions. The consultation process makes for better decision making and welcome the opportunity to participate.

The Gaming Commission, located on the Fort Hall Reservation in southeastern Idaho, is a four member commission which regulates three Tribal Class II and Class III gaming facilities. The Fort Hall Reservation is comprised of 555,000 acres of land with the majority of land (97%) held in trust status.

General Comments

Let us begin by stating that no one has a greater interest in protecting the integrity of Indian gaming than tribes. We agreed to permit the federal government through the NIGC to play a limited role in overseeing Indian gaming, but tribes still remain the primary protectors of their economic gaming resources and against crime. As a practical matter Indian tribes are

generally the primary source of knowledge and information concerning gaming and how proposed federal actions may affect their rights. Each day we take licensing and regulatory actions to ensure that our gaming operations are safe, in compliance with the applicable laws and regulations and meet the necessary gaming industry standards. We possess the expertise to assure the day to day operations of the gaming facilities on the Fort Hall Reservation are in compliance with the established industry standards.

It must be remembered that Indian gaming is tribal governmental gaming. Its foundation rests upon the inherent and treaty powers of Indian tribes to make and enforce their own laws in their own forums and to govern its own territory. Such gaming is used as a tool to build stronger, more effective tribal government and to bring economic opportunities to our tribal community.

With this in mind, our position as it relates to federal Indian gaming regulations is that the NIGC's role and its regulation should be a limited one. Simply stated, the federal regulations should be restricted so as to not interfere in tribal gaming affairs. Such limitations on federal oversight are consistent with the principles of tribal self-determination and self-governance. Tribes have made great advances in the area of gaming regulation to provide full oversight of tribal gaming assets and the general integrity of gaming. Accordingly, Tribal gaming commissions as the appointed regulators for each tribe are in the best position to oversee gaming on their respective reservations.

We commend the NIGC in taking a fresh look at its existing gaming regulations and role, and seek the involvement and opinions of Indian tribes. And, in doing so, we recommend the NIGC adopt a more "hands off" policy as it relates to internal tribal gaming regulations so as not to interfere with tribal law and reduce tribal sovereignty, and embrace a more supportive and

Commission-to-Commission relationship with tribes. Indeed, Section 3 of Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, 65 Fed. Reg. 67,249 (Nov. 6, 2000), provides that federal agencies defer to Indian tribes to establish their own standards where possible (Section 3(c)(2)), and where an agency is determining whether to establish federal standards, the consultation must include discussion of the need for federal standards, and alternatives that would limit their scope and preserve tribal autonomy (Section 3(c)(3)).

We have reviewed the Notice of Inquiry and given its broad nature we have determined to provide comments on a selection of regulations. We anticipate that the NIGC will provide further opportunity for tribal comments once it has reviewed the initial round of tribal comments on all the NIGC's regulations and prioritized the regulations to be addressed and revised.

1. Role of Tribal Advisory Committee (Not a Priority)

The NIGC seeks comments on whether a Tribal Advisory Committee (TAC) should be used to fulfill consultation by assisting in revisions and amendments to regulations. While such a TAC may streamline the amendment process, it fails to fulfill the procedural requirements of consultation which clearly mandate an opportunity for tribal input when policy and regulations are being developed. Sections 3-5 of EO 13175. A TAC cannot and should not be used to avoid significant and timely tribal officials input on pre-decisional NIGC regulations and policy. Section 5(a) of EO 13175.

The consultation process strengthens the government-to-government relationship by enabling the federal and tribal representatives to discuss how proposed agency action may affect tribal rights and interests before a decision is made. As the President's Memorandum states,

"[h]istory has shown that failure to include the voices of tribal officials in formulating policy affecting their communities has all too often led to undesirable and, at times, devastating and tragic results." 74 Fed. Reg. at 57,881.

The duty of NIGC to consult with Indian tribes is based on the federal trust responsibility, what was established by Chief Justice Marshall's historic opinions in the Cherokee Tribe cases over 175 years ago. *See Cherokee Nation v. Georgia,* 30 U.S. (5 Pet)1 (1831); *Worcester v. Georgia,* 31 U.S. (6 Pet) 515 (1832). The duty of consultation arises in part from the high degree of procedural fairness mandated by the trust responsibility, and thus the federal government cannot fulfill its trust responsibility to protect Indian rights of self-government and property unless it consults with Indian tribes which hold these rights. Consultation is essential if the federal government is to consider impacts to tribal rights, economic gaming resources and interests from proposed federal actions. Moreover, if the NIGC does not know the extent to which the proposed actions may impact Indian tribes or rights, it cannot avoid or seek to mitigate such impacts.

In sum, the purpose of EO 13175 is to protect the rights recognized in the Fundamental Principles through the consultation process. In so doing, EO 13175 implements the established principles of the federal trust responsibility. Moreover, full NIGC consultation, rather than utilizing a TAC, accords Indian tribes the respect which they are due as separate sovereigns, and reflects the sovereign commitment of the United States to honor their rights.

2. Class II MICS, Class II Technical Standards, Class III MICS and the *Colorado River Indian Tribes* Decision

The NIGC seeks comments on whether changes to the Class II MICS, Class II Technical Standards and Class III MICS are necessary in light of the *Colorado River Indian Tribes*, 466 F.3d 134 (D.C. Cir. 2006) decision. In *Colorado River Tribes v. NIGC*, the Court of Appeals for

the District of Columbia held that the Chairman and NIGC have no authority to adopt regulations governing the day to day operations of a Class III gaming facility operating pursuant to a tribe-state compact that is in effect since Congress intended that such matters were to be determined via the tribal-state compact. 466 F.3d at 137-40.

Class III MICS

Tribes retain significant regulatory authority with respect to Class III gaming depending upon the terms negotiated with a state pursuant to a Class III gaming compact and retain unilateral authority to close Class III games, regardless. 25 U.S.C. § 2710(d)(2)(D)(i) (2006). The Indian Gaming Regulatory Act (IGRA) also anticipates that the criminal and civil laws of the tribe may be chosen in the compact for the licensing and regulation of Class III operations, and the tribal courts may be allocated complete civil and criminal jurisdiction to enforce those laws and regulations. Thus, the tribes' sovereignty to regulate Class III gaming is fully recognized by IGRA.

In contrast, the authority of the NIGC and its Chair are limited with respect to Class III gaming. Congress intended that Class III gaming would be conducted pursuant to a tribal-state compact, not pursuant to regulations imposed by the NIGC. According to IGRA, it is the tribal-state compact which governs Class III gaming after it is approved and the tribe's Class III gaming operations must be "conducted in conformance" with the compact. 25 U.S.C. § 2710(d)(1)(C). Although the Chair continues to approve management contracts and tribal ordinances authorizing Class III gaming, it is the Secretary of Interior, not the NIGC Chair, who approves the tribal-state compact. The Appellate Court in *Colorado River Indian Tribes* decision thoroughly analyzed the IGRA and determined that Congress intended to leave the

regulation of Class III gaming to the Tribes and the States. It found no statutory basis empowering the NIGC to regulate Class III gaming operations.

In light of tribal sovereignty, the IGRA provisions, and the *Colorado River Indian Tribes* decision we recommend that the NIGC eliminate the Class III MICS. We have developed our own minimum internal control standards. In addition, our 2009 Gaming Ordinance and 2000 Tribal-State Compact do not incorporate the federal MICS by reference. Thus, the Gaming Commission is the sole regulatory authority for day-to-day Class III gaming operations.

Class II MICS

With respect to Class II gaming on Indian lands, tribes retain significant regulatory authority under IGRA "which remains within the jurisdiction of the Indian tribes" subject to the terms of IGRA. 25 U.S.C. § 2710(a)(2). The NIGC and Chair have been delegated some approval, investigatory and reporting authority for Class II gaming. In material part, the NIGC, has power to approve an annual budget; adopt regulations for the assessment and collection and civil fines as provided in § 2713 (a); approve tribal ordinances as provided in §2710; establish the rate of fees as provided in § 2717; authorize the Chairman to issue subpoenas as provided in § 2715; order closure of an Indian gaming operation; monitor Class II gaming conducted on Indian lands and inspect the premises where conducted; conduct background investigations as may be necessary; inspect, examine and audit books, and records respecting gross revenue; and perform certain ministerial functions. 25 U.S.C. § 2706.

Significantly, the NIGC and its Chair, possess no general authorization to impose general operational regulations for Class II gaming on Indian lands. The question of whether NIGC has authority to promulgation of Class II regulations for day-to-day operations of Indian gaming has

not been addressed by any court. As asked in the *Colorado River* case, "what is the statutory basis empowering the Commission to regulate class III gaming operations? Finding none, the court held the NIGC could not regulate Class III gaming.

Colorado River is instructive because like the Class III gaming regulations, we are unable to find any Class II *regulatory* authority in the IGRA for the NIGC. IGRA also expressly provides that Class II gaming shall continue to be within the jurisdiction of the tribe though subject to the Act. The real question here, then, is to determine precisely what limits IGRA places upon that continued tribal jurisdiction. Accordingly, we would first recommend that the NIGC assess whether it believes it has authority to promulgate Class II MICS revisions. It may well be that NIGC has simply gone too far in the Class II area.

3. Part 502 Definitions (Not a Priority)

We agree it would be beneficial to have two separate calculations that are consistent with GAAP that define the methods for determining both the management fee and allowable uses. However, such an expansion of powers by NIGC would be improper and unauthorized under the IGRA.

(1)(a) Net Revenues Management Fees. Net revenues used to calculate the management fee when the fee is a percentage on net revenue should be defined as "Net income as it is presented in audited GAAP Financial Statement plus any Management Fee that has been included to calculate that Net Income. This will make the calculation consistent, easy to document and readily available.

(1)(b) Net Revenues Allowable Uses. Net revenues used to calculate cash available for allowable uses should be defined as closely as possible to the GAAP Net Cash Provided by Operating Activities (from the GAAP Statement of Cash Flows) less Principal Loan Payments

(or Debt Reduction amount from the Financing Activities Section of the GAAP Cash Flows Statement for the same year). This will provide a degree of independent assurance that the numbers used to calculate dollars available for allowable uses is timely and accurate because the numbers can be tied directly those in the latest independently audited financial statements.

We agree that calculation of the NIGC fee should be based on the numbers from a GAAP audited financial statement for the fiscal year of the reporting Gaming Operation and that the definition of "gross gaming revenue" should also be defined consistently with GAAP making it simpler to reconcile and document. We recommend that all changes making definitions concerning Financial Calculations being more consistent with GAAP in both A and B above be high priority to NIGC with changes being effective as soon as reasonably practicable.

(2) Management Contracts. The NIGC has asked "should the definition of management contract be expanded to include any contract, such as slot lease agreements, that pays a fee based on a percentage of gaming revenue?" No, our Class III Gaming Compact with the State of Idaho does not allow any management contracts or agreement. We recommend there should be some guidance by NIGC to provide acceptable compensation to management for the Tribe's consideration.

Importantly, the Shoshone-Bannock Tribes are a member of National Indian Gaming Regulatory Association and the National Indian Gaming Association which both are equipped to make recommendations collectively that can share an expanded variety of management views and provide acceptable recommendation for tribes who use management contracts.

4. Part 514-Fees (Not a Priority)

The NIGC is interested in receiving comments on whether part 514 is in need of revision. In particular, the NIGC is interested in receiving comment on whether it should consider revising

this part to base fees on the gaming operation's fiscal year. Currently, the fee is calculated based on the calendar year. The Shoshone-Bannock Tribal government and Gaming operation is based upon the fiscal year – October 1 to September 20 -- with the option to adjust over a 12 to 18 month period. If the NIGC changes to the fiscal year, then the fee assessment periods would not need changing as in previous years notices, pointed out in the January 22, 2010, Bulletin No. 2010-1 "Annual Fees Payable by Indian Gaming Operations: New Rules".

NIGC does not have the authority to change the definition. The calculation of the NIGC fee could be based on the Gaming Operation's fiscal or annual reporting year and on the numbers from a GAAP audited financial statement for the same fiscal year. The definition of "gross gaming revenue" should also be used consistently with GAAP and the AICPA audit guide for casinos making it much simpler to reconcile and document. These changes would prevent continuous adjustments to the fees calculated because the fees would be based on a well-documented and easily identifiable audited number. If the gross revenue definition was consistent with the American Institute of Certified Public Accountant (AICPA) definitions for casinos, then revenues from fingerprinting or other miscellaneous items would not be applicable with regard to fee calculations.

We also urge the NIGC to amend the FBI fee for the finger printing process. The Gaming Commission processes the gaming operation's finger printing fees (payments) through a Tribal budgeting process, and pays the FBI finger printing cost separately from the fee calculation process. It would be a good practice to publish all charges as far in advance as possible. This would facilitate budgeting by tribes and also give them a due process opportunity to provide comment. A Bulletin could set out the process, procedures and fees. It could then be easily updated and revised as needed.

The Gaming Commission would rather have NIGC consider a late payment fee in lieu of a Notice of Violation (NOV). NIGC needs to take into consideration the adverse impact a NOV has on a Tribe's gaming operation. The issuance of a NOV results in poor credit ratings, the appearance of non-compliance, appearance of an unstable gaming management and regulatory agency, and financial institutions are more likely to scrutinize or decline financing for tribal gaming projects. The closing of a casino doors over late fees is an excessive measure and creates a negative impact to the reservation economy. NIGC should amend the regulations to provide notices, hearings and due process for tribal gaming operations. The NOV process is a harsh measure and should be eliminated for the failure to pay fees. The late payment system should include a grace period before assessing late penalties. A revised regulation would be helpful.

5. Part 518 Self Regulation of Class II (Priority)

The NIGC should revise these regulations to clearly set forth the steps to Self-Regulation not punitive in nature. Self-regulation is a hallmark of sovereignty and should be supported by NIGC by Section 518, not suppressed. The current Section 518 is inconsistent with Section 2710(c)(4) of IGRA. The factors to be considered for Self-Regulations should be those contained in Section 2710(c)(4) and be weighted to take into consideration the years a tribes has operated its gaming with integrity, honesty, and the implementation of a comprehensive Tribal regulatory regime. The independent audit conducted by a tribe's CPA should serve as the basis for the accounting/process review and determination of financial soundness. We recommend that NIGC adopt a negotiated rulemaking process for amending these provisions to give tribes a full voice and to create a transparent process and record.

6. Part 523 Review and Approval of Existing Ordinance or Resolutions (Not a Priority)

The NIGC should eliminate part 523 as obsolete. A Bulletin should be used to encourage updating and resubmission for approval of pre-1993 ordinances.

7. Management Contracts (Not a Priority)

Part 531 – Collateral Agreements

We support the proposal of reviewing a collateral agreement that may be a part of or incorporated into the management agreement. Such review would ensure that a management company is not violating any provisions of the Indian Gaming Regulatory Act. A Bulletin process would best address the submissions acted upon by NIGC and give guidance to tribes on agreements. It would be difficult to draft a regulation which anticipates all the possible conditions and circumstances of management contracts and collateral agreements.

It would be helpful is the NIGC made all declination and rejection letters (final Agency action) available to the public, similar to what it provides on violations. A comprehensive review of the topic should be undertaken with tribes to gain their experiences, risk evaluations and business perspectives. This should be done prior to any regulation or bulletin being published.

8. Part 533 – Approval of Management Contracts (Not a Priority)

The Shoshone-Bannock Gaming Compact does not permit management contracts.

9. Part 539 Appeals, Proceedings before the Commission (Priority)

The NIGC should provide for more comprehensive and detailed procedural rules for appeals relating to NOVs, civil fines and closure orders. The Gaming Commission was involved in a potential NOV being issued regarding the failure to provide certain background checks. It was unclear what process, if any, was being followed by the NIGC. The NIGC General Counsel office advised our attorneys there would be a NOV issued, but there was not one issued. In contrast to this notification, the Regional office told us we could take certain steps to remedy the

situation. Then, the Tribes met with the NIGC Chair and resolved the issue. It was quite confusing for the Gaming Commission as to what action should be taken and the potential consequences of their action or inaction. The Tribal Council, legal counsel and Gaming Commission were all involved in the issue and often receiving conflicting directions and opinions from NIGC. A review of the NIGC's NOV decisions show they are inconsistent despite similar violations. There needs to be standardization of the rules and review.

Procedures detailing the warning process, steps leading to the issuance of a NOV, and the appeal process would be very helpful. This would provide for due process notice and the opportunity for a tribe to protect its interests should the NIGC take action against the tribe. A record should be made and final agency action taken which should be appealable.

10. Part 542 Class III Minimum Internal Control Standards (Priority)

We recognize that some tribes may reference the federal MICS Section 542 in their ordinances or compacts. The MICS rule should be struck and replaced with a Bulletin with language stating that it does not affect any tribes who may have incorporated the federal MICS prior to the effective date of the guideline. Section 542 should be updated stating clearly that the provisions are advisory only but that specific tribes may choose to adopt the regulations along with NIGC oversight by written agreement. Of course, this would require continuing update and revisions of Section 542. An alternative is to issue the guidelines in a Bulletin. The Bulletin will be regularly updated based on input from tribes and other affected parties.

11. Part 543 – Class II Minimum Internal Controls Standards (Priority)

A first step for NIGC is to withdraw the current Section 543 regulations and/or suspend any enforcement of the regulations. The current Section 543 is in need of total revision. Tribes have formed a working group that is drafting a replacement regulation to be adopted by tribes

and to be recommended to NIGC. The Tribal Working Group has identified the last published NIGC draft by the last TAC to be the starting point for review.

To produce class II gaming devices, then it should be handled on a, case by case bases without having an impact to the class III operations. If new standards are developed for class II devices, then it should be designed not to have an effect on class III operations. Our Commission questions the new proposed class II proposed rules and would be concerned of any gaming legal impacts.

12. Part 547 Class II MICS for Gaming Equipment (Priority)

Section 547 should be revised; it needs clarifications. The tribes have a working group that is preparing a revised Section 547 to be adopted by tribes and to be recommended to NIGC.

13. Part 556 Background Investigations for Licensing (Not a Priority)

The Shoshone-Bannock Tribes were not afforded the opportunity to participate in the NIGC "pilot program". We have discussed this program with the Northwest Regional Office and it would be helpful and reduce the paperwork currently required of the Gaming Commission to document licensed gaming employees. The Gaming Commission and staff work diligently to get the licensing backgrounds in order to fulfill its obligations of compliance. The pilot program would be a worthwhile tool to be promulgated into a regulation.

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

Fingerprinting should be provided if requested by a tribe on a case-by-case basis and in accordance with tribal regulations. This cannot be a mandate of NIGC but should be closely coordinated between the NIGC and tribe to ensure the FBI requirements are met.

14. Part 559 Facility License Notification, Renewals and submissions (Priority)

With respect to gaming facility licensing on Indian lands, tribes retain significant regulatory authority under IGRA "which remains within the jurisdiction of the Indian tribes"

subject to the terms of IGRA. 25 U.S.C. § 2710(a)(2). The Gaming Commission conducts a facility license review of its three gaming facilities located on the Fort Hall Reservation. A thorough inspection is conducted and various regulatory agencies of the Tribes – Fire Department, Indian Health Service, Building Inspector – are involved to review facility compliance with Tribal and federal laws. The Gaming Commission provides for an inspection of the gaming facility based on the age of the facilities. The older facilities are licensed every two years and the new facility is every three years with the understanding the inspection assessment does not find serious inspection and health related problems. In addition, the Gaming Commission meets with the gaming management and undertakes any other inspection and assessment to protect the integrity of gaming on the Fort Hall Reservation. The Commission has a comprehensive gaming facility license checklist to be used in the licensing process at all three casinos. The Gaming Commission, as the local gaming agency, possesses the knowledge of each gaming facility, and is in the best position to review and issue annual facility licenses.

The NIGC and Chair have been delegated some limited approval, investigatory and reporting authority for gaming. In material part, the NIGC, has power to approve an annual budget; adopt regulations for the assessment and collection and civil fines as provided in § 2713 (a); approve tribal ordinances as provided in §2710; establish the rate of fees as provided in § 2717; authorize the Chairman to issue subpoenas as provided in § 2715; order closure of an Indian gaming operation; monitor Class II gaming conducted on Indian lands and inspect the premises where conducted; conduct background investigations as may be necessary; inspect, examine and audit books, and records respecting gross revenue; and perform certain ministerial functions. 25 U.S.C. § 2706.

Significantly, the NIGC and its Chair, possess no general authorization to impose general operational regulations for Indian gaming. NIGC facility licensing regulations on Indian lands appears to fall within this area. Equally important, the NIGC possesses no authority to regulate Tribal trust lands. The question of whether NIGC has authority to promulgate facility licensing regulations for Indian gaming has not been addressed by any court. As asked in the *Colorado River* case, "what is the statutory basis empowering the Commission to regulate class III gaming operations? Finding none, the court held the NIGC could not regulate Class III gaming.

Colorado River is instructive because like the Class III gaming regulations, we are unable to find any Class II *regulatory* authority in the IGRA for the NIGC to govern facility licensing. Facility licensing is often controlled by a tribal-state compact, not pursuant to any regulations imposed by the NIGC. IGRA also expressly provides that Class II gaming shall continue to be within the jurisdiction of the tribe though subject to the Act. The real question here, then, is to determine precisely what limits IGRA places upon that continued tribal jurisdiction for facility licensing. Finding none, it may well be that NIGC has simply gone too far in the facility licensing area and may eventually be challenged if it tries to take enforcement action against a tribe. Section 559 should be withdrawn and any enforcement suspended. It would be preferable that a series of Bulletins be issued outlining best practices for facility licensing by Tribal Gaming Commissions.

15. Section 571.1 – 571.7 – Inspection and Access

In *Colorado River Tribes v. NIGC*, the Court of Appeals for the District of Columbia held that the Chairman and NIGC have no authority to adopt regulations governing the day to day operations of a Class III gaming facility operating pursuant to a tribe-state compact that is in effect since Congress intended that such matters were to be determined via the tribal-state compact. 466 F.3d at 137-40. This decision forecloses inspection of and examination of papers,

books regarding gross revenues of Class III gaming. Many tribes, including the Shoshone-Bannock Tribes do not separate their Class II and Class III gaming records and documents regarding gross revenue. Therefore, the inspection of Class II gaming records by NIGC will likely result in the examination and inspection of Class III records. In so far as the NIGC actions may touch upon Class III gaming it is prohibited under the *Colorado River Tribes* decision.

The challenge that NIGC faces is to conduct such inspection of Class II gaming records without inspecting Class III records. Any regulations must be carefully crafted so as to not interfere in Class III gaming. Does the NIGC intend to seek access to records at Certified Public Accountant firms when it states it wishes to "clarify Commission access to records at off-site locations including at sites maintained or owned by third parties." We would not support such action if it is an expedient way to circumvent the *Colorado River Tribes'* ruling prohibiting NIGC to engage itself in Class III matters. If the NIGC moves forward with a regulation it should provide full opportunity for tribal input through the standard notice and rulemaking process.

16. Part 573 – Enforcement (Priority)

There should be a process for withdrawing a NOV after issuance. The NIGC Chair under IGRA has the authority to issue NOVs. Accordingly, the Chair should also possess the discretion to withdraw a NOV. The NIGC should recommend some guidelines for when withdrawal of a NOV is appropriate.

17. Potential New Regulations

Communication Policy or regulation identifying when and how the NIGC communicates with Tribes

President Obama's November 5, 2009 Memorandum on Consultation, 74 Fed. Reg. 57,881 (Nov. 5, 2009), declares that "[c]onsultation is a critical ingredient of a sound and productive federal-tribal relationship," and commits the Administration to "regular and

meaningful consultation and collaboration with tribal officials in policy decisions that have tribal implications..." To achieve its goals, the President Memorandum directs all federal agencies to submit a detailed plan of action to implement Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, 65 Fed. Reg. 67,249 (Nov. 6, 2000). If NIGC has not developed such a plan of action for consultation, after consulting with Indian tribes, the Gaming Commission urges NIGC to do so.

Many agencies within the executive branch have defined their trust responsibilities toward tribes by issuing various policy directives through internal agency guidance documents to deal with Indian issues in their programs. The policies vary considerably and reflect different approaches to dealing with tribes. Some of the executive branches which have policies include the Department of Interior, Department of Agriculture, Environmental Protection Agency, Department of Energy, and Department of Justice.

Although there is no standard definition of "consultation", it generally should mean more than simply providing information about what a federal agency is planning to do and allowing concerned tribes to comment. Consultation should mean two-way communication, a collaborative process between governments -- a true government-to-government relationship. The goal of consultation should be consensus, full agreement between the parties involved in the consultation.

The Gaming Commission offers to NIGC some practical considerations that can make consultation better and effective with tribes. The Shoshone-Bannock Tribes have entered into several tribal-federal agency (U.S. EPA, U.S. Forest Service) consultation agreements, which include some of the following principles and considerations --

A. Seeking an understanding of how each tribe wishes to be consulted.

B. Viewing consultation with tribes as an essential element of the government-to-government relationship and not simply as a procedural requirement.

C. Entering consultation with a good heart. In other words, federal agency representatives should enter without assumptions and a sincerity to learn and discuss the issues. Agency staff should resist thinking of Indians as a group of people with the same attitudes, ideas, cultures and responses.

D. Federal agencies should know the particular tribe, their governmental structure and resources. Federal agencies must recognize and understand that tribal people hold sincere beliefs and values toward the land, its relationship to all things in the world and the tribes relationship and dependency on the land and resources.

E. Federal agencies should recognize that tribal cultures are not dead and they are not static. Traditional religious beliefs and practices are still exercised by tribal people on and off-reservation.

F. Federal agencies must conduct consultation with official tribal governing leadership; one councilmember contact is not consultation. Tribal staff do not speak on behalf of the tribes about tribal policies, decisions and actions. Groups, intertribal councils and commissions do not speak or represent the tribes.

G. Notification is not consultation nor is a phone call or email to tribe.

H. Federal agencies should visit, listen and communicate in person. Be respectful, do not interrupt when a tribal person is speaking. Do not take offense during consultation.

I. Be open and maintain honesty and integrity about the federal agency's purpose and needs, and throughout the consultation process. Documents and statements should clearly describe the proposed agency action or policy to the tribes. Explain in plain and simple terms what the agency wants to accomplish, where the agency is in its decision making process, and the nature of the decision to be made. Limit acronyms when consulting with the tribes, or in the alternative, if they must be used, include a clear definition of their meaning.

J. Federal and tribal officials should identify the preferred communication for consultation, develop protocols or memoranda of agreement on how consultation should be conducted.

K. Develop points of contact with the tribes for day to day activities.

L. Contact the tribes early and allow sufficient time for the consultation process. Many tribes have an established governmental review process and protocols that must be followed by tribal staff. Be flexible with deadlines and decisions.

M. Allow ample time for the tribe to receive, process and respond to requests for consultation.

N. Agencies should not be driven by their own agendas. Most agencies know well in advance of what rules, policies or regulations they may seek comments on and should give tribes a schedule of rulemaking at the beginning of each fiscal year, and an advanced copy of the rules for comments.

O. If the tribe does not respond to an initial request to engage in consultation, the agency should not assume the tribe has no interest in the matter. The more information the tribe receives about the consultation the better prepared the tribe can be to comment.

P. Conduct field trips with tribal staff and leadership of the impacted or affected area.

Q. Answer questions directly and honestly, and be willing to seek out an answer. Be reliable. Do not say the easy answer or commitment. Be certain you can deliver. If you cannot say so.

R. Understand that questions posed to tribes may not be answered immediately as tribal leaders may need to discuss issues with tribal membership.

S. Do not rely on consultants or experts about what will be the position of the tribe.

T. Understand that some kind of information is sensitive and confidential. Many tribes have established privacy acts that require the approval of leadership to release tribal documents.

The basic duties of the trust obligation are well established. President Obama took a significant step toward fulfilling his trust obligation by directing his agency officials to the Indian law principles that stand apart from the federal statutory mandates. Any NIGC plan of action should address the various issues raised by the NIGC including direct communication with designated tribal entities, identifying points of contact, resolution of disputes, formal and informal consultation with tribal elected officials on policy and technical and/or Gaming operations or Gaming Commission on specific non-policy issues. Even if the NIGC is taking enforcement action against a tribal entity, it does not relieve the NIGC of its duty and responsibility to consult with a tribal governing body and staff. We urge the NIGC to issue a rulemaking on this important consultation matter.

Buy Indian Act Regulations (Not a Priority)

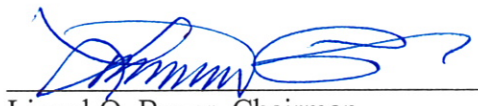
The Gaming Commission supports the NIGC adopting a regulation which would require the NIGC to give preference to qualified Indian owned business when purchasing goods or services as defined by the "Buy Indian Act', 25 U.S.C. 47.

Conclusion

In conclusion, the Shoshone-Bannock Tribes Gaming Commission thanks you for the opportunity to present our perspectives on the NIGC's Notice of Inquiry and Request for Information. We agree with the National Indian Gaming Commission's general assessment that numerous NIGC regulations need reform and revisions, and any rulemaking must provide a framework for tribal participation, review and comments. We commend the NIGC for recognizing some of its regulations are incomplete, obsolete and may go beyond its regulatory authority, and its willingness to explore and consider ways to address some regulations which may be excessive, inefficient and costly administrative procedures.

The Gaming Commission reemphasizes that any NIGC regulations and rulemaking must be in accordance with the principles of tribal self-government and self-determination. Indian tribes must determine their own future. Additionally, care must be taken to remember that Indian gaming is tribal governmental gaming. It is an essential revenue source for the provision of governmental services and programs to tribal people. Tribal Gaming Commissions provide a critical role of regulating the gaming operations which should not and cannot be filled by the National Indian Gaming Commission. Accordingly, the NIGC should not overstep the limitations placed on its authority in the Indian Gaming Regulatory Act.

Finally, we urge the NIGC to continue the consultation commitment to work with Indian tribes on these gaming issues.



Lionel Q. Boyer, Chairman
Shoshone-Bannock Tribal Gaming Commission