

Mr. Philip N. Hogen
Chairman
National Indian Gaming Commission
14411 L. Street NW, Suite 9100
Washington, DC 20005

Mr. Cloyce "Chuck" Choney
Commissioner
National Indian Gaming Commission
14411 L. Street NW, Suite 9100
Washington, DC 20005

Mr. Norman H. DesRosiers
Commissioner
National Indian Gaming Commission
14411 L. Street NW, Suite 9100
Washington, DC 20005

Re: Proposed federal facility licensing regulations

Dear Chairman Hogen and Commissioners,

As you know, in 1988 Congress passed the Indian Gaming Regulatory Act, IGRA, and the federal government codified the Act in part at 25 U.S.C. §2701, et seq.

In 25 U.S.C. §2701, Congress was careful to preserve the Indian government's role as primary civil regulator of gaming exercising the inherent sovereignty of Indian government through the federal framework of IGRA. In 25 U.S.C. §2704, the Congress established the National Indian Gaming Commission, hereinafter Commission, within the Department of Interior and granted specific rights of regulation to the Commission. In 25 U.S.C. §2706, the powers of the Commission are identified. While §2706(a)(2) provides the Commission with power to adopt regulations for assessment and collection of civil fines, federal facility licensing is not addressed by such section.

Commission authority to make the proposed federal facility licensing regulations must therefore come from 25 U.S.C. §2706(b)(10), which states the Commission has the power to:

...promote such regulations and guidelines as it deems appropriate to implement the provisions of this chapter.

Therefore, it must be inferred that the Commission federal facility licensing regulations currently proposed are to execute Commission authority in §2706(b)(1)-(9).

A quick summary of points (1)-(9) of §2706(b) indicates the following Commission action is authorized:

- (1) Monitor class II gaming conduct;
- (2) Inspect and examine premises for class II gaming;
- (3) Conduct background investigations;
- (4) Demand access to and inspect, examine, photocopy and audit;
- (5) Use United States Mail;
- (6) Procure supplies, services and property;

- (7) Enter into contracts with federal, state, tribal and private entities for activities
- (8) Hold hearings;
- (9) administer oaths.

The proposed federal facility licensing regulations are not impacted by §2706(b)(5)-(9). The authority to propose these regulations must come from power in §2706(b)(1)-(4). Yet, 25 U.S.C. §2706(b)(1)-(4) all direct the Commission to personally perform, i.e., (1) monitor, (2) inspect and examine, (3) conduct, and (4) demand access to audit. No authority for federal facility licensing regulations to demand a tribe to perform information gathering for the Commission without contract or compensation is contemplated by IGRA.

The plain language of §2706(b)(7) is specifically that if the Commission desires the Indian governments or others to perform Commission functions, then the Commission should contract and pay tribal governments. The proposed federal facility licensing regulations, appear an attempt to deprive tribal governments of compensation and subjugate the primary regulator, the tribe, to the Commission. Quite simply, §2706(b)(7) states that if tribes perform Commission functions, it is done by contract and tribes get paid. IGRA contradicts the Commission's proposed federal facility licensing regulations.

IGRA, 25 U.S.C. §2710(b) states, among other things, the following paragraph concerning facility licensing:

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.

§2710(c)(1) also states:

The Commission may consult with appropriate law enforcement officials concerning gaming licenses issued by an Indian tribe and shall have thirty days to notify the Indian tribe of objections to issuance of such license.

The federal facility licensing regulations are at odds with the Commission duty to perform evaluations after license issuance as required by §2710(c)(1). IGRA's language states that the Commission has the ability to examine the tribal government's licensing decision and state objections. However, IGRA provides no basis for Commission input prior to the initial determination of the tribe. IGRA provides no basis to require license approval by the Commission in advance of license application or use; rather, IGRA provides for notice of objection by the Commission. Inasmuch as the tribe is the primary regulator, it may be argued that the Commission may object to licensing, but may not further take disciplinary action.

It should be noted that the sole purpose of 25 U.S.C. §2708 is to grant the Commission direct access to "any department or agency of the United States" for information. Thus, no basis exists for the regulations to require the tribe provide Department of Interior information possessed by the Bureau of Indian Affairs, BIA, to the Commission.

IGRA, on its face, makes clear that the Commission has a duty to conduct its own actions to monitor, review and audit, or the Commission is to contract and pay the tribe or others under §2706(b)(7) if duties of the Commission are performed by a third party.

Specific Regulation Discussion

Proposed federal facility licensing regulation §502.22 requires that a tribe identify by resolution, code, policy or procedure, a standard for public safety. While the tribe may have the duty to have determined the same, the Commission is charged by IGRA to come to the tribe and retrieve the information or contract and pay the tribe to provide the same.

Proposed federal facility licensing regulation §502.23 merely states that facility license means a separate license for each place of gaming. The same seems to simply be a restatement of IGRA, 25 U.S.C. §2710(b). Therefore, the proposed regulation adds nothing to the statute.

Proposed federal facility licensing regulation §522.2 requires:

- (1) 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.

First, Indian lands as defined under IGRA is a place, not necessarily a receptacle of information, the wording of the proposed regulation is awkward. IGRA makes the gathering of information for Commission purposes the duty of the Commission, not the tribe and IGRA provides that if the tribe gathers information, the Commission is to contract for the same and pay the tribe or the contractor. See 25 U.S.C. §2706(b)(7). Thus, the proposed regulation violates IGRA.

Proposed federal facility licensing regulation Part 599, Facility License Notifications, Renewals and Submissions appears to be based upon the Commission desire to be advised of a license issuance. Sec. 2710(a)(2)(F)(ii)(J) provides for “prompt” notification to the Commission of individual license issuance, but IGRA does not require a similar “prompt” Commission notification of facility licenses. As notice is not required to be “prompt” for facility licenses, but is for individual licenses, it can logically be inferred that any Commission duty in regard to the facility license is a part of Commission duty to “monitor” and “inspect” class II gaming or as a part of other Commission duties in §2706(b)(1)-(4) for the Commission to seek out. No authority in IGRA exists for the Commission to make a regulation to require the tribe to provide the Commission such information without contract and compensation.

Proposed federal facility licensing regulation §559.1 seeks to enlarge Commission jurisdiction to include locations on which “...a tribe intends to conduct class II or class III gaming...”. IGRA only gives the Commission jurisdiction over Indian lands only when class II gaming by a tribe actually occurs. As quoted in 25 U.S.C. §2710(b), IGRA only requires licenses for class II gaming facilities. Moreover, Commission authority to make these demands over class III locations is not support by case law, (see Colorado River Indian Tribes v. National

Indian Gaming Commission, 383 F.Supp.2d 23 (D.D.C. 2005); affirmed D.C. Cir. October 20, 2006).

Proposed federal facility licensing regulation §559.2 violates IGRA by giving the Commission jurisdiction one hundred twenty (120) days before any gaming occurs by requiring a tribe to notice the Commission in advance of that many days before a gaming facility opening. No IGRA language grants such authority. The proposal also requires the tribe submit the BIA number assigned to the land tract. Such a requirement to provide BIA information is a Commission obligation to seek specifically addressed in 25 U.S.C §2708 of IGRA. Note, both the BIA and the Commission are part of the United States Department of Interior. This regulation also requires submission of other evidences of land title which are Commission duties to investigate and monitor. Clearly, the proposed regulation requires the tribe to perform duties for which §2706(b)(7) directs the Commission to contract and pay.

Proposed federal facility licensing regulation §559.3 directs that licensing be renewed every three (3) years. No statutory authority exists for such rule. The time line is arbitrary.

Proposed federal facility licensing regulation §559.4 requires the primary regulator, the tribe, to submit documents to the Commission. The submission appears to be at odds with Commission duty to monitor, inspect and audit as well as the tribe's right to contract and be paid.

Proposed federal licensing regulation §559.5 requires a tribe to submit a substantial amount of documentation to the Commission and requires the tribes to attest and certify to the Commission certain items. Again, the Commission, by proposed regulation, is attempting to require the tribe to perform duties of accumulation of information that Commission is directed by IGRA to address by contract and payment to the tribe if Commission does not perform.

Proposed federal facility licensing regulation §559.6 requires a tribe to notify the Chairman if a facility license is terminated or not renewed or a location closes or reopens. IGRA makes no such requirement. This regulation can even be interpreted to require repeated notices of location opening and closing when twenty-four (24) hour operation is not standard operation procedure, or require notice because a facility closes for a brief period due to power outage or tornado alert! This provision is a part of the Commission monitor responsibility, is poorly worded, is arbitrary and make demands on the primary regulator not contemplated by IGRA.

Proposed federal facility licensing regulation §559.8 allows a tribe to submit documents electronically. This is a sensible regulation, but should apply to all tribal submissions to the Commission.

Proposed federal facility licensing regulation §573.6 provides for closure of a gaming operation when the same is in violation of the proposed federal facility licensing regulations. Even if the federal licensing regulations are adopted, temporary closure is too harsh an initial remedy. Notice to a tribe and opportunity to cure should be provided to a tribe in event of violation; moreover, the same is implied by IGRA as quoted in 25 U.S.C. §2710(C)(1) which requires the Commission to notice a tribe of licensing objections. Note, IGRA makes no reference to fines or closure for licensing; rather, IGRA references Commission objections.

Summary

Overall, the Commission lacks the authority to issue the federal facility licensing regulations proposed. The Commission is not the primary regulator of Indian gaming and the Commission is limited by IGRA to issuance of regulations to guide application of Commission action and execution. The regulatory power to issue federal facility licensing regulations is further limited by IGRA's exemption of self-regulating tribes from many of the requirements of 25 U.S.C. §2706. The federal facility licensing regulations must exempt self-regulating tribes. 25 U.S.C. §2720(c)(5)(A) states that self-regulating tribes:

...shall not be subject to the provisions of paragraphs (1), (2), (3) and (4) of section 2706(b) of this title;

The Commission has overstepped its authority with the federal facility licensing regulations generally and specifically. The Commission violates IGRA, seeks to deprive tribal government of compensation by regulation, makes regulations outside IGRA authority, and fails to consider the impact of self-regulation.

I respectfully request the proposed federal facility licensing regulations be withdrawn.

Sincerely,

Bill Anoatubby
Governor