

February 11, 2022

The Honorable E. Sequoyah Simermeyer
Chair, National Indian Gaming Commission
1849 C Street NW
Mail Stop #1621
Washington, DC 20240

Re: Tribal Consultation Series C

Dear Chair Simermeyer,

The Kiowa Casino Operations Authority (“KCOA”) appreciates the opportunity to submit written comments to the proposed changes to the National Indian Gaming Commission (“NIGC”) regulations described in the “Dear Tribal Leader” dated December 10, 2021 and discussed at the “Series C” government-to-government consultations.

The KCOA has specific concerns regarding the NIGC’s suggested revisions to 25 C.F.R. § 573.4. These concerns are discussed below.

I. 25 C.F.R. § 573.4(a).

The Indian Gaming Regulatory Act (“IGRA”) authorizes the NIGC “to order temporary closure of an Indian game for substantial violation of the provisions of [the IGRA], of regulations prescribed by [the NIGC] pursuant to [the IGRA], or of tribal regulations, ordinances, or resolutions approved [by the NIGC].”¹ Presently, twelve of the thirteen “substantial” violations identified at § 573.4(a) are clear in their application and intent.² The single exception is the “environment, public health, and safety” (“EPHS”) provision,³ which the NIGC was forced to clarify through publication of an interpretive rule in 2002, and which is again under review.

Closure of tribal gaming facilities is the most significant authority granted by Congress to the NIGC. Exercise of that authority has the potential to cause irreparable harm to both the gaming operation and the tribal community. Thus, the NIGC should exercise this authority as a last resort, and only after the tribe has been provided fair notice of the elements of the applicable laws it is accused of violating.

These past two years have demonstrated the harm that closure of Indian gaming facilities can have on tribal economies. Given these impacts, the NIGC should exercise its authority to issue closure orders judiciously, and only when such actions are objectively supported by law. Where

¹ 25 U.S.C. § 2713(b)(1).

² KCOA notes that the exception to this statement is the “environment, public health, and safety” provision at 25 C.F.R. 573.4(a)(12). Uncertainty over the meaning of this provision required the NIGC to issue an interpretive rule on July 3, 2002. The appropriate scope of this rule is discussed below.

³ 25 C.F.R. § 573.4(a)(12).

a tribe operates a casino without an NIGC-approved ordinance or resolution, it is self-evident that a substantial violation has occurred.⁴ So too where a tribe operates a casino on Indian lands not eligible for gaming,⁵ fails to remit its annual fee on revenue,⁶ fails to perform required employee background checks,⁷ or operates class III games without a tribal-state compact.⁸

Unlike the aforementioned violations, “misuse of net gaming revenue” is a facially ambiguous provision that is not only difficult to enforce, but is also unnecessary to achieve the NIGC’s policy objectives.

A. The Proposal is Ambiguous and Would Require Significant Rulemaking.

As stated above, the current “substantial violations” identified at § 573.4(a) are grounded in the statutory language of IGRA and are generally clear in their meanings. Rulemaking has occasionally been necessary to clarify, for example, the meaning of “key employee” or “primary management official,” but such processes have resulted in criteria by which the NIGC is able to objectively evaluate whether one or more violations has occurred, and if a temporary closure order (“TCO”) is necessary.

The IGRA states that “net revenues from any tribal gaming are not to be used for purposes other than – (i) to fund tribal government operations or programs; (ii) to provide for the general welfare of the Indian tribe and its members; (iii) to promote tribal economic development; (iv) to donate to charitable organizations; or (v) to help fund operations of local government agencies.”⁹ The NIGC implementing regulations restate these limitations, with the addition of a parenthetical statement regarding approval requirements for any per capita distribution plan.¹⁰ Every one of these clauses is open to interpretation and will require the NIGC to engage in significant rulemaking if it wishes to develop enforceable guidelines.

The U.S. Supreme Court requires that laws give “fair notice”¹¹ to the public and contain an “ascertainable standard of guilt.”¹² For “misuse of net gaming revenue” to pass constitutional muster, the NIGC must clarify permissible expenditures “for the general welfare” or “economic development.” Absent such clarification, federal courts will most certainly find enforcement based on such provisions to be unconstitutionally vague.

⁴ 25 C.F.R. § 573.4(a)(3).

⁵ 25 C.F.R. § 573.4(a)(13).

⁶ 25 C.F.R. § 573.4(a)(2).

⁷ 25 C.F.R. § 573.4(a)(5).

⁸ 25 C.F.R. § 573.4(a)(11).

⁹ 25 U.S.C. § 2710(b)(2)(B).

¹⁰ 25 C.F.R. § 522.4(b)(2).

¹¹ *Colautti v. Franklin*, 439 U.S. 379, 390 (1979).

¹² *Palmer v. City of Euclid*, 402 U.S. 544, 545 (1971).

B. The Proposal Undermines Tribal Sovereignty.

This Administration has vowed to uphold and strengthen tribal sovereignty.¹³ Any agency proposal that seeks to define by administrative fiat what constitutes the needs of a tribe or the limits of its permissible economic development activity does not strengthen tribal sovereignty. Rather, such a proposal would substitute the judgment of tribal officials with that of political appointees or career officials: the antithesis of tribal sovereignty.

Indian Country's experience with COVID-19 has demonstrated the importance of tribal decision-making and the need for flexibility from federal agencies. At the height of the pandemic, tribes throughout the United States benefited from the U.S. Department of the Treasury's interpretation of certain provisions in the Coronavirus Aid, Relief, and Economic Security ("CARES") Act in a manner that provided maximum flexibility. Tribal decisionmakers were then able to meet the unexpected challenges faced by their communities. The NIGC's attempt to now define permissible uses of gaming revenue seems ill-timed and will result in tribes feeling constrained from allocating or distributing gaming-derived funds as novel or unexpected needs arise.

C. The Proposal is Unnecessary to Meet NIGC's Policy Objectives

Without a clearly identified problem to address, we can only assume that this proposal is in response to vague NIGC concerns, possibly animated by some past egregious examples of misappropriated gaming revenue. The KCOA notes that § 573.4(a)(6) already provides for discretionary facility closure where "there is clear and convincing evidence that a gaming operation defrauds a tribe." This provision would presumably cover cases of embezzlement or money laundering, and if these are areas of NIGC concern, an interpretive rule could help clarify when such activities fall within this clause's purview.

For other instances of net revenue misuse, the NIGC maintains the ability to issue a notice of violation ("NOV") pursuant to § 573.3.¹⁴ The NIGC is further able to "levy and collect appropriate civil fines, not to exceed \$25,000 per [NOV]."¹⁵ Any attempt to impose penalties under this section without first defining the scope of permissible expenditures would suffer the same constitutional infirmities discussed above. The KCOA nevertheless notes this alternative to a TCO, as it was not discussed at the Series C consultations, or identified as an ineffective tool to address the NIGC's concerns.

II. 25 C.F.R. § 573.4(a)(12).

The NIGC additionally expressed its interest in updating the EPHS interpretive rule issued on July 3, 2002. The KCOA submits that "cyber-security" is beyond the scope of the EPHS provision contained in the IGRA and the NIGC implementing regulations. While it is possible

¹³ Memorandum for the Heads of Executive Departments and Agencies, *Tribal Consultation and Strengthening Nation-to-Nation Relationships*, January 26, 2021.

¹⁴ 25 C.F.R. § 573.3(a) ("The Chair may issue a notice of violation to any person for violations of any provision of the [IGRA] or this chapter, or of any tribal ordinance or resolution approved by the Chair under part 522 of this chapter.").

¹⁵ 25 U.S.C. § 2713(a)(1).

that the NIGC could engage in notice-and-comment rulemaking that mandates compliance with certain cyber-security requirements, the KCOA does not believe that Congress intended for the EPHS provision in the IGRA to encompass cyber-security threats. This is confirmed in the NIGC's own prior attempt to interpret this the meaning of EPHS. After a review of the legislative history and a discussion of public comments, the NIGC identified EPHS standards as appropriately addressing "emergency preparedness, food and water, construction and maintenance, hazardous and other materials, and sanitation."¹⁶

Even if the NIGC concludes that the EPHS interpretive rule should be expanded to include cyber-security requirements, the KCOA notes that the regulations permit the issuance of a TCO for EPHS violations only if the "a gaming operation's facility is constructed, maintained, or operated in a manner that threatens the [EPHS], *in violation of a tribal ordinance or resolution approved by the [NIGC]*."¹⁷ As such, revising the EPHS interpretive rule does not necessarily result in expanded NIGC TCO authority. A review and analysis of each tribe's gaming ordinance is required before the impact of such any such change is known.

As an alternative, the KCOA proposes that the NIGC address concerns over cyber-security through the issuance of guidance or information notices. Tribes are fully capable of issuing their own laws to combat cyber-security threats and would welcome the opportunity to participate in NIGC-led training sessions on this subject, or access other NIGC resources to help protect gaming patrons. Such actions would both recognize tribal sovereignty and be a legitimate exercise of the NIGC's statutory authority.

III. Conclusion.

The KCOA appreciates your careful consideration of its concerns. If you have any questions or would like to discuss further, I am available at your convenience.

Sincerely,



John Tahsuda III
Chairman, Kiowa Casino Operations Authority

¹⁶ Environment, Public Health, and Safety, 67 Fed. Reg. 46,109 - 46,112 (July 12, 2002).

¹⁷ 25 C.F.R. § 573.4(a)(12) (emphasis added).