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

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

Attn: Lael Echo-Hawk

Re: Comments on Preliminary Discussion Draft of 25 C.F.R. Part 518 – Self-Regulation.

Dear Chairwoman Stevens, Vice-Chairperson 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") Preliminary Discussion Draft of 25 C.F.R. Part 518 – Self Regulation of Class II Gaming. The Tribe believes that the promise of self-regulation has not been realized to date due to the Commission's overly restrictive regulations. However, the Tribe also believes that self-regulation, like Indian Self-Determination, could be a tremendous success for tribes by allowing tribes to perform for themselves regulatory functions presently carried out by the NIGC. The Tribe's specific comments are below.

As noted in the Tribe's comments filed on February 10, 2011, the existing Part 518 contains requirements that are contrary to the plain language of the Indian Gaming Regulatory Act (IGRA), which requires the NIGC to issue a certificate of self-regulation if a tribe meets the minimum requirements set forth in the statute. Instead, the regulation imposes numerous additional requirements that make it very difficult for any tribe to achieve self-regulation. Moreover, even if a tribe achieves self-regulation, the current Part 518 takes away most of the benefits intended by the statute.

The changes reflected in the discussion draft of Part 518 are a step in the right direction. However, the draft does not go far enough and still contains requirements and limitations that exceed the statute. The Tribe strongly believes that self-regulation can be successful, but only if

the NIGC allows the process to function in the manner intended by Congress. In short, self-regulation must truly mean self-regulation.

Before listing specific concerns with the draft of Part 518, it is worth reviewing the statutory criteria for self-regulation: The IGRA provides:

> (4) The Commission shall issue a certificate of self-regulation if it determines from available information, and after a hearing if requested by the tribe, that the tribe has--
> (A) conducted its gaming activity in a manner which--
> (i) has resulted in an effective and honest accounting of all revenues;
> (ii) has resulted in a reputation for safe, fair, and honest operation of the activity; and
> (iii) has been generally free of evidence of criminal or dishonest activity;
> (B) adopted and is implementing adequate systems for--
> (i) accounting for all revenues from the activity;
> (ii) investigation, licensing, and monitoring of all employees of the gaming activity; and
> (iii) investigation, enforcement and prosecution of violations of its gaming ordinance and regulations; and
> (C) conducted the operation on a fiscally and economically sound basis.

25 U.S.C. § 2710(c)(4) (emphasis added). Any tribe that meets this discreet set of requirements is entitled to a certificate of self-regulation as a matter of law.

Since the criteria are set forth in the statute, the NIGC is not permitted to impose additional requirements. While the discussion draft eliminates some of the excessive requirements in the existing regulation, others remain. For example, the draft would appear to require that a tribe seeking a certificate of self-regulation demonstrate a spotless compliance record for the three year period preceding its application. Specifically, the draft regulation requires that the tribe show compliance with all provisions of "the IGRA, NIGC regulations in this chapter, and the tribe's gaming ordinance and gaming regulations ... ." Draft §518.4(a)(3). As written, this provision would appear to require absolute compliance, such that even a minor violation (such as a late audit) would disqualify a tribe from self-regulation. The IGRA simply does not require this level of perfection.

Similarly, the draft would continue to impose a list of "factors" to evaluate whether a tribe has met the criteria listed in the statute. However, many of the factors have no relationship to the statutory criteria and thus must be deleted. For example, establishing vendor licensing standards (Draft § 518.4(b)(5)(ix)) is not one of the statutory requirements for self-regulation. Other factors that impermissibly go beyond the statutory criteria include at least the following:

§ 518.4(b)(2) (requiring that tribal gaming regulators meet the same requirements as key employees and primary management officials), § 518.4(b)(4) (requiring a dispute resolution process for customers and employees), § 518.4(b)(5)(x) (requiring game rule approval and posting), § 518.4(b)(5)(xii) (requiring hearings and testimony on regulatory matters), § 518.4(b)(6) (requiring "a sufficient source of permanent and stable funding for the tribal regulatory body"), § 518.4(b)(7) (requiring a conflict of interest policy for tribal regulators and staff) and § 518.4(b)(10) (requiring protections for the environment and public health and safety). While many of these items may be desirable as a matter of policy or may be required under other sections of the IGRA under a separate approval process, the NIGC lacks the authority to mandate these practices as a condition of self-regulation.[1]

The Tribe further notes that a modification should be made to Draft § 518.4(b)(5), which requires that a tribe have a "gaming regulatory body" to oversee various functions, including audits and revenue accounting systems. Depending on the tribe, some of these functions may be performed by the internal audit department rather than the gaming regulatory authority. Thus, we suggest that the provision be revised to read: "The tribe has a gaming regulatory body and/or an internal audit department which … ."

The Tribe also believes that the regulatory provision establishing the burden of proof for meeting the requirements for self-regulation is flawed. At present, the regulation states that the burden is on the tribe filing the petition for a certificate of self-regulation. § 518.4(c). However, placing the burden on the tribe is not required by the statute. Indeed, the fact that the issuance of certificates of self-regulation by the NIGC is statutorily mandated strongly suggests that the burden should be on the Commission to show that a tribe has failed to meet the criteria.

The Tribe has significant concerns with § 518.4(d), which authorizes the Commission to conduct an exceedingly intrusive inspection of any tribe seeking self-regulation. The regulation provides:

> During the review of a tribe's petition for self-regulation of class II gaming, the Commission shall have complete access to all papers, books, and records of the tribal regulatory body; the gaming operation premises; and any other entity involved in the regulation or oversight of the gaming operation. The Commission shall be allowed to inspect and photocopy any relevant materials. The tribe shall take no action to prohibit the Commission from soliciting information from any current or former employees of the tribe, the tribal regulatory body, or the gaming operation. Failure to adhere to this paragraph may be grounds for denial of a petition for self-regulation.

[1] Such issues could be addressed in the NIGC's model gaming ordinance to the extent they are not already covered.

(Emphasis added.)

While the Commission certainly has the power to request information from a tribe seeking a certificate of self-regulation, the assertion of a unilateral right to review and copy "all" of a tribe's records and even interview that tribe's current and former employees exceeds the Commission's authority.[2] Whether or not intended, the effect of the present regulation likely is to discourage tribes from seeking self-regulation, since filing an application could subject a tribe to an open-ended and unlimited examination of all aspects of the tribe's gaming operations and regulatory agencies. Such an approach is inconsistent with the government-to-government relationship and the intent of the self-regulation provisions of the IGRA.

Finally, the Tribe believes that a fundamental flaw remains with § 518.9, which addresses the status of the Commission's investigative and enforcement powers as to a tribe that is self-regulated. Pursuant to § 518.9 the Commission purports to retain significant investigative powers over a self-regulated tribe. Specifically, § 518.9 provides:

> 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.

(Emphasis added.)

Of course, the point of self-regulation is that tribes will be able to regulate their own gaming operations with only a minimal role for the NIGC. Thus, the statute strictly limits the NIGC's oversight and investigative powers over self-regulated tribes. The IGRA states:

> (5) During any year in which a tribe has a certificate for self-regulation--
> (A) the tribe shall not be subject to the provisions of paragraphs (1), (2), (3), and (4) of section 2706(b) of this title;
> (B) the tribe shall continue to submit an annual independent audit as required by subsec. (b)(2)(C) of this section and shall submit to the Commission a complete resume on all employees hired and licensed by the tribe subsequent to the issuance of a certificate of self-regulation; and
> (C) the Commission may not assess a fee on such activity pursuant to section 2717 of this title in excess of one quarter of 1 per centum of the

[2] Of note, § 518.5(c) appears to suggest that the Commission will request additional information from the tribe rather than conduct its own inspections of the tribe's gaming operation.

> gross revenue.
> (6) The Commission may, for just cause and after an opportunity for a hearing, remove a certificate of self-regulation by majority vote of its members.

25 U.S.C. § 2710(c)(5)-(6) (emphasis added). The powers of the Commission made inapplicable to a self-regulated tribe are the following:

> The Commission -
>
> (1) shall monitor class II gaming conducted on Indian lands on a continuing basis;
>
> (2) shall inspect and examine all premises located on Indian lands on which class II gaming is conducted;
>
> (3) shall conduct or cause to be conducted such background investigations as may be necessary;
>
> (4) may 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 this chapter;

25 U.S.C. § 2706(b)(1)-(4). Thus, the statute clearly removes from the Commission the authority to "monitor, "inspect" or "examine" self-regulated tribes. Nevertheless, § 518.9 asserts that the Commission retains the right to investigate "violations of the IGRA, its implementing regulations, and violations of tribal gaming ordinances." However, if this were true, then a certificate of self-regulation would be meaningless, since a tribe would remain subject to direct regulation by the Commission. Since § 518.9 is contrary to the plain language of the statute, it should be deleted.

This is not to say that the NIGC has no role if it believes that a tribe is violating the law. In such a case, the Commission may initiate proceedings to revoke the certificate. The IGRA provides: "The Commission may, for just cause and after an opportunity for a hearing, remove a certificate of self-regulation by majority vote of its members." 25 U.S.C. § 2710(c)(4)(C).

On behalf of the Seminole Tribe of Florida, we appreciate the opportunity to comment on the draft changes to the Commission's regulations. We look forward to working with the Commission through this regulatory review process to develop regulations that will support meaningful self-regulation by tribal governments.

Sincerely,

HOBBS, STRAUS, DEAN & WALKER, LLP

By: Joseph H. Webster

cc: Jim Shore, Esq.