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February 11, 2011

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

Via Electronic Mail
reg.review@nigc.gov

Re: Notice of Inquiry and Request for Information; Notice of Consultation

Dear Chairwoman Stevens:

The Suquamish Tribe ("Tribe") thanks you for the opportunity to comment on the regulations promulgated by the National Indian Gaming Commission (NIGC) pursuant to the Indian Gaming Regulatory Act (IGRA). Our comments are made in the order the regulations appear, and we have noted in bold the priority we attach to each section. Before commenting specifically on the regulations, the Tribe offers some general thoughts.

First, gaming works. The operation of gaming by Indian tribes has enabled unprecedented economic development in Indian country, which has in turn allowed many tribes to diversify their economies, strengthen their tribal governments, and become more self-sufficient. The Suquamish Tribe is a model of this. The Tribe has invested all of its gaming revenues in its government, its community, and its economic development efforts. It has grown and diversified its business enterprises continuously but cautiously, being careful not to overextend itself as some other tribes have done. It has used gaming revenues to repurchase land on its Port Madison Indian Reservation and to build a new Tribal government center, police station, courthouse, community house, community dock, early learning center, sports facilities, and veterans memorial, among other things. The Tribe is in the process of creating a new memorial at Chief Seattle's gravesite, and constructing a new Suquamish museum. Moreover, the Tribe has made substantial contributions to the surrounding communities, due in no small part to gaming revenues. But much work remains to be done. Tribal economic development is an ongoing process, and tribes' ability to continue on their paths of economic development and self-sufficiency must not be impeded.

Second, the industry is well regulated. The concerns used to justify passage of IGRA, such as the possible infiltration of organized crime and other corrupting influences, have not been realized. Many tribes now have several decades of successful experience under their belts as the primary regulators of their gaming operations. Notably, the experience of many tribes (including the Suquamish Tribe) predates the NIGC's more intrusive efforts to regulate Indian gaming, such as its promulgation of minimum internal control standards, technical standards, and facilities licensing

standards. The Tribe is concerned that these regulatory activities by the NIGC are not only unnecessary but constitute overreaching and encroach on tribal sovereignty.

The Tribe shares the NIGC's commitment to the effective regulation of tribal gaming and believes that other tribes do as well. In fact, tribes are the ones with the most incentive to protect their gaming operations, both in terms of the fairness of play and in terms of public health and safety. The Tribe accordingly believes that tribes must remain the primary regulators of their gaming operations. For this reason, the making and enforcement of laws and regulations applicable to Indian gaming should be left to tribes as much as possible, and tribes should be free to make their own business decisions, even if those decisions might occasionally fall short of optimal. In contrast, NIGC regulations should be revised to be as respectful of tribes as possible, and new NIGC regulations pertaining to tribes should be considered only when truly necessary. Both of these things should be accomplished using as much tribal input as possible, beginning as early in the process as possible.

From that frame of reference, the Tribe provides the following additional comments in response to your November 12, 2010, Notice of Inquiry and Request for Information; Notice of Consultation ("Notice of Inquiry"):

I. Current Regulations

A. Definitions

(1) Net Revenues

The Notice of Inquiry requests comments regarding whether there should be two separate definitions of the term "net revenues" (which the NIGC currently defines in 25 C.F.R. § 502.16).

(a) Management Fee

First, the NIGC asks whether it would be appropriate, for purposes of calculating allowable management fees, to have a definition of "net revenues" that more closely resembles Generally Accepted Accounting Principles (GAAP). Such a definition might permit the deduction of additional expenses in calculating the net revenues. The Suquamish Tribe does not have a management contract for its Casino. Therefore, it has no strong interest in the method of calculating management fees. Nor does the Tribe otherwise have any concerns with the current definition of "net revenues." The Tribe can, however, see that it might be more convenient for accounting professionals if the definition of net revenues more closely resembled the corresponding definition in the GAAP. The Tribe can also see that providing for the deduction of additional expenses in calculating net revenues might protect some tribes with management contracts, by effectively reducing the maximum amount that the tribes can pay under the management contracts. But the Tribe questions whether there is actually a need to protect tribes in this manner, when tribes are sovereigns which are free to negotiate the terms of their contracts. If they wish to pay lower fees on their management contracts, then they can negotiate lower fees. The Tribe also notes that the term "net revenues" is defined in IGRA at 25 U.S.C. § 2703(9) and

that any definition of the term in the NIGC regulations must be consistent with IGRA definition. Accordingly, the Tribe views this potential revision as a **low priority**.

(b) Allowable Uses

Second, the NIGC asks whether it would be appropriate to have a separate definition for purposes of calculating the “net revenues” that are available for the allowable uses specified under IGRA. More specifically, a revised definition might take the actual cash flow and financial integrity of the gaming operation into account before allocating funds to allowable uses under IGRA. The Tribe agrees that tribes should consider the cash flow and costs of doing business (e.g., making loan payments, accounting for depreciation) and the financial integrity of their gaming operations before allocating funds for other purposes. However, the Tribe does not believe that the NIGC should dictate such a requirement to tribes. Tribes must be able to make their own business and budgeting decisions, even if their decisions occasionally might not be optimal. Therefore, the Tribe considers this potential revision a **low priority**.

(2) Management Contract

The Tribe does not believe that the NIGC should expand the definition of “management contract” to include any contract that requires the payment of a fee based on a percentage of gaming revenues, such as slot lease agreements. While a vendor might receive payment based on a percentage of gaming revenues under these contracts, the vendor typically does not receive control over the “operation and management” of the gaming operation, as contemplated by 25 U.S.C. Section 2711 of IGRA. To the extent a vendor does receive control over the operation and management of the gaming operation, NIGC review of that contract would be appropriate under IGRA and the existing regulations. For the NIGC to review contracts that do not give a vendor control over the operation and management of the gaming operation would constitute overreaching by the NIGC and would interfere with the tribes’ sovereign authority to contract and to make their own business decisions. Moreover, broadening the definition of “management contractor” in this manner could require tribes to seek review of even small contracts, which could easily impede tribes’ ability to contract efficiently and would hardly be the best use of NIGC resources.

The Tribe is aware, however, of the possibility that a management contractor might receive an impermissibly high percentage of gaming revenues by executing a series of agreements, some of which do not require NIGC review under the current regulations. The Tribe understands the desire to prevent such circumstances. Accordingly, the Tribe probably would not oppose (although it would not actively support) placing a cap on the total compensation that a management contractor can receive from all revenue sources relating to a tribe. But as a matter of principle, the Tribe believes that each tribe’s circumstances are unique, and as sovereigns, all tribes should be free to contract as they see fit. Therefore additional contracting restrictions are neither necessary nor appropriate. The Tribe therefore places a **low priority** on any such revision.

(3) § 502.22

25 C.F.R. Section 502.22 defines the phrase “construction and maintenance of the gaming facility, and the operation of that gaming is conducted in a manner which adequately protects the environment and the public health and safety,” which is a phrase used in IGRA at 25 U.S.C. Section 2710. The Notice of Inquiry did not specifically request comment on Section 502.22, but the Suquamish Tribe believes the NIGC should consider revising it. The relevant portion of IGRA states only that “The Chairman shall approve any tribal ordinance or resolution concerning the conduct, or regulation of class II gaming on the Indian lands within the tribe’s jurisdiction if such ordinance or resolution provides that...the construction and maintenance of the gaming facility, and the operation of that gaming is conducted in a manner which adequately protects the environment and the public health and safety....” 25 U.S.C. § 2710(b)(2)(E). IGRA does not otherwise dictate what laws a tribe must have in place or require tribes to identify and enforce any specific laws. Therefore, as a general matter, the Tribe believes that 25 C.F.R. Section 502.22 far exceeds the scope of IGRA by requiring tribes to identify, adopt, and enforce laws on specific topics. The Tribe also views this as a blatant and severe encroachment on tribal sovereignty. Moreover, the second sentence of Section 502.22 is a substantive provision, which does not belong in a definition. For these reasons, the Tribe suggests that the NIGC remove or substantially revise this definition. The Tribe places a **high priority** on this revision and believes the NIGC should work with a Tribal Advisory Committee to address it in conjunction with the facility licensing provisions discussed below.

B. Fees

(1) Calculation of NIGC Fees

Under the current NIGC regulations, tribes must calculate the fees they pay to the NIGC on a calendar year basis. The fees are based on a percentage of each gaming operation’s gross revenues. However, IGRA does not specify that either the gross revenues or the fees must be calculated on a calendar year basis. Moreover, 25 C.F.R. Section 571.12 requires audits “for each fiscal year.” These audits must further be reconciled with the NIGC fee assessment reports under 25 C.F.R. Section 571.14. Thus, calculating the NIGC fees on a calendar year basis and reconciling them with the annual audits could be problematic and unnecessarily burdensome for tribes that operate on a fiscal year other than the calendar year. The Suquamish Tribe’s fiscal year is the calendar year, so it does not have a problem with this itself. However, many other tribes follow the federal fiscal year, and the Tribe believes that tribes should be free to choose what their fiscal year will be and should not be negatively impacted as a result of that choice. Therefore, the Tribe believes the NIGC should revise Part 514 to provide for the calculation of fees on the basis of a tribe’s fiscal year, whatever that may be. The Tribe places a **medium priority** on this but believes that the contemplated revision is straightforward enough that the NIGC should be able to accomplish it relatively quickly. For the same reason, the Tribe believes that a standard notice-and-comment process should be sufficient to accomplish this revision.

(2) “Gross Gaming Revenues”

The Tribe does not have concerns with the current definition of “gross revenues” for purposes of calculating NIGC fees. Unless other tribes are experiencing difficulty because the definition is not more consistent with the GAAP, the Tribe does not see a need to revise this definition. Moreover, the Tribe notes that the term is defined in IGRA at 25 U.S.C. Section 2717 for the same purposes and submits that any revision to the definition of “gross revenues” in the NIGC regulations would have to be consistent with IGRA. The Tribe places a **low priority** on this potential revision.

(3) Fingerprint Fees

The NIGC has put forth for consideration the question of whether it should expressly include fingerprint processing fees in the fees calculated under Part 514. This would include the fingerprint fees in the statutory and regulatory cap on the fees gaming tribes must pay the NIGC, which would presumably have a positive, although not highly significant, financial impact on the tribes. The Tribe would therefore support such a revision but places a **low priority** on it in light of the greater importance it places on other issues discussed herein. The Tribe agrees that the NIGC should periodically review the fees charged by the FBI for fingerprint processing and ensure that the fees the NIGC charges tribes are reasonably similar. But the Tribe does not find it necessary to promulgate such a requirement by regulation. If the NIGC does decide to proceed with either or both of these potential changes, the Tribe believes a standard notice-and-comment process should be sufficient.

(4) Late Payment Fees

The Tribe fully supports the idea of the NIGC instituting a late payment system instead of issuing NOV's or taking other more serious actions. The Tribe believes that a reasonable monetary penalty is far more appropriate than an NOV in the case of late payments. The Tribe would support revising Part 514 to clarify that late payments will ordinarily result in a monetary penalty and to set forth the schedule of monetary penalties. The Tribe would also support revising Part 514 to clarify that an NOV would issue only under certain limited circumstances. The Tribe views this as a **medium priority**, and believes a standard notice-and-comment process should be sufficient.

C. Self-Regulation

25 C.F.R. Sections 518.3 and 518.4 set forth extensive requirements that a tribe must meet in order to obtain a certificate of self-regulation for its class II gaming operations. Many tribes would undoubtedly be able to meet these requirements, but very few have chosen to make the effort. Presumably, tribes do not attempt to meet these requirements both because the requirements are so extensive and because the benefits of achieving self-regulation are few. The Tribe believes that a number of the requirements are either duplicative in that they require a tribe to produce information that is already available to the NIGC or are not reasonably related to the limited factors set forth in IGRA. As for the benefits of self-regulation, the fee reduction is clear,

but the other benefits are limited and rather vague. Finally, there is not much benefit in achieving self-regulating status for class II gaming for tribes who also offer class III gaming. The Tribe would support the NIGC in streamlining the requirements and process for self-regulation. However, unless there is a corresponding increase in the benefits of self-regulation (such as clearly reduced NIGC oversight, self-regulation for class III as well, and other clear benefits), the Tribe suspects that streamlining Part 518 would have little impact. Therefore, the Tribe recommends that the NIGC explore the possibility of increasing the benefits of self-regulation first. The Tribe views this as a matter of **medium priority**. In the event the NIGC does decide to pursue revisions to Part 518 (or relevant amendments to IGRA), the Tribe believes a Tribal Advisory Committee and a subsequent opportunity for comment would be appropriate.

D. Review and Approval of Ordinances

(1) Part 522

The Notice of Inquiry does not specifically request comment on 25 C.F.R. Part 522, but the Tribe believes the NIGC should consider eliminating 25 C.F.R. Section 522.2(i), which was recently added as part of the facility licensing standards. The subsection requires tribes to provide “Indian lands or environmental and public health and safety documentation that the Chairman may in his or her discretion request as needed.” For the reasons discussed above with regard to Section 502.22, the Tribe believes that this subsection exceeds the NIGC’s authority and encroaches on tribal sovereignty. The NIGC should work with a Tribal Advisory Committee to address this issue in conjunction with the facility licensing provisions discussed below, which the Tribe views as a **high priority**.

(2) Part 523

The Tribe has no objection to removing 25 C.F.R. Part 523.

E. Management Contracts

(1) Collateral Agreements

IGRA specifies that references to the term “management contract” include “collateral agreements to such contract that relate to the gaming activity.” 25 U.S.C. § 2711(a)(3). The NIGC regulations likewise define “management contract” to include a “collateral agreement between an Indian tribe and a contractor or between a contractor and a subcontractor if such contract or agreement provides for the management of all or part of the gaming operation.” 25 C.F.R. § 502.15. Thus, in order for the NIGC to have the authority to approve a collateral agreement under 25 U.S.C. Section 2711, the contract must relate to the gaming activity. And in order for the NIGC to have the authority to approve a collateral agreement under 25 C.F.R. Part 533, the collateral agreement would have to provide for the management of all or part of the gaming operation. The Tribe believes this structure is appropriate as it is. The NIGC should not have authority over all collateral agreements. And, if the NIGC chooses not to exercise the full extent of its authority over collateral agreements, that is fine. Indeed, many of the requirements

of Parts 531 and 533 do not apply well to collateral agreements. As a general matter, the Tribe believes that tribes should have the freedom to contract and to make their own business decisions whether good or bad. If a tribe specifically asks the NIGC to review and approve its collateral agreements, then the NIGC would be within its authority to do so, provided the collateral agreements at least relate to gaming. In most instances, however, the Tribe believes that tribes are perfectly capable of determining for themselves what amounts a contract requires them to pay and whether such amounts exceed a percentage of the net revenues that is permissible under IGRA or, more importantly, acceptable to the tribes themselves. Thus, the Tribe does not perceive a need for revisions regarding collateral agreements and accordingly views this as a **low priority**.

(2) Approval of Management Contracts

The Tribe does not believe it is necessary to add specific grounds for disapproving management contracts under the “trustee standard” of Part 533. For one thing, the specific grounds the NIGC mentions already constitute grounds for disapproving a management contract under 25 C.F.R. Section 533.6(a). While it might be somewhat desirable to limit the NIGC’s ability to disapprove a management contract under the “trustee standard,” the Tribe views this as a **low priority**. In the event the NIGC nevertheless decides to pursue such a revision, the Tribe suggests that a standard notice-and-comment process would be sufficient.

(3) Background Investigations

On its face, 25 C.F.R. Part 537 appears to limit its background investigation requirements to management contracts for class II gaming. As the Notice of Inquiry points out, the Chairperson of the NIGC does have the power under IGRA to approve management contracts for both class II and class III gaming. 25 U.S.C. § 2705(a)(4). However, the Tribe notes that this does not constitute a general grant of authority over class III management contracts. The Tribe also questions whether it would be appropriate for the NIGC to impose background investigation requirements on class III management contracts, when the NIGC’s requirements would in many cases either duplicate or be inconsistent with background investigation requirements under tribal-state gaming compacts. If the NIGC does intend to impose the requirements of Part 537 on class III management contracts, then the Tribe agrees that Part 537 requires revision. But the Tribe would advise the NIGC to convene a Tribal Advisory Council to determine whether that course of action is appropriate in the first place and, if so, how to revise Part 537. The Tribe places a **low priority** on this issue, primarily because the Tribe does not have any management contracts for its gaming operation.

F. Proceedings before the Commission

The Tribe is somewhat concerned with the lack of formal processes for appeals. The Tribe suggests removing the option for initial service by facsimile and requiring prior consent of the party to be served for subsequent service by facsimile. The Tribe views extensive revisions to these Parts as a **moderate priority**. If the NIGC does decide to proceed with such revisions, the Tribe suggests that the NIGC convene a Tribal Advisory Committee for that purpose.

G. MICS and Technical Standards

(1) Class III MICS

Given the *Colorado River Indian Tribes v. NIGC* decision, it is clear that the NIGC does not have the authority to regulate class III gaming and accordingly lacks the authority to require tribes to comply with the class III Minimum Internal Control Standards set forth in 25 C.F.R. Part 542 (“Class III MICS”). Therefore, the NIGC should strike the Class III MICS from the Code of Federal Regulations. The Tribe views this as a **high priority** and suggests that the NIGC undertake this task as soon as possible.

The Tribe recognizes that some tribes may have agreed to incorporate the Class III MICS in their gaming compacts with the states and that eliminating the Class III MICS could impact their gaming compacts. As the Tribe suggested at the Squaxin Island hearing, the NIGC could move these regulations to the “Reading Room” page of its website and relabel them as “model” regulations for use by any Tribe in its own ordinances. It would be acceptable for the NIGC to convert the current Class III MICS into guidelines or model Class III MICS.

But that still leaves the issue of whether the NIGC should periodically revise the no-longer-effective Class III MICS, in order to keep up with changes in technology and other circumstances. The Tribe does not believe that continuing to revise the Class III MICS is an efficient use of NIGC resources. The Tribe views the Class III MICS as unnecessary in the first place. The Suquamish Tribe, like other tribes, has negotiated internal controls in its Gaming Compact, and has also implemented additional internal controls, all of which meet or exceed the NIGC’s Class III MICS. Even without the Class III MICS, tribes will conduct their gaming in a manner that meets or exceeds industry standards because they have a strong incentive to protect their gaming operations. Moreover, the Suquamish Tribe and other tribes are able to revise their internal controls in order to keep up with rapid changes in technology and other circumstances (including the type of tribe-specific circumstances that the Class III MICS are not well adapted to) better and more quickly than the federal government can. Finally, many tribes will not use the Class III MICS, yet the cost to continue to revise them will be substantial. The NIGC’s resources can be spent in better ways that benefit a broader spectrum of tribes.

(2) Class II MICS

The Tribe acknowledges that IGRA gives the NIGC the authority to monitor and inspect class II gaming on Indian lands. It is not convinced, however, that the NIGC therefore has the broad authority to promulgate and require tribes to comply with the class II Minimum Internal Control Standards set forth in 25 C.F.R. Part 543 but not yet effective (“Class II MICS”). The Tribe urges the NIGC to remember the fundamental purposes behind IGRA and to remember that class II gaming is a safe harbor for all tribes, because the consent of the states is not required. The Class II MICS should reflect that reality. In addition, a one-size-fits-all set of Class II MICS is not well suited to the realities of the tribal gaming industry, which is very diverse in terms of geography, the size of gaming operations, the applicable laws, etc. Moreover, the NIGC’s ability

to keep the Class II MICS current with changing technology and other circumstances in a timely fashion remains questionable. And as a general matter, the Tribe firmly believes that it is far better for tribes to determine the rules and regulations they will abide by, rather than have rules and regulations unilaterally imposed on them by the federal government. Just as in class III gaming, tribes currently have or are perfectly capable of adopting their own internal controls that meet or exceed the NIGC's Class II MICS. The Tribe would therefore encourage the NIGC to consider rescinding the Class II MICS. In the alternative, the NIGC could convert them to guidelines or to model Class II MICS.

If the NIGC does not rescind the Class II MICS, the Tribe believes the Class II MICS will need substantial revisions in order to constitute a useful system of internal controls. The Tribe understands that the NIGC has already drafted some revisions, and it would not want to see the time and resources invested in that go to waste. However, the Tribe believes that the NIGC should generally seek tribal input before preparing a draft of any new regulations or substantial revisions to regulations. The Tribe would accordingly recommend convening a Tribal Advisory Committee and starting the revision process essentially from scratch, using the already-prepared draft merely as a point to begin conversation. The tribes and the NIGC should work together to prepare a revised draft before opening the draft up to comment by the general public. Finally, any Class II MICS should be as minimal and general as possible, in order to best allow for the diversity amongst tribal gaming operations and the inevitable changes in technology and circumstances. The Tribe views the issue of the Class II MICS as a **high priority**.

(3) Class II Technical Standards

The Tribe's comments regarding the Class II Technical Standards are the same as its comments regarding the Class II MICS, above.

H. Backgrounds and Licensing

(1) Background Investigations

Most tribes currently participate in what was originally a pilot program regarding the background investigation of employees. The Tribe would not object to the NIGC promulgating regulations formalizing the program. But because most tribes already participate in the program and it seems to work well as it is, the Tribe views this as a relatively **low priority**. If the NIGC decides to pursue this, the Tribe believes a standard notice-and-comment process should be sufficient, as long as the proposed regulations adhere closely to the existing program.

(2) Fingerprinting

The NIGC should give tribes the option of submitting to the NIGC the fingerprints of vendors, consultants, and other non-employees that have access to the gaming operations. The key point is that this should be an option, not a requirement, for tribes. Tribes who choose to avail themselves of this option should pay standard fingerprint processing fees. The Tribe is not sure that regulations regarding this issue are necessary, but in the event the NIGC does decide to

promulgate such regulations, the Tribe would place a relatively **low priority** on them. As long as any such regulations do not purport to impose any requirements on tribes, the Tribe believes a standard notice-and-comment process should be sufficient.

I. Facility Licensing

Of **highest priority** to the Tribe is the issue of the new facility licensing provisions of 25 C.F.R. Part 559 (together with the specific provisions in Parts 502 and 522 discussed above). The Tribe would like to see these provisions eliminated. IGRA only requires a license for each gaming facility and, as discussed above, gives the NIGC the authority to review a tribal ordinance governing class II gaming to determine if it provides that “the construction and maintenance of the gaming facility, and the operation of that gaming is conducted in a manner which adequately protects the environment and the public health and safety.” 25 U.S.C. § 2710(b). If an ordinance does so provide and if it meets the other requirements of Section 2710(b)(2), then the Chairperson of the NIGC does not even have discretion—he or she “shall approve” the tribal gaming ordinance. The requirements of subsection (b) are incorporated into the requirements for class III gaming activities as well. 25 U.S.C. § 2710(d). Notably, these provisions of IGRA only give the NIGC the authority to review a tribal gaming ordinance for specific content and approve it. The provisions do not give the NIGC any authority to review other tribal laws or any say over the substance of other tribal laws.

For tribes with class III compacts, those compacts completely address issues of environmental and public safety in class III facilities and should be given precedence over any NIGC regulation. This is especially true when tribes combine class II and class III activities in a single facility, as is the case with the Suquamish Tribe.

Yet the NIGC has seized hold of the above-cited IGRA provisions and claims that they give the NIGC the authority to require tribes to promulgate laws on specific topics, to require tribes to provide information going far beyond information related to gaming, to pass judgment on the substance of tribal laws, to penalize tribes if their laws do not meet the NIGC’s standards, and more. All of this far exceeds the scope of authority IGRA grants to the NIGC. Moreover, it constitutes a gross intrusion on tribal sovereignty. Indeed, the Tribe can conceive of few, if any, incursions on tribal sovereignty greater than dictating to tribes (albeit in a roundabout way) what laws they must adopt and then judging the adequacy of those laws.

There are also several practical concerns. For one thing, the requirements are burdensome. Having to identify all laws that apply, for a laundry list of topics, then determine whether a gaming operation is in compliance with every provision of those laws is extremely time consuming and expensive. For another thing, the end product provided to the NIGC under the regulations is essentially meaningless. It is merely a list of laws, the content of which the NIGC does not know. Also, requiring tribes to submit information on the land for new gaming operations is duplicative of DOI function and unnecessary. It is the Tribe’s view that the NIGC likely lacks expertise and depth of staffing in the broad range of topics it seeks to require tribes to address, and that the NIGC is therefore not qualified to determine whether a tribe’s laws on those topics are adequate or whether a tribe is in compliance with the laws on those topics. For all of

these reasons and many more, the Tribe strongly urges the NIGC to promptly retract Part 559 and the related provisions of Parts 502 and 522. Again, this issue is of the **highest priority** to the Tribe.

In the event the NIGC does not eliminate these provisions, the Tribe strongly urges the NIGC to at least revise the more troublesome aspects of them. The Tribe would recommend that the NIGC work closely with a Tribal Advisory Committee to determine what provisions should be revised and what the appropriate revisions might be. Among other things, if the NIGC retains Section 559.5, the Tribe would recommend revising it so that the standard under subsection (a)(1) is substantial enforcement and the standard under subsection (a)(2) is substantial compliance. The Tribe believes that 100% enforcement or compliance, 100% of the time, is an unrealistic standard. An employee could leave a food item out a little too long and violate a food code, or someone could temporarily prop a fire door open and violate a fire code, just to give two examples. Tribes are in the best position to deal with these kinds of incidents and routinely do. Surely the NIGC would not want a written plan regarding how a tribe will come into compliance for minor issues such as these! Yet as the regulations of Part 559 are currently written, there is no room for minor lapses in enforcement or compliance. This is but one minor revision that the Tribe would recommend in the event the NIGC decides to retain Part 559. The Tribe strongly advises the NIGC to accept extensive tribal input into more significant revisions to Part 559, if the NIGC does not rescind Part 559 outright, as the Tribe would recommend.

J. Inspection and Access

The NIGC should not revise 25 C.F.R. Part 571 to “clarify” the NIGC’s access to records at off-site locations, including at sites maintained or owned by third parties. The Tribe views Section 571.6(b) as already adequately addressing the availability of off-site records. And to the extent a gaming operation refuses to make available off-site records that are properly within the NIGC’s purview, the NIGC can compel non-tribal third parties to produce the information using standard avenues. Tribes must be able to protect their information and records. Third parties already have less of an incentive to protect tribes’ information and revising Part 571 as the NIGC proposes could increase the pressure on third parties to provide information, whether or not that is proper. While this might benefit the NIGC in limited instances, it is not right to impair tribes’ ability to protect their information in appropriate circumstances. Because the Tribe does not believe the NIGC should revise Part 571, it places a **low priority** on this issue. If the NIGC does revise Part 571, the Tribe would recommend at least a standard notice-and-comment process and perhaps a Tribal Advisory Committee depending on the nature of the contemplated revisions.

K. Enforcement

As a general matter, the Tribe believes that the NIGC should issue Notices of Violation (NOVs) only as a last resort, after the NIGC has notified a tribe of a problem, tried in good faith to work with the tribe to resolve the problem, and failed to resolve the problem through those efforts. The Tribe would support amendments to 25 C.F.R. Part 573 that clarify the steps the NIGC must take before issuing an NOV. It might also be helpful to include a heightened standard for when the NIGC may issue NOVs and orders of closure, so that tribes do not receive

serious penalties for relatively minor issues. In addition, if the NIGC does decide to institute a late payment system as discussed above, the NIGC will likely want to amend Section 573.6(a)(2) to reflect that late payments would only result in orders of closure under certain very limited circumstances.

The Notice of Inquiry asks whether the NIGC should promulgate a regulation permitting the withdrawal of an NOV after it has been issued. The Tribe notes that nothing in Part 573 would prevent the withdrawal of an NOV after it has been issued. Because Section 573.3 specifies that it is the Chairperson who may issue an NOV, the Tribe believes that the Chairperson also has the implicit authority to withdraw an NOV. The Tribe would not object to revising Part 573 to make that authority explicit and to address under what circumstances an NOV should be withdrawn, and by whom.

The Tribe would also like the NIGC to expunge NOVs after a certain amount of time has passed. This may be another appropriate revision to Part 573.

The Tribe views these as **medium priority** issues and believes the NIGC should work first with a Tribal Advisory Committee to accomplish any revisions to Part 573.

II. Potential New Regulations

A. Tribal Advisory Committee

The Tribe believes that a thoughtfully organized Tribal Advisory Committee can be an effective way to begin drafting or revising NIGC regulations. It therefore encourages the NIGC to use Tribal Advisory Committees in appropriate circumstances. The Tribe believes that Tribal Advisory Committees should consist of duly authorized tribal government representatives with specific experience in the particular area that the contemplated regulation will address. The members of Tribal Advisory Committees should represent a cross section of tribes, taking into account geographic area, size of gaming operation, etc. Tribal Advisory Committees should be large enough to represent a relatively broad range of tribal views, yet not so large as to be unwieldy. The NIGC should involve Tribal Advisory Committees early in the process, preferably before the NIGC has prepared a draft of a proposed regulation. Once the Tribal Advisory Committee and the NIGC have worked together to prepare a draft, the NIGC should circulate the draft to other tribes for comment, before opening the draft up to public comment. Having said all that, the Tribe does not believe that a regulation regarding Tribal Advisory Committees is necessary. Perhaps an NIGC policy, drafted with tribal input, would be more appropriate. While the Tribe views the use of appropriate Tribal Advisory Committees as a continuing **high priority**, it gives a relatively **low priority** to the drafting of a regulation or policy regarding Tribal Advisory Committees.

B. Sole Proprietary Interest

The Tribe does not believe a “sole proprietary interest” regulation is necessary. In the event the NIGC does pursue a “sole proprietary interest” regulation, the Tribe stresses the

paramount importance of preserving tribes' sovereign authority to make their own business decisions. Also in that event, the Tribe recommends that the NIGC work with a Tribal Advisory Committee to draft appropriate regulations, which should then be submitted for comment.

C. Communication with Tribes

The Tribe does not believe a regulation regarding the NIGC's communications with tribes is necessary. All tribes are different, and a one-size-fits-all regulation therefore would not be appropriate. The Tribe believes that the NIGC's current policy of sending communications to both tribal leaders and tribal gaming commissions/agencies, in addition to issuing press releases and publishing notices, will generally be sufficient to reach all necessary parties. The NIGC should use these as the default means of communication with tribes, although tribes should also be able to designate different or additional parties to receive communications if they wish. When the NIGC sends communications to tribal leaders and gaming commissions/agencies, the Tribe recommends sending the communications by both U.S. Mail and electronic mail. With that said, a flexible NIGC policy on this subject would probably be more appropriate than a regulation. In the event the NIGC does pursue a regulation on this subject, the Tribe would urge the NIGC not to unduly complicate the communications process. There are different types of communications, and not all communications need to be subject to formal processes.

D. Buy Indian

The Tribe fully supports the NIGC's desire to "Buy Indian." The Tribe believes it is eminently appropriate for the NIGC to give preference to qualified Indian-owned businesses when purchasing goods and services. However, the Tribe believes this subject is better suited to an internal NIGC policy than to a regulation. The Tribe views this as a relatively **low priority**.

E. Financing Issues

In accordance with NIGC Bulletins 93-3 and 94-5 and in the context of the recent court decision, *Wells Fargo, N.A. v. Lake of the Torches Economic Development Corp.*, 677 F. Supp.2d 1056 (W.D. Wis. 2010), lenders are now requiring loan documents involving gaming revenues to be submitted to NIGC for a declination letter opining that the loan documents, individually or collectively, do not constitute a management contract requiring the approval of the NIGC Chairwoman or grant to any person a proprietary interest in any gaming operation of the tribe within the meaning of the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq.* ("IGRA") and regulations promulgated thereunder at 25 C.F.R. Parts 500-599.

NIGC should address this issue by issuing a new bulletin that clearly spells out the requirements necessary to ensure that traditional financing documents (credit agreements and bond indentures) from commercial financial institutions are not viewed as management contracts under IGRA. Such a bulletin could be drafted to apply proactively to new documentation and in it the NIGC could specifically express that the bulletin is not intended to be applied to any existing financings not previously reviewed by the NIGC. By doing so both lenders and tribes can use that new bulletin as a resource to drafting financing documents that are clearly not

management agreements and do not require the issuance of a declination letter. Without such a bulletin lenders will continue to require nearly all financing documents to be submitted to NIGC for approval. This process costs tribes additional resources for outside attorney and consulting fees and leads to lost revenues and opportunities while the letters are requested and processed. Further, this process overly burdens the NIGC and requires the NIGC to dedicate limited resources to such reviews and letters, which detracts from the NIGC's ability to focus on other important and pressing issues facing tribes. This is an issue of **high priority** that NIGC should address quickly.

F. External Audits

The Tribe would also urge that the NIGC look at the class III compacts of Tribes, such as the Washington State tribes, to determine if duplicative audit requirements can be eliminated. As it stands now, the State already audits to not only the compact but NIGC standards as well. However, the State audit currently does not count as the NIGC external audit. If the NIGC could adopt an audit standard that incorporates what is happening in tribe's class III compacts, significant and costly duplication of effort could be reduced. This cost reduction could come at no significant regulatory risk if the various state gaming agency audits could be utilized in whole or in part to satisfy NIGC requirements.

The Tribe has no further comments at this time. Once again, the Tribe thanks you for the opportunity to help the NIGC develop the best possible regulations and policies, and looks forward to commenting further as this process unfolds.

Sincerely,

A handwritten signature in dark ink, appearing to read "Leonard Forsman", with a horizontal line extending from the end of the signature.

Leonard Forsman
Chairman
The Suquamish Tribe