Spokane Tribe of Indians

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Thank you for the opportunity to address the NIGC on the important issues identified in Groups One and Two:

On behalf or the Spokane Tribe, I am submitting a preliminary written statement. I say "preliminary" because this session is only one of many. Spokane will observe and listen to the consultation sessions. The Tribe anticipates additional drafts to be circulated before the end of the Group # 1 and Group #2 consultations, and likely will submit supplemental comments at that time.

<u>Spokane Support For Pending Drafts:</u>

The Spokane Tribe expresses support for the NIGC draft changes to 25 CFR part 559, Facility Licensing. The Spokane applauds the jettison of those provisions that require the Tribe to submit, and ostensibly for NIGC to approve or compel changes in, tribal laws regarding public health and safety. As you know, the Spokane Tribe took strong objection with the current rule and is prepared to challenge the current rule in the event it is used in a manner that compels a Tribe to change its laws. We are confident that such litigation would track the results in *C.R.I.T. v. NIGC* because it is clearly beyond the statutory authority vested by IGRA in the NIGC. The current facility licensing rule is the most troubling of all current NIGC regulations. The draft circulated last week corrects this fatal defect and replaces it with a provision that preserves tribal self-governance while still enabling the NIGC to take corrective action in egregious circumstances. The Spokane Tribe applauds you for this effort.

The Spokane Tribe also expresses support for 25 CFR part 514 – fees. The draft is sound and appropriately addresses the comments submitted by the Tribes in the initial NOI stage. Depending on how the NIGC addresses the Class III MICS provisions, there may be a need to add language regarding assessment of fees for Tribes looking to the NIGC to maintain Class III MICS and/or audit Class III MICS compliance, Additionally, the draft leaves blank the amount of the fine. We suggest that the fine start at up to 1% for statements and/or fee payments one (1) to thirty (30) calendar days late, up to 2% for statements and/or fee payments thirty-one (31) to sixty (60) calendar days late, up to 5% for statements and/or fee payments sixty-one (61) to ninety (90) calendar days late, but in the more egregious situation where statements and/or fee payments are over ninety-one (91) calendar days late, a late fee of up to 25%%.

The Tribe apologizes in advance for some redundancy between the comments today and the comments submitted in response to the NOI. Still, the Tribe believes many of these points deserve being repeated many times as this process evolves.

<u>Placing the Class III MICS In Their Proper Historical and Legal Contexts.</u>

<u>The Hope Commission:</u> The Tribes had their issues with original NIGC Chairman Anthony Hope. He was certainly hostile to the Tribes and the present opportunity to revisit the definition regulations promulgated by the Hope Commission is welcome and overdue. Still, Anthony Hope got one key principal correct, which all subsequent Commissions, other than the Monteau Commission, got wrong, and which the Hogan Commissions got seriously wrong. The regulation of Class III gaming is to be governed by the compact agreements reached between Tribal and State governments at the negotiation table. It is not the province of the NIGC.

The hostility of the Hope Commission should not be forgotten. The work done here will empower and/or limit the work of future Commissions. Future elections could very well result in future Administrations that are outright hostile to Indian interests generally, and Indian gaming interests, specifically. This Commission should be cognizant of that fact as it proceeds with this process.

<u>The Hogan Commissions:</u> The Hogan Commissions took a product of the NIGA/NCAI Task Force, which was inspired by the Tribes' self-governing desire to pursue the goal of self-regulation and to share resources and information amongst tribes. The Hogan Commission converted that into NIGC mandatory regulations, with the ever-present threat of severe enforcement action. Tribes warned Mr. Hogan at the time that he was exceeding his statutory authority. He did it anyway. While imploring with Tribes to refrain from suing over the regulations, he stated that this would be the outer boundaries of NIGC's encroachment into Class III gaming. C.R.I.T. sued the NIGC and Spokane weighed in as amicus beginning with the initial decision of ALJ, along with a growing number of Tribes at the District Court and ultimately NIGA weighed in before the D.C. Appeals Court.

At every level of the litigation, the ALJ, the federal District Court and ultimately the D.C. Court of Appeals concluded that IGRA was straightforward in defining the parameters of NIGC authority and that did NOT include regulation of Class III gaming. The Hogan Commission was so frustrated with the bright line drawn by the Appeals Court, it filed a motion for reconsideration, alleging that NIGC could still assume the authority through approval of gaming ordinances and incorporation into tribal state compacts, and possibly other avenues; MOTION FOR RECONSIDERATION DENIED. Despite that clear decision, the Hogan Commissions continued an illegal agenda of circumventing the decisions

and direction of the federal courts. This includes the present practice of promulgating Class III MICS anyway, approving ordinances that fiat regulatory authority to NIGC that is not based in the statute, and using tribal fees paid to NIGC for unauthorized and improper purposes.

<u>Class III MICS: How Does NIGC Get Out of the Mess Created by The Hogan Commissions?</u>

Class III MICS have taken on a life of their own. The NIGC approved ordinances expressly empowering the NIGC to promulgate and enforce them. Several compacts refer to the NIGC MICS as a base line for compact standards. The Spokane Tribe even gave testimony years ago suggesting a level of tolerance to NIGC continuing down this road so long as it was clear that the MICS are purely advisory and that NIGC staff be limited to providing technical assistance. In hindsight, that testimony was wrong. In hindsight, it is clear that the Hogan Commissions had a deliberate and zealous agenda to circumvent and riddle the bright line drawn by IGRA and the federal courts such that the NIGC is the overlord of Class III MICS. This Commission should run away from the agenda of the Hogan Commissions and stay clearly within the parameters of authority set by Congress. Those States and Tribes that embraced NIGC Class III MICS in compacts and ordinances did so at their own peril. We often hear that NIGC had the authority to promulgate the MICS until it lost at the D.C. Circuit. That is pure nonsense. The Court ruled correctly: NIGC NEVER had such authority. Every tribal leader who followed the issue knew that NIGC's legal position ranged from weak to totally devoid of merit.

So where should NIGC go from here? Spokane proposes that NIGC establish a clear date to withdraw Class III MICS from its body of regulations, notices and Bulletins. The NIGC should provide those tribes with defective ordinances or compacts an opportunity to take correcting measures as a matter of exercising tribal self-governance and/or through government-to-government compact amendment negotiations.

Spokane rejects the idea that NIGC must step in to fill an alleged void in regulation. Spokane poses this question: If the NIGC is to take on the role as chief watchdog of the regulation of Class III gaming, then why do tribes need to negotiate compacts with States? Congress intended that the regulation of the games be the very crux of compact negotiations. That States have embraced the *Seminole* decision and used that leverage to extract gaming taxes and unreasonable encroachment on tribal self-governance, instead of seriously negotiating the manner in which class III games should be regulated, does not justify NIGC to venture outside of its statutory authority. If this Commission in any way intends to follow its predecessors and go to Congress with an agenda of amending IGRA to empower the NIGC to regulate Class III games and/or continue the practice of promulgating Class III MICS and to assume oversight

authority by means of approving tribal gaming ordinances, fiating such authority to the NIGC, it should at the same time advocate for removing states from the process altogether. Perhaps that is unrealistic or unreasonable, but no more so than subjecting Tribes to heavy paternalistic oversight by both the State compact and the NIGC, which in many cases conflict with one another.

During the NOI process, we heard a small but vocal group of Tribes insists they want to see the Class III MICS continue in some form because they made some deal in a compact or state regulation. They made those agreements at their own peril knowing the NIGC did not have such authority, or at best, that the question was in serious dispute. This Commission should not perpetuate the problem. NIGC Class III MICS are illegal and have always been illegal.

Additionally, we challenge the allegation that some are at peril if the NIGC no longer promulgates Class III MICS. A number of Tribal-State gaming compacts in North Dakota, Arizona, Oklahoma, Wisconsin, and Florida refer to the Class III MICS. That being said, the reference within those compacts is not impacted by whether the Class III MICS exist or do not exist on a prospective basis. Many of these compacts only refer to MICS as they existed at a date certain. Thus if the Class III MICS were repealed today, they still would have existed on the date certain previously referenced. That baseline would still exist. Other compacts refer to compliance with the Class III MICS that are found in the NIGC regulations (without a reference to a date). Spokane's position is that even if the Class III MICS were to be repealed, it would not result in a violation of any of those "incorporation by reference" compacts unless those individual compacts require the Class III MICS to continue to be published. We are not aware of any compact which has such a publication requirement.

Beyond a short phase out period, the Spokane Tribe strongly opposes the perpetuation of illegal MICS simply because it conveniences some Tribes that have built a house of cards on a faulty foundation. Those Tribes can transition into some other type of default MICS through a regulators organization, or amend their compacts, or defer to some other industry entity. Indeed, the NIGA/NCAI Task Force subgroup of regulators, which authored the initial Class III MICS could be revived. Perhaps more appropriately, the NTGC/R (National Tribal Gaming Commissioners/Regulators) could assume the tasks. Indeed, it would be a logical extension of the excellent services provided to date by NTGC/R. Bottom line is that there are other ways to skin that cat rather than have NIGC continue to violate the clear orders of the federal courts.

Calling the Class III MICS "guidelines" rather than "regulations" does not work either. NIGC has a limited budget based on fees paid by the Tribes. The Spokane Tribe certainly objects in the strongest terms to having its fees be used by the NIGC for an improper and illegal purpose that former Chairman Hogan should never have pursued to begin with. We hesitate to suggest any action that perpetuates the illegal Class III MICS, but if the NIGC does capitulate to the

vocal minority of Tribes insisting on NIGC Class III MICS, then the fee structure should be changed to make sure that only those Tribes advocating for Class III MICS pay for every dime, from promulgation, to auditing, to enforcement.

Enforcement: NIGC Should Expand Its Discretion And Use Large Fines And Closure Orders Only As A Last Resort.

The TGA is the primary regulator of tribal gaming. The tens of millions of dollars in authorized Commission budgets, the shear manpower numbers and the common presence of the most experienced regulators in the industry quantify this basic fact. The Tribe itself has the highest incentive to ensure that the games are fair and honest. In the vast majority of circumstances, any Tribe out of compliance has the highest incentive to come in to compliance. Spokane encourages the NIGC to embrace a formal policy that ensures that the NIGC will take every effort to identify the problem for the TGA and/or Tribal Council, work with the Tribe to come in to compliance and only if those steps have been taken and have failed, take action in the form of an NOV with attendant threats of fines and closures. In this vein, Spokane supports the idea suggested in the NOI to clarify the NIGC's authority to withdraw the NOI.

Additionally, Spokane believes that the approach embraced in the draft changes to the fees regulation be used when dealing with late financial audits. One gets the impression that NIGC in the recent past used the ability to smack a tribe for a late audit in order to rack up numbers for enforcement actions because they can then submit a scorecard to Congress that shows they are out there "regulating" tribes. Many in the news media then use those same numbers for sensational headlines that Tribes are doing a poor job in regulating tribal gaming. In many of these instances, the audit was only a few days or weeks late, and in many, if not most of those, the outside accounting firm poorly managed its own time allocation, which is the fault of the accounting firm, and not the Tribe. Replacing the status quo with late fees would clearly place the issue of late audits in a more proper context.

Appeals and Process: A Need for Minor Repairs.

The Appeals and Process, although never pretty, seem to work fairly well. Spokane does propose four minor changes designed to afford greater due process to both the Tribe and the NIGC.

First, thirty (30) days is not sufficient time for a Tribal government to go through its internal process to determine whether to file an appeal. Ninety (90) days would be far more appropriate. Such a change would not preclude a Tribe from filing earlier in exigent circumstances.

Second, in complex situations, the NIGC may need more than ninety (90) days to resolve an appeal (only 30 days in context of a management contract). Accordingly, we suggest that the Chairman have the discretion to extend the time period an additional ninety (90) days, if needed.

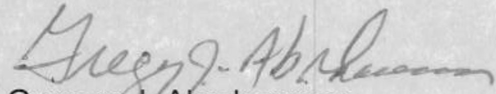
Third, and along these same lines, the requirement that a Tribe submit a supplemental statement within ten (10) days of filing a Notice of Appeal may be too short. The time period should be changed to thirty (30) days and/or the Presiding Officer should have the discretion to grant extensions.

Fourth, the Presiding Officer should have the authority to extend and/or modify the procedures when doing so furthers the objective of adequate due process without unduly prejudicing either the Tribe or the NIGC.

Finally, Spokane discourages NIGC from going forward with changing the current regulations where the Tribe designates the agent for service. We understand the friction that may exists between TGAs, casino management and tribal councils, however, it is the province of the Tribe to determine the designated agent.

Thank you for your consideration.

Respectfully,



Gregory J. Abrahamson
Chairman
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