



Spokane Tribe of Indians

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COMMENTS OF THE SPOKANE TRIBE REGARDING NATIONAL INDIAN GAMING COMMISSION REGULATORY REVIEW TULALIP RESERVATION JULY 14 -15, 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, we submitted our comments to Group # 1 and Group #2. Accordingly, I limit my comments today to Groups ## 3, 4 and 5. I note, however, that the Class III MICS issue is in both Groups 1 and 5, and that is an issue of great importance to the Spokane Tribe. A copy of the Tribe's May 20, 2011 comments are attached hereto, and the Tribe may supplement this statement as we hear and read the comments of other Tribes and review preliminary drafts released by the NIGC.

GROUP THREE: CLASS II GAMING – GENERAL COMMENTS

Our comments on Group Three, Class II gaming, will be brief. We have followed the very hard and detailed work of the Class II Working Group and we support their efforts and comments. Many tribes are confronted by states who hide behind 11th Amendment immunity to deprive them of compacts, such as Louisiana with the Jena Band and Texas with the Kickapoo. Many other states use the unfair leverage of the *Seminole* decision to coerce tribes into unreasonable gaming taxes and intrusions on tribal self-governance. Spokane knows the plight of these tribes all too well. 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 the State hid behind 11th Amendment immunity. As you consider the regulations for Class II games, please keep in mind that a viable Class II game is the only leverage many tribes have in the wake of the *Seminole* decision.

With prior Commissions, discussion of Class II policy flowed into discussion regarding monitoring and investigation – a main topic of Group Four. It was with great frustration that Spokane watched prior Commission Chairman Hogan work so hard to draw a "bright line" with Class II games only to undermine the efforts of many tribes to leverage Class II gaming to secure Class III gaming compacts. While the NIGC would place many Class II games in to question, DOI sat by quietly, opting not to implement Class III procedures when confronted with

state assertions of 11th Amendment immunity. Likewise, DOJ opted not to bring litigation against hostile states on behalf of the tribes. In *Seminole's* wake, NIGC, DOI and DOJ should work cooperatively under the federal umbrella to develop a collective and coordinated approach to ensure tribes are in the position that Congress intended when states refuse to negotiate in good faith. .

GROUP FOUR: DEFERENCE TO TGAs AS THE PRIMARY REGULATOR – GENERAL COMMENTS

Group Four covers a lot of territory. Spokane accepts that NIGC needs access to the tribal gaming facilities. Spokane applauds the policy embraced by the NIGC's preliminary draft revisions to Part 573, which embraces a policy of deference and support of TGAs. The TGA is the primary regulator of tribal gaming. The tens of millions of dollars in authorized Tribal Commission budgets, the sheer 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. The draft revisions to Part 573 embrace a formal policy that ensures 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. We hear rhetoric that this is how the Hogan Commissions approached situations, but we know of too many circumstances where the NOV came as a surprise to tribes, resulting in panic when facing the prospect of major fines and closure orders. Even though those situations ultimately were resolved with nominal fines, such heavy-handed threats have no place in proper government – to- government dialogue.

In the preliminary draft to Part 573, there is a provision about when an NOV becomes a final agency action that appears intended to clarify that the Chair may withdraw an NOV, which is good. Still, we are looking into the technical legal issue of whether this language properly fits within the framework of APA review, and may supplement this statement based upon that review.

The monitoring and investigative authority of the NIGC is best utilized when tempered with a policy of proper deference and support of TGAs. Within those policy constraints, the proposed preliminary draft changes to part 571 set forth an acceptable process to ensure the NIGC's access to critical documents. Access to and review of those critical documents should be utilized when necessary to enable the NIGC to discover problems and to work with TGAs and tribal councils to correct those problems.

Spokane submits certain technical comments on the specifics of Group Four.

GROUP FOUR: TECHNICAL COMMENTS
Parts 556 and 558 – Background Investigations for Primary Management Officials and Key Employees

_____ We just received Tuesday morning, the NIGC's preliminary drafts of parts 556 and 558. Our initial review is favorable and supportive, with two exceptions.

First, Tribes should be able to turn to the NIGC for assistance to conduct a background investigation on any employee or entity for which the TGA seeks assistance. Being able to turn to the NIGC to process fingerprint cards beyond primary management officials and key employees enables tribes to make better informed and faster decisions. This is particularly important because many states deny or severely restrict tribes from the State's database resources. The costs of processing fingerprint cards, however, should be borne by the participating tribes and not paid out of fees paid by other tribes, who restrict NIGC assistance to Key Employees and Primary Management Officials.

Second, the revision to 558.2(c)(2) highlights a provision that considers requiring notification to NIGC of determinations of unsuitability in license denials. We suspect this is highlighted because IGRA requires that a Tribe notify NIGC of licenses issued, but is silent on notifying NIGC of licenses denied. 25 U.S.C. §2710(b)(2)(F)(ii)(I). The crux of the abuses of the Hogan Commissions were the result of an agency culture that believed it could fiat authority on the grounds that it was a good idea, without regard to IGRA's limits on that authority (class III MICS, facility licensing, etc.). Although the proposed requirement to notify NIGC of licenses denied is a good one, and improves a data base on which all tribes can make better, more informed licensing decisions, it falls outside of the NIGC's parameters of authority set forth by IGRA and perpetuates the culture that lead to past abuses. Accordingly, Spokane endorse using the word "may" and opposes using the word "shall." We do believe that a Tribe can compel its TGA to submit such information to the NIGC in the context of the Tribal Gaming Ordinance, but that is properly a matter of tribal self-governance.

The preliminary draft appears to make the "pilot " program permanent. We applaud this change. It has been a farce to call it a "pilot program" when it is older than most tribal gaming facilities.

Part 531 – Collateral Agreements

The definition of management agreement should be revised to make clear that collateral agreements can be made and binding upon the parties before NIGC approval of the management agreement. No entity should be allowed to perform day-to-day decision making over a tribal gaming facility prior to NIGC approval, but other agreements should be valid. Many times, tribes are hindered from entering into finance and consulting agreements with desired contracted

parties because of the collateral agreement rule. Such a result arbitrarily stifles tribal self-determination by restricting a tribe's ability to enter into contracts. Collateral agreements should be required to be submitted with proposed management contracts to ensure full disclosure of all aspects of the relationship between the Tribe and the contracting entity, but that can be accomplished without the current rule that voids collateral agreements unless and until the management agreement is approved.

Additionally, formal regulations regarding declination letters would provide tribes and contracting parties greater confidence that declination letters are meaningful and correct.

Part 502 – Definitions.

Definition of “management contract”

Some commentators suggest expanding the definition of “management contract” to include any contract that includes a percentage-based fee. This proposed change has no basis in IGRA. If Congress wanted to provide NIGC with that authority, they would not have used the restrictive term “management contract.” Given the consequences of such a definition, it would be challenged and likely would not survive judicial scrutiny. While Spokane shares the concerns of the proponents of such a definition, we are mindful that NIGC must remain within the bounds of its authority, as created and limited by Congress.

The stated concerns in the NOI regarding aggregate fees (loans/expenses/ development fees, etc.) is valid, but that discussion is more appropriate in the context of “sole proprietary interest” and “primary beneficiary,” and not in the context of defining “management agreement.” The concern of aggregate fees is not limited to financial agreements, but includes MOUs and Gaming Compact taxes as well.

Definition of “net revenue”

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 calculation of net revenue.

We note that the current proposed definition better reflects the reality in Indian gaming that management fees are a cost of doing business.

Both of these concerns warrant avoidance of GAAP. The only reason to use GAAP is for convenience. GAAPs function is to establish uniformity and consistency for purposes of financial audits. Convenience alone should not overcome the sound policy of ensuring a accurate reflection of the costs of business regarding Indian gaming.

Definition of “allowable uses”

Some suggest that NIGC define “allowable uses” to clarify what a tribe may legitimately fund with gaming revenue. Spokane opposes a separate definition of “allowable uses”. The concerns expressed by proponents, e.g. maintaining adequate reserves and cash flow, can best be accomplished by tribes authorizing such expenditures “to promote tribal economic development” as expressly authorized by IGRA. Any new definition of allowable uses carries the substantial risk of unduly impeding tribal self-governance.

GROUP FIVE: CLASS III MICS AND “SOLE PROPRIETARY INTERESTS” - GENERAL COMMENTS

CLASS III MICS

Spokane submitted comments on Class III MICS at the Coeur d’Alene session on May 20. We were hopeful that we would have a draft to review by the time we reached group 5 on the NIGC’s aggressive and welcome consultation schedule. We cannot stress enough the importance of NIGC’s compliance with the Order and opinion of the United States Court of Appeals for the D.C. Circuit in *C.R.I.T. vs. NIGC*.

In our May 20 statement, we went through the NIGC’s inconsistent history on this issue, from the Hope Commissions through the Hogan Commissions. We noted Spokane’s amicus support for the Colorado River Indian Tribes at every level of the litigation, from the Administrative Law Judge through the DC appeals court. We applaud the policy embraced in the NIGC’s preliminary draft facility license regulations as properly reflecting the parameters of that court decision. We emphasize that the DC Court decision leaves no room for NIGC to promulgate Class III regulations. We know a few tribes are urging the NIGC to continue to promulgate Class III MICS. Because of that, we repeat a small portion of our statement submitted in May:

Class III MICS have taken on a life of their own. The Hogan Commissions 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. 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 correctly ruled that *NIGC never* had such authority.

We continue to hear from a small but vocal group of Tribes insisting they want to see the Class III MICS continue in some form because they made some deal in a compact or state regulation. Those agreements were reached with full knowledge that the NIGC's authority to promulgate Class III MICS was in serious dispute. This Commission should not perpetuate the problem by devoting NIGC resources to promulgate regulations that admittedly are *ultra virus*.

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, tribes with such compacts would have the baseline that existed on the date certain previously referenced. 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 that 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. 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.

Calling the Class III MICS "guidelines" rather than "regulations" is code for making all tribes pay to develop MICS that only will be utilized by relatively small number of tribes. Spokane Tribe sharply objects to the use of its fees for such purposes. 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 ensure that only those Tribes advocating for Class III MICS pay the entire cost, from promulgation, to auditing, to enforcement.

SOLE PROPRIETARY INTEREST

In response to the NIGC's initial Notice of Inquiry for regulatory review, which preceded the current consultations, the Spokane Tribe recognized the

importance of the issue of sole proprietary interest. To Date, the focus of this issue has been in the context of management, development and finance agreements, which are important. It is with grave concern that Spokane observes the trends around the country wherein large portions of tribal gaming revenue are sliced off and handed to state treasuries, state agencies and local governments. IGRA's "primary beneficiary" rule also is triggered when such large portions of tribal gaming revenue are exported to state and local governments. 25 U.S.C. § 2702(2). We express great caution, however, as to whether these issues can be properly addressed in the context of NIGC regulations. We are not objecting to the effort, but we are skeptical that regulations are the appropriate means to address the issue. Certainly, any approach requires a look to the aggregate impact on tribal gaming revenue, taking into account all development and finance costs, management fees, compact "taxes," mitigation fees, etc. Terms for one tribe in one location may be wholly unworkable for a different tribe in a different location. The analysis is necessarily very fact-specific. If the NIGC proposes a preliminary draft regulation, we will supplement our comments at that time.

The Spokane Tribe appreciates that the NIGC has undertaken this difficult task of regulatory review. Spokane respects NIGC's appreciation for listening to the tribes' concerns which is reflected in the preliminary drafts that have been circulated to date. Thank you for your consideration.

Respectfully,



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Vice-Chairman
Spokane Tribe of Indians