DORSAY & EASTON LLP

ATTORNEYS AT LAW
1 S.W. COLUMBIA STREET
SUITE 440
PORTLAND, OREGON 97258-2005

Licensed in:
Oregon (*)
Washington (**)
New Mexico (±)

Craig J. Dorsay *, **, ±
Lea Ann Easton *, **

Susan K. Driver *, ±
Of Counsel

June 7, 2011

Comments submitted by e-mail to reg.review@nigc.gov

Tracie L. Stevens, Chairwoman
Nation Indian Gaming Commission
1441 L St., N.W.
Suite 9100
Washington, D.C. 20005

Re: Comments on Preliminary Draft Modifications to 25 C.F.R. Part 559, Facility License Notifications, Renewals, and Submissions.

Dear Chairwoman Stevens:

I represent the Confederated Tribes of Siletz Indians of Oregon ("Siletz Tribe"). I am submitting comments on behalf of the Siletz Tribe regarding NIGC's proposed modification of the Facility Licensing Regulations at 25 C.F.R. Part 559.

First, the Siletz Tribe must reaffirm its previous position, expressed in comments when the Commission's Facility License Regulations were first enacted, that the regulations exceed the Commission's authority, for at least the following reasons:

1. Authority to issue facility licenses is vested exclusively with the tribe, and NIGC is not vested with any authority over this subject. 25 U.S.C. § 2710(b)("A separate license issued by the Indian tribe shall be required for each place, facility, or location on Indian lands at which class II gaming is conducted."). *See* 25 U.S.C. § 2710(d)(1)(A)(ii). Tribes have the authority to issue facility licenses. No authority over this process is vested in the NIGC. At most, NIGC could require that a copy of all current facility licenses be provided to it. As discussed below, whatever minimal authority NIGC might possess over facility licenses cannot be bootstrapped into general authority over environment, public health and safety issues, and Indian lands determinations and issues.

2. The Siletz Tribe has consistently maintained the position, upheld in the *Colorado River* case, that the NIGC lacks regulatory authority over Class III gaming. Class III gaming is a joint regulatory exercise between the States and Tribes through the vehicle of a Class III Gaming Compact. To the extent the facility licensing

Telephone: (503) 790-9060; Facsimile: (503) 790-9068; Cellular: (503) 939-8022; E-mail: craig@dorsayindianlaw.com

regulations purport to exercise authority of any kind over Class III gaming under the Indian Gaming Regulatory Act, such authority is null and void.

3. The NIGC previously attempted to exercise regulatory authority over environmental, public health and safety issues at tribal gaming operations through enactment of direct regulations, but withdrew those proposed regulations over tribal opposition. Such authority is for the most part connected to Class III gaming, over which the NIGC lacks legal authority. The NIGC is now attempting to assert such authority indirectly over tribes, through the guise of facility licensing regulations. The facility license provision of IGRA says nothing and has no connection to environment, public health and safety issues. One provision of IGRA states that an Indian tribe shall issue a facility license for each gaming operation. Another, completely separate provision of IGRA lays out some of the mandatory subjects that must be covered in some fashion in a tribal gaming ordinance. There is no connection between the two, and NIGC does not have jurisdiction over these issues under any interpretation of IGRA, and particularly under the facility licensing provision of IGRA, which does not mention the NIGC.

4. Indian lands determinations are also not connected in any fashion to facility licensing under IGRA. The Siletz Tribe does not dispute that Indian gaming under IGRA is limited to Indian lands as defined by IGRA. But trying to impose Indian lands determinations upon the framework of facility licensing is trying to force a square peg into a round hole. Certainly the federal government – either the BIA or the NIGC, has some authority to determine whether a particular Indian gaming operation is occurring on Indian lands as defined by IGRA. But it is a long road between such a general principle and requiring Indian tribes to submit proof that its gaming operation is taking place on Indian land as part of providing a copy of its tribal facility license to NIGC. There is no connection between these two subjects in IGRA; the NIGC is making up the connection out of whole cloth. The NIGC lacks such authority over Class III tribal gaming.

The purpose provision or the regulations at § 559.1(b), claiming that the purpose of this Part is to assert NIGC over subjects 3 and 4 above, is therefore directly contrary to law.

I also have a couple of comments about specific provisions of the proposed regulation amendments. The Tribe's comments on specific provisions of the proposed regulations do not alter the Tribe's view that the regulations as a whole are without valid legal authority.

§ 559.2(b): The proposed new language for this subsection states that the NIGC Chair "shall expedite the process" for verifying Indian land status under IGRA of Class II or Class III gaming activities. What "process" is this subsection referring to? There is no formal process that the Siletz Tribe is aware of. The BIA and NIGC have been jousting with each other for years about which agency has authority to determine whether Indian gaming is taking place on Indian lands, and that authority has changed over the years. In

addition, case law is inconsistent on which agency has that authority in a specific situation. It is not helpful to make a reference to speeding up the process when no one in the tribal community can say with certainty what the process is or will be. To satisfy due process concerns, the regulations must specify the process in detail, plus any appeal rights that exist to challenge the Chair's determination (or whoever else may make the actual Indian lands determination).

§ 559.4: When a tribe submits a copy of its facility license to NIGC under the proposed regulations, it must attest and certify that "the tribe has determined 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." This language is taken from 25 U.S.C. § 2710(b)(2)(E). Care must be taken to separate out the two entirely separate subjects discussed in this section, both of which require adequate protection of the environment and the public health and safety. The first subject is "construction and maintenance of the gaming facility." (emphasis added). The second subject is the operation of "that gaming," which is a reference only to class II (and, under § 2710(d), class III) "gaming activity." (emphasis added). *See*, heading, 25 U.S.C. § 2710 (b)("**Regulation of class II gaming activity**"); subsection (1)("tribe may engage in class II gaming").

The separate reference to gaming is clearly a reference to gaming activities – meaning Class I, Class II, and Class III "gaming" as specifically defined at 25 U.S.C. §§ 2703(6), (7), and (8). The separation of construction and maintenance of the gaming facility from operation of gaming activities was deliberate and is critical. Several states, and some courts, however, have mistakenly attempted to conflate both phrases to assert that "operation" of the gaming "facility" must also take place in a manner that adequately protect the environment, public health and safety. Operation is different than construction and maintenance. By conflating the two separate subjects, States have attempted to impose the whole panoply of State public health and safety rules and regulations, many of which are not directly connected to the subject of regulation gaming activities. This includes attempts to impose smoking and other general public health standards on tribes.

Such indirect regulation of Indian lands and activities, under the narrow intrusion of State authority permitted by IGRA, is expressly prohibited by IGRA and its legislative history. *See, e.g.*, 25 U.S.C. §§ 2710(d)(4); (d)(7)(B)(iii). NIGC has previously clarified the types of subjects that are properly included under the subject of protecting the "environment and the public health and safety," in its withdrawn 2000 environment, public health and safety regulations, which were referenced when the original facility licensing regulations were proposed and finalized. They covered only immediate and critical threats to public health, safety and the environment – disaster planning, emergency evacuation, fire safety protections, water and food sanitation standards, room occupancy standards – provisions that could cause immediate death or serious physical injury to patrons and employees. The full panoply of state public health rules and regulations was never contemplated as a proper subject for inclusion under this provision of IGRA. NIGC should clarify in this section of the regulation that this provision of

IGRA does not authorize general State intrusion into the field of public health and safety unrelated to direct regulation of gaming, and what subjects are properly included (referencing the 2000 proposed regulations) under this provision.

For this reason, the Siletz Tribe believes the amended regulation should retain as a reference to proper subjects for environment, public health and safety the list at subsection (b), identifying the following areas for this subject: (1) emergency preparedness, including but not limited to fire suppression, law enforcement and security; (2) food and potable water; (3) construction and maintenance; (4) hazardous materials; (5) sanitation (both solid waste and wastewater), and (6) other environmental or public health and safety laws . . . adopted by the tribe in light of climate, geography and other local conditions and applicable to its gaming places, facilities, or locations." For the Siletz Tribe, for example, the Tribe has adopted tsunami and earthquake related safety measures because the Casino is located on the ocean and near fault lines.

The Siletz Tribe agrees with the proposal to delete the remaining provisions of renumbered Section 559.4, which require certification of compliance with all 'those" laws and policies, as well as a document listing all such laws, regulations, policies, etc.

This concludes the Siletz Tribe's comments on amendments to the proposed Part 559. Please contact me if you have any questions.

Sincerely,

Craig J. Dorsay
Siletz Tribal Attorney

CJD/jjm
c: Siletz Tribal Council
Siletz Tribal Gaming Commission