Spokane Tribe of Indians

P.O. Box 100 • Wellpinit, WA 99040 • (509) 458-6500 • Fax (509) 458-6575

COMMENTS OF THE SPOKANE TRIBE REGARDING

NATIONAL INDIAN GAMING COMMISSION REGULATORY REVIEW

SUQUAMISH RESERVATION

DECEMBER 5, 2011

Thank you for the opportunity to address the NIGC on the important issue of regulatory review.

Previously, at the May 20, 2011 session at the Coeur d'Alene Reservation, and at the July 14, 2011 session at the Tulalip Reservation, we submitted our preliminary comments to all five Groups. Accordingly, we limit our comments today to developments that have occurred since the Tulalip consultation.

Since our last submission, the National Indian Gaming Commission published three Notices of Proposed Rulemaking and a Notice of No Action; established and convened a Tribal Advisory Committee to review the Class II Minimum Internal Control Standards and the Technical Standards and Class III Minimum Internal Control Standards; and completed a reorganization of the Agency.

AGENCY REORGANIZATION

First, we are very supportive of the reorganization undertaken by the Commission at the Agency. We watched with concern as the Hogan Administration continued to hire additional personnel, create new positions and establish new offices. As indicated by the substantial increase in the fee rate earlier this year, these offices were created and personnel hired without a mechanism for paying for them. As tribes continue to tighten our belts and evaluate our budgets, it is imperative that the Agency funded solely by tribal dollars do the same. Additionally, a streamlined NIGC can only result in better access to Agency resources by the Tribes. It is to the Commission's credit that the review of Agency operations led to this sorely needed reorganization. We look forward to seeing the result of the reorganization and recommend the Commission also evaluate the number and location of NIGC regional and satellite offices.

TRIBAL ADVISORY COMMITTEE

Second, we commend the Commission for convening a Tribal Advisory Committee to review the Class II Minimum Internal Control Standards and Technical Standards. As the primary regulators for Indian gaming, tribes are truly the experts on the MICS and Technical Standards and we appreciate the Commission's willingness to include tribes in the conversation in a meaningful way. While we understand the concern that the format of the meetings may be more formal than the consultations have been, we also recognize the limitations imposed by the Federal Advisory Committee Act. We encourage the Commission to continue to "think outside the box" when communicating with tribes on this and other matters. This Commission's commitment to meaningful consultation and communication with tribes is a breath of fresh air and should be an example to other federal agencies as they communicate with tribes.

We have followed the work of the ad hoc tribal Class II Working Group and support the draft submitted to the NIGC in July 2011. The Class II game is often the only leverage a tribe has to encourage a state hiding behind 11th Amendment immunity to negotiate a gaming compact. As we noted in our July 2011 comments, Spokane operated without a compact for a decade because we refused to capitulate to Washington State's unreasonable restrictions, including a complete prohibition on machine gaming. As you work with the Tribal Advisory Committee to review the Class II regulations, please keep in mind that a viable Class II game is the only leverage many tribes have in the wake of the *Seminole* decision. We also recommend the NIGC continue its work under the Stevens Administration to work collaboratively with the DOI and DOJ to develop a collective and coordinated approach which will ensure tribes are in the position that Congress intended when states refuse to negotiate in good faith.

However, we would again like to recommend that the NIGC establish a clear date to withdraw Class III MICS from its body of regulations, notices and Bulletins. The D.C. Court of Appeals in *Colorado River Indian Tribes v. N.I.G.C.* made it clear that the NIGC NEVER possessed the authority to either promulgate regulations or enforce those regulations. While some tribes have embraced the NIGC CLASS III MICS in compacts and ordinances, those tribes did so at their peril. Those tribes can transition into some other type of default MICS through a regulators organization, or amend their compacts, or defer to some type of industry entity. The Spokane Tribe would caution the NIGC AGAINST including Class III MICS as part of the discussions with the Tribal Advisory Committee. As the Chairwoman testified before Congress, there is no regulatory void for the NIGC to fill with the promulgation of Class III MICS, guidelines or bulletins. Class III MICS are properly left as a point of compact negotiation between tribes and states.

PROPOSED RULEMAKING

Finally, we are excited to see the publication of the Notices of Proposed Rulemaking. We strongly support the process of regulatory review the NIGC has undergone during the past 12 months. We applaud the Commission for listening to tribal comments and incorporating them into the Proposed Rules and look forward to publication of other proposed rules in the very near future.

With regard to the Part 514- Fees Proposed Rule, we are supportive of the Proposed Rule. The addition of the "ticket" system as a mechanism for addressing late fee payments instead of the issuance of a NOV is a giant step forward to creating a relationship between the tribes and NIGC based on reasonableness. The use of late penalties as contemplated by the proposed rule places the issue of late audits and fee payments into a more proper context. While we recognize the need for the penalties to encourage tribes to submit their audits and fee payments in a timely manner, however we reiterate our earlier recommendation that the penalty 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, and up to 25% for the more egregious situation where statements and/or fee payments are over ninety-one (91) days late.

The Spokane Tribe is also very supportive of Part 571 Proposed Rule. Tribes have often been left in a state of limbo following an investigation by the NIGC. If no enforcement action is issued at the conclusion of the investigation, tribes were left hanging while also required to report that they were "under investigation" to bond holders, banks or other lenders. The inclusion of a process to provide closure to tribes at the conclusion of an investigation is a very good thing. Further, we also agree that the amendment in the discussion draft clarifying the NIGC's authority to access records located off-site is unnecessary and support leaving it out of this Part.

Spokane has no objection to repealing Part 523.

The Spokane Tribe understands the Commission's reasoning for declining to take action to define "collateral agreements" and "net revenues". However, Spokane believes that collateral agreements should be a required when a proposed management contract is submitted for approval. This would ensure full disclosure of all aspects of the relationship between the Tribe and the contracting entity. The current rule that voids collateral agreements unless and until the management agreement is approved, is impractical and unnecessary. Tribes often need to enter into collateral agreements before reaching a point where a management contract must be submitted. While no entity should be allowed to perform day-to-day decision making over a tribal gaming

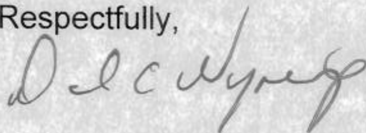
facility prior to NIGC approval, other agreements entered into before the management contract has been approved should be valid.

Additionally, as discussed by the 7th Circuit in the *Wells Fargo v. Lake of Torches Economic Development Corp* opinion, formal regulations regarding declination letters would provide tribes and contracting parties greater confidence that declination letters are meaningful and correct.

Further, the Tribe supports the avoidance of using GAAP to define "net revenues". However, we do believe that the definition of "net revenue" should be clarified to include machine lease payments, participation fees, and contributions to wide area progressives as allowable operating expenses in calculating net revenue. However, this could be accomplished though a guidance document or bulletin.

The Spokane Tribe appreciates the NIGC's efforts in conducting the regulatory review and inclusion of tribes in that review. We look forward to additional collaboration on the proposed rules as they are published.

Respectfully,



David C. Wynecoop

Council Member