February 11, 2011

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National Indian Gaming Commission
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Via email: reg.review@NIGC.gov

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

On behalf of the Choctaw Nation of Oklahoma, I thank you for the opportunity to provide comments on the National Indian Gaming Commission's ("Commission") proposed regulatory amendments as published in the Federal Register on November 18, 2010. Your commitment to tribal consultation is both noteworthy and much appreciated and I look forward to working with you, together with the rest of Indian country, on these and other matters in the future.

The Choctaw Nation believes that while some of the changes proposed in the Commission's Federal Register notice may be helpful, others are unnecessary and/or potentially detrimental. In the paragraphs below we explain which of the changes proposed we believe should be developed and which should be abandoned, and explain our reasoning in each case. We support our position by providing specific examples of how the proposed changes would affect the Choctaw Nation. Finally, we attempt to provide constructive input where possible by suggesting alternative ways the Commission may address some of the issues identified in the Federal Register notice.

25 CFR Part 502: Definitions

Definition of "Net Revenues"

The Commission inquired whether the definition of "Net Revenues" should be revised to ensure that Tribes consider cash flow prior to allocating gaming revenues for non-gaming purposes.

We believe that the definition of "Net Revenues" should not be revised as outlined in the Federal Register. As you know, tribal governments are sovereign and independent and their sovereignty must be respected, subject only to Congressional limitation. Under the Indian Gaming Regulatory Act, tribes may consider cash flow, financial integrity, and any other matter prior to allocating their net revenues to non-gaming programs, but there is no specific matter they are *required* to consider when doing so. Indeed, IGRA gives tribal governments relatively wide

discretion in deciding whether and how to allocate their net revenues as long as those revenues are intended for one of the five permitted types of expenditures. Tribal sovereignty requires that tribes continue to exercise this right freely, without being required to account for extraneous issues.

We understand that the Commission's interest in the definition of net revenues stems from a concern that some tribes may be allocating gaming revenue to non-gaming venues without properly taking into account their gaming operation's financial integrity. Enacting a regulation that requires tribes to take cash flow into account prior to making allocations would, paternalistically, protect tribes from making (at least some) bad financial decisions. However, such a regulation would also cut into tribal sovereignty. Making decisions about how to expend tribal revenue lies at the core of tribal governmental decision-making and at the core of tribal sovereignty. Thus, while the Commission may want to assist tribes in making prudent financial decisions by providing training, seminars, or other such optional guidance, it should not undermine tribal sovereignty by limiting tribal governmental discretion beyond the limitations explicitly imposed by Congress.

Furthermore, we question whether it is possible to come up with a definition of cash flow that would be appropriate for all tribes. Indian tribes finance their gaming operations in a multitude of ways using various tribal governmental instrumentalities, boards, corporations, and other entities. In some cases the tribal gaming operation takes out loans or enters into financing agreements to fund gaming operations, whereas in other cases some other entity may take out the loan and subsequently transfer the funds to the gaming operation. In the latter situation, the gaming operation's cash flow may not be affected by loan payments even if such payments impose heavy burdens on tribal government as a whole. Defining "cash flow" as "Net income plus depreciation minus principal loan payments and reserve funding" would not adequately address the financial situation of such a tribe, nor would it achieve the outcome the Commission proposes to achieve.

In short, while we agree with the Commission that it is prudential, from an economic standpoint, to take cash flow into account prior to distributing gaming revenue for non-gaming purposes, we believe that each tribe should have the freedom to make this determination on its own. Respect for tribal sovereignty requires that tribal governments be permitted to act in accordance with their rightful discretion in the manner they believe best serves their citizens. Like any other government, tribal governments too should be permitted to exercise discretion in making financial decisions.

Definition of "Management Contract"

The Commission inquired whether the definition of management contract should be expanded to include any contract paying a fee based on a percentage of gaming revenues. We believe that the said definition should not be altered in the manner suggested.

Many tribes have numerous contracts, including slot machine lease agreements, in which fees are based on a percentage of gaming revenue. Our tribe, for example, has multiple agreements with each of our slot vendors, for a total of more than 25 agreements. Were the

Commission to amend the definition of management contract as proposed, each of these agreements would be subject to review and approval by the Commission in order to be valid.

Requiring NIGC approval for each such agreement would have several detrimental effects. First, the Commission could easily become overwhelmed by the onslaught of agreements that tribes nationwide would submit for approval. Several thousand agreements, above and beyond those currently submitted for approval, would be submitted to the NIGC annually. Given that it currently takes staff a little more than a year, on average, to process management contracts, the Commission would likely need to hire additional staff to meet increased workloads or risk unreasonably prolonged approval times.

In addition, requiring such approval could significantly debilitate tribal gaming. Tribal gaming operations must be free to enter into percentage-based gaming agreements easily and quickly. Flexibility in introducing new games and removing unsuccessful ones is key to running a successful casino. Were the Commission to require approval for each percentage-based slot lease, gaming operations would be slowed to the point of stagnation. Tribes would have to wait months, if not years, to make changes on their gaming floors, leading to potentially significant losses in revenue.

Finally, the Commission did not express any rationale that might justify expanding the definition of management contract. If the Commission feels that increasing its approval authority to encompass slot leases or other percentage-based contracts is required, it should share its rationale with tribes so that we may discuss the underlying issues openly.

25 CFR Part 514: Fees

Fiscal Year versus Calendar Year

The Commission suggested that calculating fees based on a calendar year may be difficult for some tribes and inquired whether the difficulty may be resolved by changing "calendar" to "fiscal" throughout part 514. You also inquired how such a revision might be implemented if it were to be pursued. It is our position that while such a revision may make things somewhat easier for our accounting department and those of other tribes, the difficulties involved are not significant and do not justify making the regulatory change proposed. Thus, if only a small number of tribes would benefit from switching over to a fiscal year fee calculation, the change should not be made. On the other hand, if the vast majority of tribes operates on the basis of a fiscal year, the change may be warranted.

For our tribe, it would be easier to calculate fees based on a fiscal year than on a calendar year because our accounting system is based on fiscal year calculations. Currently, in order to perform the calculations required by existing regulations our accounting department is required to generate two separate reports and to manually combine them, thereby arriving at calendar-year fees. We note, however, that the fact that manual reconciliation is required in our case may be a product of the particular software we use. There may be alternative accounting software available that would perform the required calculations automatically.

Although calculating fees based on a calendar rather than fiscal year poses some minimal inconveniences for us (and, presumably, for some other tribes as well), we do not believe that a

regulatory change is required to address this matter unless the vast majority of gaming tribes would likewise benefit from such a change. We have become accustomed to performing the required calculations -- which do not in and of themselves require significant resources on our part -- and are prepared to continue doing so going forward. On the other hand, adopting a new regulation would be costly for the Commission. The small inconvenience to tribes (like us) who use fiscal year accounting is far outweighed by the cost involved in adopting a regulatory change. We therefore think the change is unnecessary unless it would significantly benefit a large number of tribes.

In addition, were the Commission to replace "calendar" with "fiscal" for purposes of part 514, those tribes that currently base their accounting on the calendar year would be inconvenienced and some would incur costs associated with switching over to a new fee-calculation system. Some of these tribes may even have elected calendar-year accounting in order to more easily meet part 514's requirements. It would be unfair to these tribes to change the accounting rules now, just to make things easier for a small number of other tribes who have already devised ways of meeting existing regulatory requirements. For this reason, too, we do not think the regulation should be revised unless the change would benefit a significant number of tribes.

The Commission also inquired how such a change should be implemented were the Commission to effect it. We recommend that the transition occur pursuant to a detailed transition plan published by the Commission. The plan should provide in-depth explanations of the required calculations and specify deadlines by which the calculations must be completed. The Commission's transition plan should provide tribes with at least two years' prior notice to ensure that their accounting systems are adjusted and their accounting personnel trained to submit calculations in accordance with the Commission's new requirements.

Definition of Gross Gaming Revenue

The Commission inquired whether this definition should be revised so that it is consistent with GAAP definitions. We have not had any difficulty calculating or reconciling gross revenues based on the existing definition, nor are we aware of any industry-wide problems in this regard. Accordingly, we see no need for its revision.

Fingerprint Processing Fees

The Commission inquired whether fingerprint processing fees should be included in the total revenue collected by the Commission that is subject to statutory limitation. We believe that such fees should, as suggested in the Federal Register notice, be subject to the statutory cap imposed on revenue collection. Tribes are burdened with significant fees, all of which should be subject to an overall cap.

In addition, you asked whether the Commission should review and adjust fingerprint processing costs annually. We are not opposed to the Commission's reviewing and adjusting such costs annually, as long as tribes are only charged for the actual cost of fingerprint processing. Tribes should not be required to cover the cost of NIGC personnel or overhead beyond what they already pay. If the Commission limits the amount tribes may be charged for

fingerprint processing as described above, we would support the Commission's reviewing and adjusting fingerprint processing costs annually.

Late Payment System versus NOV

The Commission inquired whether the existing NOV system for late payments should be modified, and if so, how. We believe that the system should be changed for the following reasons and in the following ways.

The advantage in the current NOV system is that it provides a no-nonsense means of collecting late fees and serves as a deterrent against late payments. It is important that the penalties for late fee payments be such that tribes are incentivized to comply with payment schedules. In addition, it is imperative that the Commission have at its disposal a quick and easy method for dealing with late payments and levying penalties that does not involve endless reminders to delinquent tribes.

On the other hand, as stated in the Federal Register notice, the system currently in place is unnecessarily draconian and inflexible in cases where late payments are only a few days late and/or are due to clerical error, personnel changes, or other similar causes. When a tribe that normally complies with fee schedules submits a late payment, that tribe is subject to the same treatment as repeat offenders; the tribe receives a Notice of Violation and is subjected to a fine. Furthermore, under the existing system tribes whose lateness results from clerical error are sometimes subject to large fines, followed by lengthy (and costly) settlement meetings with the Commission's Office of the General Counsel. Such meetings are a waste of resources both for tribes and for the Commission.

For these reasons, we believe that the Commission should implement a system that provides some flexibility in the event of a late payment. And perhaps the late payment option should be available only to those tribes that normally pay their fees on time and only in connection with payments that are no more than two weeks late (or some similarly appropriate timeframe). For example, the Commission may decide to incorporate such a policy starting January 1, 2012. Each tribe would be forgiven for one late payment (up to two weeks late) in each pre-set 18 month period (e.g., from 1/1/12 through 6/1/13, and again from 6/2/13 through 1/1/15, etc.). If a tribe submits more than one payment after its due date in any pre-set 18-month period, the second late payment would be subject to NOV and fine. Likewise, if a payment is more than two weeks late, the payment would be subject to NOV and fine. This type of solution would provide deterrence from making late payments while also allowing for clerical or oversight errors once in a while.

25 CFR Part 523: Review and Approval of Existing Ordinances or Resolutions

You asked whether the Commission should consider eliminating part 523 as obsolete, and if so, how it should do so.

We believe the section should be eliminated for the reasons stated in your Federal Register notice, but only provided there are no tribes whose ordinances justify keeping the

regulations in place. Given that the section is more than likely obsolete, standard notice and comment rulemaking should suffice for its elimination.

25 CFR Part 531: Collateral Agreements

The Commission inquired whether it should consider its authority to approve agreements that are collateral to a management contract. We understand that on occasion tribes ask the Commission to determine whether the cumulative effect of management and collateral agreements violate the sole proprietary interest provisions of the IGRA. The Commission now wants to know whether it should have -- or seek to find -- authority to certify that no such violation has occurred.

First, we believe that it is important to distinguish between *requiring* tribes to get NIGC approval with regard to the "sole proprietary interest" issue and enabling them to do so on a *voluntary* basis. Under existing rules tribes are already burdened with obtaining a large number of costly approvals. We believe that they should not be required to obtain any additional approvals. Requiring tribes to meet strict criteria under a "sole proprietary interest" standard rather than enabling them to determine the matter on their own would be unnecessarily paternalistic. Thus, our first response to the Commission's inquiry is that tribes should not be *required* to obtain NIGC approval with regard to the sole proprietary interest issue.

With regard to the NIGC's providing an opinion on "proprietary interest" to those tribes that voluntarily seek such an opinion, we believe that authority to issue such a non-binding *opinion* already exists. The Commission may, under existing law, review collateral agreements (*if a tribe so requests*) for purposes of providing an opinion on whether the "proprietary interest" rules have been followed. There is nothing in existing law that would preclude the Commission from doing so. Under existing law, however, the Commission can only *approve* such agreements if they meet the definition of a "management contract."

It seems that the Commission now seeks to go a step beyond merely providing an opinion on collateral agreements, and instead wants to explore the possibility of its having and exercising authority to "approve" them, i.e., to conclusively determine whether the arrangements they create meet IGRA's proprietary interest rule. It is our understanding that the Commission proposes "obtaining" authority to approve collateral agreements by expanding the definition of "management contract" to include collateral agreements as well. Were the definition of management contract thus expanded, the Commission would have authority to approve collateral agreements (because, by definition, such agreements would be part of the "management contract" over which the Commission retains approval authority). We believe that expanding the definition of "management contract" to include collateral agreements should not be undertaken for the following reasons.

First, there are policy considerations that weigh against the Commission's having authority to approve collateral agreements. Were the Commission to obtain such authority, tribes would ultimately be required to obtain yet another approval before moving forward with their management contracts. Obtaining such approval, above and beyond the approvals already

required today, would encumber tribal gaming operations significantly. Obtaining NIGC approval for management contracts can easily take more than one year under existing conditions. It is an expensive process that costs tribes time, manpower, and money. If tribes were further obligated to obtain approval of the entirety of their agreements, the approval process would take longer and cost more. And in any case, requiring this additional approval is unwarranted. Accordingly, we do not think the Commission should spend time on expanding its formal authority to cover approval of collateral agreements.

In addition, there are legal reasons for not expanding the definition of "management contract" to include collateral agreements. First, IGRA distinguishes between management contract review (25 U.S.C. § 2711) and the issue of "sole proprietary interest" (25 U.S.C. § 2710). Expanding the definition of management contract for the sole purpose of granting the Commission authority to have a say on the "sole proprietary interest" issue would be mixing two issues that -- under IGRA -- are distinct. IGRA only grants the Commission authority to review the "sole proprietary interest" issue when it approves tribal gaming ordinances. No equivalent authority expressly exists in connection with approval of contracts.

Second, in order to expand the definition of "management contract" to include collateral agreements, the Commission would first have to provide a sufficiently workable set of standards for what constitutes a management contract. The Commission has historically failed to provide a consistent set of standards. Were the Commission to attempt to provide standards that included not only the core management contract itself, but also all collateral agreements, the standards would likely be either too vague or too narrow. And while the Commission may resolve the uncertainty by providing a "model" management contract, doing so would be highly undesirable. A model contract would be overly restrictive in that it could not possibly capture all of the variations that tribes may wish to include in their management arrangements.

In short, we believe the Commission should refrain from attempting to expand its approval authority to include collateral agreements and to cover the "sole proprietary interest" issue. Such an expansion would be detrimental to tribes and contrary to existing law.

25 CFR Part 542: Class III MICS

The Commission inquired whether it should replace the class III MICS with guidelines. You also asked how such a change might affect tribes whose gaming compacts require compliance with the MICS. We believe that the MICS should, as suggested, be converted into guidelines. While such a change would necessitate some adjustment in tribal-state compacts, like ours, that require compliance with the MICS, we do not think such adjustments should pose any significant difficulties for tribes or states.

We believe that the class III MICS should be removed from the regulations because, as recognized by the courts, the Commission lacks authority to enforce regulation of class III gaming. We acknowledge, however, that these MICS, which have been widely adopted throughout the industry, are helpful in that they provide a recognized standard for internal controls. To the best of our knowledge many (if not most) tribal gaming operations have adopted the MICS and adhere to them. Therefore, we urge the Commission not to abandon the MICS entirely, but rather to re-publish them as guidelines.

With regard to the transition from regulations to guidelines, we do not think the transition should pose significant problems for tribes, like ours, whose compacts incorporate the MICS. Compacts that refer to the MICS by reference to their CFR citation could be revised to refer to the MICS as guidelines rather than as regulations. While making this revision to existing compacts would require time and effort, it is a non-substantive change that should not meet any objection by tribes or states. Some tribes and states may even elect not to make the change, relying instead on their mutual understanding that the MICS are binding regardless of whether they are a regulation or a guideline under federal law. As far as substance goes, the fact that the MICS are guidance rather than regulation on a *federal* level should not affect a tribe's state-level commitment to be bound by them. Therefore, the Commission's classification of the MICS as guidelines rather than as regulations should not have any substantive impact on the tribal-state relationship.

It is important to note that although revising a compact solely for purposes of changing the compact's citation to the MICS is a simple legal undertaking, some tribes might encounter practical difficulties while attempting to make the change. States may take the opportunity of a compact's being open to revision to try to demand amendments that go beyond the mere correction of the MICS' citation. Tribes have experienced such difficulties in the past.

Under our tribal-state compact we are required to comply with the class III MICS. Specifically, we are required to comply with internal control standards that "provide a level of control that equals or exceeds those set forth in the National Indian Gaming Commission's Minimum Internal Control Standards (25 C.F.R., Part 542)." Were the Commission to transition from regulations to guidelines, we may (but will not necessarily) want to amend our compact to refer to the MICS as guidelines instead of referencing their citation in the Code of Federal Regulations. Other than that, however, no additional change would be required. Our commitment to adhere to standards equal to or more stringent than those present in the MICS would not change if the Commission were to classify the MICS as guidance rather than regulation.

The Commission noted that some tribal gaming ordinances recognize Commission authority to regulate and enforce class III MICS and that some tribal-state compacts have likewise done so. Neither our ordinance nor our compact accept federal oversight of class III MICS, and accordingly we cannot opine on whether and how the proposed change might impact such tribes and their compacts.

Finally, the Commission inquired how the regulations should be published to the industry and whether a Tribal Advisory Committee should be convened to make any changes to the MICS. With regard to publishing, it might be easiest for tribes if the Commission could keep the guidelines at their current location in the CFR despite their being guidelines rather than regulations. Barring this, the NIGC could issue the guidelines in an advisory bulletin, post the guidelines on its website and distribute hard copies to all gaming tribes. With regard to procedures for making changes to the MICS, we strongly believe that tribes (and other industry participants) should be consulted. Past experience has shown that those on the grounds often have insights and experience that are invaluable in defining internal control problems and crafting solutions to those problems.

Because the NIGC's class III MICS are non-binding, we are not sure that a formal TAC needs to be convened. Instead, the Commission may want to consider convening a MICS working-group composed of representatives from all interested industry participants. The working group could convene on a pre-set schedule to discuss pressing issues, allocate work and research to its members, and -- utilizing a process that draws on the experience of a wide array of lawyers and practitioners -- narrow down the problems and craft a set of potential solutions. The Commission could then finalize its guidelines based upon the input presented by the working group. Several years ago a similar process was undertaken when the then-sitting Commission sought to revise its class II MICS. The process worked well, enabling the Commission to consider matters that would not otherwise have come to its attention. While the process proposed here is lengthier than one conducted by the small group of representatives who participate in a TAC, we believe that the final outcome will be infinitely better.

25 CFR Part 556: Background Investigations for Licensing

The Commission inquired whether the background investigation pilot program should be formalized into the regulations. We think the pilot program should, as suggested, be formalized. The procedures that are currently in place under the pilot program are far easier to follow than those specified in the regulations.

25 CFR Part 556: Fingerprinting for Non-Primary Management Officials or Key Employees

The Commission inquired whether it should adopt regulations that would allow tribes to submit fingerprint cards for non-primary management officials or key employees. We think the regulations should, as suggested, be revised to permit tribes to submit such fingerprints and obtain related reports. Permitting tribes to fingerprint vendors, consultants, and other non-employees who have access to gaming operations would enable tribes to better protect the integrity of their gaming operations.

General Comment on Class II MICS and Technical Standards

In several places throughout the Federal Register notice the Commission inquired whether it should assess, and possibly revise, the existing class II MICS and technical standards. We believe that some changes should be made to both the MICS and the technical standards. In our experience, the most comprehensive and effective means of effecting such change is through a working group consisting of tribal representatives, industry representatives, and NIGC representatives. We recommend that the need for, and final version of, any changes to the class II MICS and technical standards be defined by a committed working group.

The Commission further inquired whether the draft prepared by an earlier commission should be used as a foundation for any future changes, or whether that draft should be abandoned. In our opinion, portions of the earlier draft were unclear and some of the regulatory changes it adopted were unnecessary and/or undesirable. Rather than comment on each portion of that draft, however, we recommend that the Commission convene a working group, comprised of all interested industry participants, and that the group discuss which of the previously proposed changes should be adopted and which should not.

In conclusion, on behalf of the Choctaw Nation I thank you for the opportunity to provide comment on the Commission's proposed regulatory changes. We look forward to working with the Commission as it moves to make some of the changes discussed above in the coming years.

Sincerely,

Paula Penz, Gaming Commissioner
Choctaw Nation of Oklahoma