The Confederated Tribes of the Grand Ronde Community of Oregon

Tribal Attorney's Office
Phone (503) 879-2172
1-800 422-0232
Fax (503) 879-2333

9615 Grand Ronde Rd
Grand Ronde, OR 97347

September 16, 2011

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

via electronic submission to reg.review@nigc.gov

Re: Comments on NIGC's Preliminary Draft of Proposed Changes to 25 CFR Part 518 – Self-Regulation of Class II Gaming

Dear Chairwoman Stevens:

The Confederated Tribes of the Grand Ronde Community of Oregon ("Grand Ronde") respectfully submits the following comments regarding NIGC's preliminary draft of proposed changes to the regulations for self-regulation codified at 25 C.F.R. Part 518. Grand Ronde appreciates this opportunity to comment. As one of two tribes that have earned a Certificate of Self-Regulation, it is important to Grand Ronde that the regulations governing self-regulation require tribes to meet high standards to achieve a certificate as required by IGRA and that the regulations give full effect to IGRA's self-regulation provisions.

Proposed Section 518.4 - What criteria must a tribe meet to receive a certificate of self-regulation?

IGRA lists the criteria a tribe must meet to receive a certificate of self-regulation in 25 U.S.C. § 2710(c)(4). These criteria are also listed in proposed Section 518.4(a), but an additional requirement is listed at Section 518.4(a)(3) which is not specified in IGRA – that the tribe has "[c]onducted its gaming activity in compliance with the IGRA, NIGC regulations in this chapter, and the tribe's gaming ordinance and gaming regulations." This language has not changed from the current regulations, but it should be omitted because it is not listed in IGRA and because there may be legitimate issues as to whether NIGC's regulations are within its authority and appropriate for the self-regulation determination.

For example, NIGC's authority to implement its facility licensing regulations at 25 CFR Part 559 has been questioned, and although NIGC is currently proposing to significantly revise the facility licensing regulations, the authority to implement them in the first place is uncertain. Along these same lines, proposed Section 518.4(b)(10) provides that among the factors which a tribe may address to illustrate that it has met the criteria listed in 518.4(a) is the following: "The tribe

demonstrates that the operation is being conducted in a manner which adequately protects the environment and the public health and safety." This factor is problematic because IGRA only requires that a tribe's gaming ordinance include a provision 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). There is a clear difference between the power to approve the terms of an ordinance and the power to police compliance with the terms of an ordinance, a point made clear in *Colorado River Indian Tribes v. NIGC*, 383 F. Supp. 2d 123, 134 (D. D.C. 2005), *aff'd* 466 F.3d 134 (D.C. Cir. 2006) (CRIT decision). A tribe should only be required to demonstrate that its ordinance has the provision required by IGRA and not to demonstrate to NIGC that its operation is in compliance with the provision. The latter is beyond NIGC's authority.

Proposed Section 518.7 – What must a self-regulating tribe provide the Commission to maintain its self-regulatory status?

IGRA also lists the items a tribe must submit to NIGC during any year in which a tribe has a certificate for self-regulation. Specifically, a self-regulating tribe is required to continue to submit the annual independent financial audit required by 25 U.S.C. § 2710(b)(2)(C) and a résumé on all employees hired and licensed by the tribe. 25 U.S.C. § 2710(c)(5)(B). Grand Ronde supports the proposed changes to Section 518.7 which reflect these specific requirements and omit the current requirement of a self-regulation report. Under the current regulations, self-regulating tribes have to provide more information than other tribes, which is antithetical to the idea of self-regulation.

Grand Ronde does recommend that submission date for the annual independent financial audit coincide with the submission date for such audit provided in 25 C.F.R. § 571.13, which is within 120 days after the end of each fiscal year of the gaming operation. Furthermore, there is an inconsistency within the proposed regulation regarding the timing of the submission of the résumé of employees. The opening sentence to the regulation states that each tribe holding a certificate is required to submit the information on "an annual basis," and subsection (b) states that the résumé shall be filed "upon hiring and licensing or as arranged with the appropriate NIGC regional office." Grand Ronde recommends that the language "upon hiring and licensing or" be omitted.

Proposed Section 518.9 – Are any of the investigative or enforcement powers of the Commission limited by the issuance of a certificate of self-regulation?

IGRA exempts self-regulating tribes from most of NIGC's regulatory powers. Specifically, self-regulating tribes are exempt from NIGC's power to:

(1) Monitor class II gaming conducted on Indian lands on a continuing basis;

(2) Inspect and examine all premises located on Indian lands on which class II gaming is conducted;
(3) Conduct or cause to be conducted such background investigations as may be necessary; and
(4) Demand access to and inspect, examine, photocopy, and audit all papers, books, and records respecting gross revenues of class II gaming conducted on Indian lands and any other matters necessary to carry out the duties of the Commission under IGRA.

25 U.S.C. § 2710(c)(5)(exempting self-regulated tribes from 25 U.S.C. § 2706(b)(1)-(4)). The preliminary draft is an improvement over the current regulations in that proposed Section 518.9 lists NIGC's powers described above which are limited by the issuance of a certificate of self-regulation; however, NIGC continues to understate the express limitations of its powers. First, NIGC improperly modifies the limitation to its power to inspect and examine all premises described in power 2 above by adding the term "solely." Specifically, proposed Section 518.9 states: "During any time in which a tribe has a certificate of self-regulation, the following four powers of the Commission shall be inapplicable: ... (b) The power to inspect and examine all premises located on Indian lands on which *solely* class II gaming is conducted. ..." (Emphasis added). IGRA does not restrict this exemption to premises on which only class II gaming is conducted and Congress clearly envisioned that a tribe would offer both class II and class III gaming at the same facility. There is no basis or authority for NIGC to devise such a restriction.

In addition, NIGC improperly minimizes the limitations of its powers pertaining to self-regulating tribes in proposed Section 518.9 by including the following language, some of which exists in the current regulations, after the list of restrictions on its powers:

> Notwithstanding the inapplicability of the above four powers to self-regulating tribes, the Commission retains all other investigative and enforcement powers over the class II gaming activities of self-regulating tribes. The Commission shall retain its powers to investigate and bring enforcement actions for violations of the IGRA, its implementing regulations, and violations of tribal gaming ordinances.

It is not clear what these "other investigative and enforcement powers" are and Grand Ronde is concerned that this language swallows the broad exemptions for self-regulating tribes specifically articulated in IGRA. Other than the powers of the Chairman listed in 25 U.S.C. § 2705 – the power to issue orders of temporary closure of gaming activities, to levy and collect civil fines, and to approval tribal ordinances and management contracts – there are very few remaining powers NIGC may exercise over a self-regulating tribe. Despite this, NIGC appears to minimize the importance of self-regulation because it only applies to Class II. However, NIGC is quick to ignore that its regulatory powers are limited to Class II. This limitation is unambiguously in IGRA, which vests responsibility for regulation of Class III gaming with the tribes and states, and was confirmed by the CRIT decision.

Furthermore, NIGC cannot rely on its authority "to promulgate regulations as it deems appropriate to implement the provisions of IGRA" as provided at 25 U.S.C. § 2706(b)(10) to exercise broad authority over self-regulating tribes. As stated in the CRIT decision, broad delegations of rulemaking authority do not permit NIGC to ignore the plain text of IGRA. 383 F. Supp. 2d at 145. The plain text of IGRA limits NIGC's regulatory authority to Class II and further limits NIGC's Class II authority over self-regulating tribes. 25 U.S.C. § 2710(c). Such limitations cannot be overcome by relying on the rulemaking authority in 25 U.S.C. § 2706(b)(10). Likewise, NIGC cannot rely on its authority to approve gaming ordinances in 25 U.S.C. § 2705(a)(3) to exercise broad authority over self-regulating tribes. As stated in the CRIT decision, there is a clear difference between the power to approve the terms of an ordinance and the power to police compliance with the terms of an ordinance. 383 F. Supp. 2d at 134.

Other Sections

- Section 518.3(a) – The proposed regulations delete the language requiring a tribe to provide a description of the record keeping system for all allegations of criminal or dishonest activity and measures taken to resolve them. There are no other proposed provisions requiring a tribe to provide information that would go to the IGRA requirement that the gaming activity be "generally free of evidence of criminal or dishonest activity" which is stated in 25 U.S.C. § 2710(c)(4) and repeated in Section 518.4 of the regulations. A tribe petitioning NIGC for a certificate of self-regulation should submit information on this requirement.
- Section 518.3(a)(vii) – A tribe must provide a list of gaming activity internal controls at the gaming operation with its petition for a certificate of self-regulation. The list would replace the manual of internal control systems which is currently required under the regulations. It is not clear what NIGC means by a list.
- Sections 518.5(d) and 518.6 appear to be inconsistent in terms of the timing of the announcement of NIGC's decision on a petition for self-regulation. Section 518.5(d) provides that the Office of Self-Regulation shall make an initial determination on a petition within 120 days of receipt of a complete petition and issue a report of its findings to the tribe, whereas Section 518.6 provides that the Commission will announce its determinations on December 1.
- Section 518.10 – The current language of this Section requires NIGC to provide a tribe with "prompt" notice of NIGC's intent to remove a certificate of self-regulation. Grand Ronde suggests that the term "prompt" be replaced with a more specific timeline. In addition, Grand Ronde recommends that the notice of intent be preceded by a notice describing NIGC's concern and an opportunity to cure. The more specific timeframe for the notice of intent then could be a period following the expiration of the opportunity to cure.
- Section 518.12 – The current language of this Section provides that a request for reconsideration of a denial or removal of a certificate of self-regulation will be considered disapproved if NIGC fails to issue a decision within 30 days. Grand Ronde believes that NIGC should be required to issue a final decision within the 30 days.

Other comments

- Fees – IGRA provides that NIGC may not assess a fee on a self-regulating tribe's gaming activity in excess of one quarter of 1 per centum of the gross revenue. 25 U.S.C. § 2710(c)(5)(C). Grand Ronde urges NIGC to act within its discretion and assess a lower fee as self-regulating tribes demand less oversight and should be assessed lower fees.
- Grand Ronde also continues to urge NIGC to include language in other regulations on how the regulation impacts self-regulating tribes. This would be beneficial because it would require NIGC to specifically analyze the appropriateness of the application of the regulation to self-regulating tribes and also demonstrate to other tribes the benefits of self-regulation.

Thank you again for the opportunity to comment on NIGC's preliminary draft of proposed changes to the Class II self-regulation regulations. Grand Ronde appreciates the Commission's efforts in revising these and other NIGC regulations. Please contact me at (503) 879-2270 if you have any questions or to further discuss Grand Ronde's comments and concerns regarding these important regulations.

Very truly yours,

Rob Greene
Tribal Attorney

cc: Tribal Council
Grand Ronde Gaming Commission