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VIA E-mail to reg.review@nigc.gov

Tracie L. Stevens, Chairwoman
Steffani A. Cochran, Vice-Chairwoman
Daniel Little, Associate Commissioner
National Indian Gaming Commission
1441 L Street, N.W., Suite 9100
Washington, DC 20005

Re: Comments on Proposed Changes to 25 C.F.R. Part 502 (76 Fed. Reg. 80,847 (Dec. 27, 2011)); 25 C.F.R. Part 537 (76 Fed. Reg. 79,565 (Dec. 22, 2011)); 25 C.F.R. Parts 556 and 558 (76 Fed. Reg. 79,567 (Dec. 22, 2011); and 25 C.F.R. Part 573 (76 Fed. Reg. 80,847 (Dec. 27, 2011).

Dear Chairwoman Stevens, Vice-Chairwoman Cochran and Commissioner Little:

On behalf of the Seminole Tribe of Florida (the "Tribe") we offer the following comments in response to the National Indian Gaming Commission's ("NIGC") request for comments on the proposed regulations listed above.

1. 25 C.F.R. Part 502 – Definition of Enforcement Action

The existing regulations do not contain a definition of the term "enforcement action." According to the NIGC, after considering the comments it received in response to its proposal to amend 25 C.F.R. Part 573 – Enforcement Actions, it realized that a definition of "enforcement action" was necessary to "provide clarity to persons subject to enforcement actions by the NIGC." 76 Fed. Reg. 80,847.

The proposed definition of "enforcement action" at section 502.24 is "any action taken by the Chair under 25 U.S.C. 2713 against any person engaged in gaming, for a violation of any provision of IGRA, the regulations of this chapter, or tribal regulations, ordinances, or resolutions approved under 25 U.S.C. 2710 or 2712 of IGRA, including but not limited to the following: a notice of violation, a civil fine assessment; or an order for temporary closure."

The Tribe does not object to the proposed definition. However, it would be useful to clarify that the definition does not include letters of concern and warning letters issued under Part 573 (see discussion below), since such actions are characterized as "pre-enforcement" actions in the proposed rule.

2. 25 C.F.R. Part 537 – Management Contracts – Background Investigations

The proposed change to section 537.1(a)(4) would give the Chair the discretion to reduce the background investigations for certain tribal entities or financial entities subject to federal regulation, background checks and/or licensing under a tribal-state compact. The Tribe believes that this is a reasonable change that would eliminate unnecessary and/or duplicate investigations.

3. 25 C.F.R. Parts 556 and 558 – Tribal Background Investigations and Licensing

The Commission has proposed several changes to Part 556 to clarify the process to be used by a tribe when determining the eligibility for licensing of a key employee or primary management official. These changes would formalize the current pilot program, which allows tribes to submit a notice of results to the NIGC instead of the application and investigative report. The Tribe supports this change. The Tribe also supports the proposed provision (section 556.4(b)) to clarify that a tribe may use investigative materials obtained from the NIGC that were submitted by another tribe.

The Tribe generally supports the changes to Part 558 concerning the issuance of gaming licenses by a tribe. Of note, the Tribe is pleased that the Commission has added language in section 558.1 to clarify that the regulation "does not apply to any license that is intended to expire within 90 days of issuance." Without this clarification, the language in section 558.2(d)[1] would be problematic, in that some tribes such as Seminole issue temporary or provisional licenses which can be revoked upon the receipt of objections by the Commission without the requirement for a hearing.[2] However, as clarified, the Tribe understands that the hearing requirement would not apply to provisional or temporary licenses the term of which is not intended to exceed 90 days.

The Tribe also supports the provision proposed by the Commission concerning the Indian Gaming Individuals Record System. That provision (section 558.3(c)(2)) would allow a tribe that does not license an applicant to forward the eligibility determination and any investigative report "to the Commission for inclusion in the Indian Gaming Individuals Record System." Adding this material to the database would be a very useful resource for other tribes. However, the Tribe believes that submission should be discretionary, as a mandatory requirement (as suggested in the proposed rule) would exceed the Commission's authority under the IGRA.

Finally, the Tribe supports the initiative concerning access to background information mentioned in the preamble to the rule. As noted in the preamble, "the NIGC is working towards

[1] The proposed section 558.2(2) reads: "If the tribe has issued the license before receiving the Commission's statement of objections, notice and hearing shall be provided to the licensee as provided by § 558.4."
[2] The Seminole Tribe's gaming code expressly provides for the issuance of temporary gaming licenses "pending the satisfactory completion of all background investigation and other applicable requirements … [including] expiration of the 30-day NIGC review period provided for at 25 C.F.R. § 558."

making [background investigation] information more readily available to tribes." 76 Fed. Reg. 79,569. However, the Tribe is puzzled by the Commission's suggestion that it presently lacks "sufficient resources and technology" to make this information available in a secure format. The Tribe believes that the necessary technology is available and that the required Commission resources would be minimal. The Tribe urges the Commission develop both a plan and timeline for implementing such a system.

4. 25 C.F.R. Part 573 – Enforcement Action

While the Tribe supports the Commission's desire to achieve compliance through measures short of a Notice of Violation (NOV), the Tribe has serious concerns about the approach set forth in the proposed rule. As drafted, the Chair would be authorized, though not required, to issue a "letter of concern" or "warning letter" before issuing an NOV. The proposed rule provides that neither letter would "constitute agency action," so neither would be subject to appeal.

While such an approach might be appropriate for a letter of concern, which we understand would not contain a finding that a violation has occurred, it would be wholly inappropriate in the case of a warning letter. As explained in the preamble, a warning letter would be issued when "NIGC staff believes an actual violation of IGRA, NIGC regulations, or the tribe's approved gaming ordinance has occurred, or is occurring." 76 Fed. Reg. 80,848. This is essentially the same as an NOV, except that the tribe would not have the procedural rights associated with an NOV, including the right to appeal. This is of particular concern, since a warning letter could have significant negative repercussions for a tribe that has publically traded debt or other notice obligations under its financing documents. It also could have negative licensing implications for the tribe and its employees.

The NIGC suggests in the preamble that a warning letter would not be final agency action, since it would be issued by NIGC staff rather than the Chair. Id. However, this appears to be a distinction without a difference, since the staff work under the direction and supervision of the Chair. Relevant case law indicates that a warning letter, issued as currently proposed, almost certainly would be considered final agency action by the courts. See, e.g., Appalachian Power Co. v. EPA., 208 F.3d 1015, 1021 (D.C. Cir. 2000) ("[W]e have also recognized that an agency's other pronouncements can, as a practical matter, have a binding effect."); Ciba-Geigy Corp. v. EPA, 801 F.2d 430, 436 (D.C. Cir. 1986) ("Once the agency publicly articulates an unequivocal position, however, and expects regulated entities to alter their primary conduct to conform to that position, the agency has voluntarily relinquished the benefit of postponed judicial review.")

If the intent is to alert a tribe to a potential violation without the need to resort to an enforcement action, then we believe that the "letter of concern" is sufficient. Under the proposed rule, the letter would alert the tribe to a situation that "may be a violation." In most cases, such a letter would be sufficient to resolve the matter without the need for further action by the

Commission. Thus, the Tribe believes that the "letter of concern" option should be included in the rule, but that the "warning letter" should be deleted.

On behalf of the Seminole Tribe of Florida, we appreciate the opportunity to comment on the proposed changes to the Commission's regulations.

Sincerely,

HOBBS, STRAUS, DEAN & WALKER, LLP

By: Joseph H. Webster

cc: Jim Shore, Esq.