Rincon Band of Luiseño Indians

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Thank you for the opportunity to address the NIGC on the important issues identified in Group One:

On behalf or the Rincon Band, I am submitting a preliminary written statement. I say "preliminary" because this session is only the 3rd of 7 sessions scheduled for Group One. Rincon will observe and listen to the consultation sessions. The Band anticipates drafts to be circulated before the end of the Group # 1 consultations, and likely will submit supplemental comments at that time. Rincon applauds the inclusion of Class III MICS and facility licenses in Group One. As indicated in our Initial comments to the NOI, the Band believes these are two matters that deserve the highest of priorities, so it is refreshing to see that they have been given the priority they deserve.

I will focus the Band's comments today on those two issues. However, the Band expresses support for the NIGC draft changes to 25 CFR part 514 – fees. The draft is sound and appropriately addresses the comments submitted by the Tribes in the initial NOI stage. Depending on how the NIGC addresses the Class III MICS provisions, there may be a need to add language regarding assessment of fees for Tribes looking to the NIGC to maintain Class III MICS and/or audit Class III MICS compliance,

The Band apologizes in advance for some redundancy between the comments today and the comments submitted in response to the NOI. Still the Band believes many of these points deserve being repeated many times as this process evolves.

Placing the Class III MICS and Facility License Regulations In Their Proper Historical and Legal Contexts.

The Hope Commission: The Tribes had their issues with original NIGC Chairman Anthony Hope. He was certainly hostile to the Tribes and the present opportunity to revisit the definition regulations promulgated by the Hope Commission is welcome and overdue, Still, Anthony Hope got one key principal correct, which all subsequent Commissions, except the Monteau Commission, got wrong, and which the Hogan Commissions got seriously wrong. The regulation of Class III gaming is to be governed by the compact agreements reached between Tribal and State governments at the negotiation table. It is not the province of the NIGC.

Bo Mazzetti	Stephanie Spencer	Charlie Kolb	Steve Stallings	Open Seat
Chairman	Vice-Chairwoman	Council Member	Council Member	Council Member

The hostility of the Hope Commission should not be forgotten. The work done here will empower and/or limit the work of future Commissions. Future elections could very well result in future Administrations that are outright hostile to Indian interests generally, and Indian gaming interests, specifically. This Commission should be cognizant of that fact as it proceeds with this process.

<u>The Hogan Commissions:</u> The Hogan Commissions took a product of the NIGA/NCAI Task Force, which was inspired by the Tribes' self-governing desire to pursue the goal of self-regulation and to share resources and information amongst tribes. The Hogan Commission converted that into NIGC mandatory regulations, with the ever-present threat of severe enforcement action. Tribes warned Mr. Hogan at the time that he was exceeding his statutory authority. He did it anyway. While imploring with Tribes to refrain from suing over the regulations, he stated that this would be the outer boundaries of NIGC's encroachment into Class III gaming. C.R.I.T. sued the NIGC and Rincon weighed in as amicus beginning with the initial decision of ALJ, along with a growing number of Tribes at the District Court and ultimately NIGA weighed in before the D.C. Appeals Court.

At every level of the litigation, the ALJ, the federal District Court and ultimately the D.C. Court of Appeals concluded that IGRA was straightforward in defining the parameters of NIGC authority and that did NOT include regulation of Class III gaming. The Hogan Commission was so frustrated with the bright line drawn by the Appeals Court, it filed a motion for reconsideration, alleging that NIGC could still assume the authority through approval of gaming ordinances and incorporation into tribal state compacts, and possibly other avenues; MOTION FOR RECONSIDERATION DENIED. Despite that clear decision, the Hogan Commissions continued an illegal agenda of circumventing the decisions and direction of the federal courts. This includes the present practice of promulgating Class III MICS anyway, approving ordinances that fiat regulatory authority to NIGC that is not based in the statute, and using tribal fees paid to NIGC for unauthorized and improper purposes.

Hogan promised Tribes that his intrusion into Class III regulation would end with the Class III MICS, only to take thereafter two unsuccessful stabs at positioning the NIGC to be the overlord of tribal law regarding health and public safety. Hogan's third effort succeeded when he attached such requirements to the current facility licensing regulation. NIGC is currently positioned to compel tribes to change their laws to meet NIGC's unqualified and arbitrary standards. These regulations go far beyond NIGC's authority under IGRA and far beyond the direction and decisions of the federal courts.

Former Chairman Hogan dismissed the Tribes' fears. He suggested that, except in extreme circumstances, the NIGC would not actually use the self-appointed authority to compel tribes to adopt or amend laws in a long laundry list of areas: emergency preparedness (accidents, injuries, and medical emergencies, natural and other disasters, fire, and security threats); construction, maintenance and operations; drinking water and food; hazardous materials; and sanitation and waste disposal. That sounds hauntingly familiar to his statements that NIGC would not aggressively enforce the Class III MICS.

Such a position is scary in that he was not contemplating the potential abuses of future Commissions. IGRA allows the NIGC to require facility licenses; IGRA does not empower the NIGC to impose its governance preferences upon Tribes.

Class III MICS: How Does NIGC Get Out of the Mess Created by The Hogan Commissions?

Class III MICS took on a life of their own. The NIGC approved ordinances expressly empowering the NIGC to promulgate and enforce them. Several compacts refer to the NIGC MICS as a base line for compact standards. The Rincon Band even gave testimony years ago suggesting a level of tolerance to NIGC continuing down this road so long as it was clear that the MICS are purely advisory and that NIGC staff be limited to providing technical assistance. In hindsight, that testimony was wrong. In hindsight, it is clear that the Hogan Commissions had a deliberate and zealous agenda to circumvent and riddle the bright line drawn by IGRA and the federal courts such that the NIGC is the overlord of Class III MICS. This Commission should run away from the agenda of the Hogan Commissions and stay clearly within the parameters of authority set by Congress. Those States and Tribes that embraced NIGC Class III MICS in compacts and ordinances did so at their own peril. I often hear that NIGC had the authority to promulgate the MICS until it lost at the D.C. Circuit. That is pure nonsense. The Court ruled correctly: NIGC NEVER had such authority. Every tribal regulator and every tribal attorney who followed the issue knew that NIGC's legal position ranged from weak to totally devoid of merit.

So where should NIGC go from here? Rincon proposes that NIGC establish a clear date to withdraw Class III MICS from its body of regulations, notices and Bulletins. The NIGC should provide those Tribes with defective ordinances or compacts an opportunity to take correcting measures as a matter of exercising tribal self-governance and/or through government-to-government compact amendment negotiations.

Rincon rejects the idea that NIGC must step in to fill an alleged void in regulation. Rincon poses this question: If the NIGC is to take on the role as chief watchdog of the regulation of Class III gaming, then why do tribes need to negotiate compacts with States? Congress intended that the regulation of the games be the very crux of compact negotiations. That States have embraced the *Seminole* decision and used that leverage to extract gaming taxes and unreasonable encroachment on tribal self-governance instead, of seriously negotiating the manner in which class III games should be regulated, does not justify NIGC to venture outside of its statutory authority. If this Commission in any way intends to follow its predecessors and go to Congress with an agenda of amending IGRA to empower the NIGC to regulate Class III games and/or continue the practice of promulgating Class III MICS and to assume oversight authority by means of approving tribal gaming ordinances fiating such authority to the NIGC, it should at the same time advocate for removing states from the process altogether. Perhaps that is unrealistic or unreasonable, but no more so than subjecting Tribes to heavy paternalistic oversight by both the State compact and the NIGC, which in many cases conflict with one another.

During the NOI process, we heard a small but vocal group of Tribes insists they want to see the Class III MICS continue in some form because they made some deal in a compact or state regulation. They made those agreements at their own peril knowing the NIGC did not have such authority, or at best, that the question was in serious dispute. This Commission should not perpetuate the problem. NIGC Class III MICS are illegal and have always been illegal.

Additionally, we challenge the allegation that some are at peril if the NIGC no longer promulgates Class III MICS. A number of Tribal-State gaming compacts in North Dakota, Arizona, Oklahoma, Wisconsin, and Florida refer to the Class III MICS. That being said, the reference within those compacts is not impacted by whether the Class III MICS exist or do not exist on a prospective basis. Many of these compacts only refer to MICS as they existed at a date certain. Thus if the Class III MICS were repealed today, they still would have existed on the date certain previously referenced. That baseline would still exist. Other compacts refer to compliance with the Class III MICS that are found in the NIGC regulations (without a reference to a date). Rincon's position is that even if the Class III MICS were to be repealed, it would not result in a violation of any of those "incorporation by reference" compacts unless those individual compacts require the Class III MICS to continue to be published. We are not aware of any compact which has such a publication requirement.

Beyond a short phase out period, the Rincon Band strongly opposes the perpetuation of illegal MICS simply because it conveniences some Tribes that have built a house of cards on a faulty foundation. Those Tribes can transition into some other type of default MICS through a regulators organization, or amend their compacts, or defer to some other industry entity. Indeed, the NIGA/NCAI Task Force subgroup of regulators, which authored the initial Class III MICS could be revived. Perhaps more appropriately, the NTGC/R (National Tribal Gaming Commissioners/Regulators) could assume the tasks. Indeed, it would be a logical extension of the excellent services provided to date. Bottom line is that there are other ways to skin that cat rather than have NIGC continue to violate the clear orders of the federal courts.

Calling the Class III MICS "guidelines" rather than "regulations" does not work either. NIGC has a limited budget based on fees paid by the Tribes. The Rincon Band certainly objects in the strongest terms to having its fees be used by the NIGC for an improper and illegal purpose that former Chairman Hogan should never have pursued to begin with. We hesitate to suggest any action that perpetuates the illegal Class III MICS, but if the NIGC does capitulate to the vocal minority of Tribes insisting on NIGC Class III MICS, then the fee structure should be changed to make sure that only those Tribes advocating for Class III MICS pay for every dime, from promulgation, to auditing, to enforcement.

Facility Licenses: Amend Now to Jettison the Paternalistic Intrusions into Tribal Self-Governance.

The Rincon Band has no quarrel in requiring each gaming facility to be licensed. Rincon has serious quarrel with the NIGC second-guessing the Tribe's governmental decisions regarding the form and substance of tribal law.

Unlike the Class III MICS, this regulation has yet to take on a life of its own such that merely repealing these provisions of Part 559 is the best and quickest way to correct this defect Fundamentally, the Rincon Band disagrees with the expansive view of the NIGC's regulatory and enforcement jurisdiction reflected in the existing rule. In enacting the IGRA, Congress vested the NIGC with limited, well-defined regulatory jurisdiction over Indian gaming.. The current rules improperly vault the NIGC into the exercise of sweeping regulatory authority over tribal *governance*, as opposed to the limited, well defined role of regulating tribal gaming intended by Congress. In enacting IGRA, Congress never intended to exalt federal agency over-regulation over tribal self-determination – a notion that lies at the core of the current rule.

The primary purpose of IGRA is to: "provide a statutory basis for the operation of gaming by Indian Tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." Congress went to great lengths to respectfully allocate regulatory authority between Tribes, the NIGC, and States. IGRA clearly states that a "separate license *issued by the Indian tribe* shall be required for each place, facility, or location on Indian lands." (25 U.S.C. 2710 (b)(1)(B) (emphasis added)). The rule effectively strips Tribes of their express facility licensing authority by authorizing NIGC to force a tribe to change tribal law. While we agree that IGRA is quite clear that the Tribe must issue a license for each facility and that the NIGC has authority to review the authorizing tribal ordinance, the NIGC does not have authority to force Tribes to change tribal law.

The rule risks the creation of a new bureaucracy within the NIGC to evaluate emergency preparedness (accidents, injuries, and medical emergencies, natural and other disasters, fire, and security threats); construction, maintenance and operations; drinking water and food; hazardous materials; and sanitation and waste disposal. Tribal governments, as with any government, exist to protect their citizens from harm. In emergencies, Indian Tribes already work with the Federal Emergency Management Administration. With regard to facility construction, Tribes work with licensed inspectors to ensure that the work conforms to tribal building codes. To ensure safe drinking water and sanitation and waste disposal, Indian Tribes work with the EPA under the Safe Drinking Water Act and the Resource Conservation and Recovery Act, among other laws. The Food and Drug Administration provides oversight of food and beverage safety. Finally, Tribes work with the Departments of Justice and Interior as well as State and local law enforcement and other agencies to ensure adequate protection for public health and safety. Any additional requirements unduly burden tribal governments, and directly conflicts with

IGRA's primary purpose of promoting tribal economic development, self-sufficiency, and strong tribal governments.

A close reading of the explanation accompanying the Federal Register notice of the proposed rule reveals the NIGC expects Tribes to enact positive laws if the NIGC determines the "laws" documented by the Tribe to be insufficient:

> *One-time costs may be incurred by tribal governments drafting and adopting laws if there are none in the identified areas*... Potentially, a few tribes will have to make significant changes to their infrastructure before a certificate of compliance can be issued.

Fed. Reg. Vol. 72, No. 21, *Cite.at* p. 59048.

In addition to forcing tribes to enact environmental and public health and safety laws to its liking, the rule gives the NIGC seemingly unbridled discretion to require tribes to "document" ongoing compliance with these laws. *See* § 559.7 (a tribe shall provide Indian lands or environmental and public health and safety documentation that the Chairman may in his or her discretion request as needed).

Congress did not bestow the NIGC with the sweeping authority it asserts in the current rule, which includes authority to compel tribes to enact laws covering broad substantive areas and subsequently take severe enforcement actions against tribes for failing to comply with these NIGC-mandated laws. Congress intended the NIGC to have a limited role in regulating tribal gaming, not the sweeping role in regulating tribal governance asserted in the current rule.

Congress expressly acknowledged the tribal sovereignty doctrine in enacting the IGRA: "The Committee recognizes and affirms the principal that by virtue of their original tribal sovereignty, tribes reserved certain rights when entering into treaties with the Untied States, and that today, tribal governments retain all rights that were not expressly relinquished." S. Rep. No. 446, 110th Cong., 2nd Sess. 1988, 1988 U.S..C.C.A.N. 3071, 3075 ("Senate Report"). Neither IGRA nor its legislative history mentions a Congressional intent to abridge tribal sovereignty by vesting the NIGC with authority to require Tribes to revise Tribal law as deemed appropriate by the NIGC. Indeed, the NIGC advocated that it has no such obligation in *North County Community Alliance, Inc. v. Kempthorne, et al,* (US Dist. Ct., W.D. Wash, No. C07-1098-JCC), where the Court flatly rejected the Plaintiffs' argument that the NIGC "had an ongoing obligation to make formal findings as to whether '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.' 25 U.S.C. § 2710(b)(2)(E)."

Fortunately, the NIGC does not have a track record of substituting the Tribes' decisions of self-governance with its own. Rincon respects the professionalism and expertise of the NIGC staff, But with all due respect, the expertise is not in the areas set out by the current facility licensing rule. The Tribe's fears regarding the facility licensing rule have not

come to fruition. At least not yet. The rule is the hook on which a future NIGC can hang its hook to massively expand its bureaucracy to add staff of supposed experts to second-guess tribal governments. A future NIGC may not have the respect for tribal self-governance exercised by the current NIGC. The restraint shown by this Commission and even the Hogan Commission is the only reason that the current facility license rule has not yet been the subject of litigation. If the rule is not changed, it will suffer the same fate at the Class III MICS suffered in the *C.R.I.T.* litigation. You cannot guarantee that future NIGCs will exercise the same restraint, however. Accordingly, you should act now to gut the current rule of its paternalism.

Thank you for your consideration.

Respectfully,

Bo Mazzetti, Chairman
Rincon Band of Luiseno Indians