the Chickasaw Nation Division of Commerce

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Office of Management and Budget
Office of Regulatory Affairs
New Executive Office Building
725 17th Street N.W.
Washington, D.C. 20503

Attention: Alex Hunt, Desk Officer for National Indian Gaming Commission

RE: Comment on Paperwork Reduction Act Requirements for Proposed Part 546, National Indian Gaming Commission as published in the Federal Register on October 24, 2007.

Dear Mr. Hunt:

These comments are submitted by the Chickasaw Nation in relation to the notice of request for comments submitted by the National Indian Gaming Commission in relation to Proposed Part 546, National Indian Gaming Commission, as published in the Federal Register on October 24, 2007. The NIGC has invited comment on the following four questions:

1) Is the collection of the proposed information necessary for proper performance of the agency's functions, including whether the information would have any utility?

In Section 2701 of the Act, Congress expressly found that Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a state which does not, as a matter of criminal law and public policy, prohibit such gaming activity. Accordingly, tribal governments possess regulatory primacy while the NIGC has a much more limited oversight function which is why we question whether this rule, and the submission requirements it contains, is necessary for the proper performance of the agency's functions.

The agency's authority to promulgate regulations of the type proposed is not clearly articulated in the preamble; rather, the agency cites simply to the statute in its entirety. Given that the agency's authority to issue similar regulations was previously struck down, the PRA analysis should include a specific reference to the provision in the statute upon which the

proposed rule is based. Obviously, if the agency should lack authority to adopt the rule, the PRA burdens it imposes could not be sustained.

It is important to note that Congress delegated the agency certain specific and limited functions. Among these, the NIGC is responsible for the approval of tribal gaming ordinances; the approval of management contracts, and the authority "to order temporary closure of an Indian game for substantial violation of the provisions of this Act, of regulations prescribed by the Commission pursuant to this Act, or of tribal regulations, ordinances, or resolutions approved under section 11 or 13 of this Act [25 USCS § 2710 or 2712]."

While the NIGC certainly possesses authority to issue rules and regulations, the scope of this authority depends upon the operative language of the statute. Section 2706, for example, directs the NIGC to adopt regulations for the assessment and collection of civil fines as provided in Section 2713 (a); Section 2713 again addresses regulations governing the assessment and collection of civil fines and further directs the adoption of related hearings and appeals regulations; Section 2717 authorizes the adoption of regulations related to the payment and collection of the NIGC's fees; and there is a general grant of authority in Section 2706 for the adoption of regulations to "implement the purposes of the Chapter."

To determine the NIGC's authority under Section 2706 to adopt regulations to "implement the purposes of the Chapter," one must identify the purposes of the Chapter. In IGRA, the NIGC is accorded three basic operational functions: 1) the approval of tribal gaming ordinances; 2) the approval of management contracts, including the completion of related background investigations; and 3) to monitor and enforce through sanctions compliance with IGRA, NIGC regulations, and tribal gaming ordinances approved by the Chairman. All other statutory references to the NIGC's rulemaking authority are incidental to these core functions, such as the authority to conduct hearings, issue subpoenas, administer oaths, and collect fees to cover the agency's costs.

Furthermore, it is clear that Congress intentionally crafted IGRA to minimize federal reporting burdens on tribal governments. The Act specifically identifies the document submission requirements imposed upon tribal governments. Tribal governments must submit: 1) annual audit reports; 2) proposed gaming management contracts; 3) proposed gaming ordinances; 4) notice of the issuance of a gaming license to key employees and primary management officials; and 5) an application for self-regulation status. The only other statutory requirement for document submission is in Section 2715 which pertains to depositions. All other document submission requirements specified in IGRA are in relation to the compact approval process which is under the authority of the Secretary of the Interior. Otherwise, the burden for collecting documents and records falls affirmatively upon the NIGC through the monitoring process.

Section 2706(4) specifically provides that the NIGC 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. It also provides the NIGC authority to inspect and examine all premises located on Indian lands on which class II

gaming is conducted. Nowhere in the statute is there any authority for the NIGC to require the submission of documents other than those listed.

As the primary regulators of Class II gaming, we strongly believe that tribal regulatory gaming agencies are the proper repositories for all gaming-related documentation, including laboratory analyses and certification reports. By law, the NIGC has full and open access to these files and has developed a region-based structure to facilitate its monitoring function. If there is a need for the information, it is a simple matter of collecting it during one of the agency's routine site visits. The time and effort necessary for the development and submission of reports and other documents needlessly burdens tribal gaming regulatory agencies and detracts from the more critical regulatory functions performed by these tribal agencies.

2) Has the agency accurately portrayed the estimated burden of the collection including the validity of methodology and assumptions used?

In our view, the agency has not accurately portrayed the estimated burden of the collections and bases its estimate on flawed assumptions. In particular, the agency's analysis of the information collection burden is focused on impacts upon private game testing laboratories rather than upon those of tribal governments. In fact, game testing laboratories, as commercial businesses, will derive a significant benefit under the proposed rule. A tribal government, on the other hand, is specifically prohibited from utilizing or developing its own game testing laboratory under the rule, and thus will have no choice but to utilize private laboratories. This will necessarily increase the paperwork burden on tribal governments in classifying and licensing games and gaming systems.

With regard to methodology, the analysis contains no documentation or foundation for the time estimates. Without a factual basis for the presumptions and projections contained in the analysis, we are unable to discern the methodology employed. Based on our experience, however, we are certain that the analysis significantly underestimates the collection burden on tribal governments. The agency assumes, for example, that there will be only one to five new submissions per year. We fear that the proposed rules will destroy the economic viability of Class II gaming and result in manufacturer's abandoning the market for reasons exceeding the scope of these comments, while the agency offers no factual basis for its projections of minimal impact.

A major flaw in the analysis is the agency's failure to address the paperwork burden it imposes on tribal gaming regulatory agencies. In addition to the responsibility for licensing and classifying games, tribal gaming regulatory agencies would be required to perform a wide variety of paperwork, including the preparation of correspondence and contracts with gaming laboratories; the review and documentation of reports prepared by the laboratories; the issuance of classification determinations; and correspondence with the NIGC and manufacturers regarding determinations.

3) What are ways the quality, utility, and clarity of the collection of the information can be enhanced?

In our view, the collection of this information is unnecessary to the performance of agency functions as enumerated in Indian Gaming Regulatory Act (IGRA).

4) How can the burden of the collection of information be minimized on the respondents, including the use of automated collection techniques when appropriate?

In our view, the most obvious means of reducing the burden would be a withdrawal of the proposed rule. When the NIGC wishes to monitor the Chickasaw Nation's game classification system, it already possesses such authority under current law and regulations through its monitoring function. Finally, we would urge that the agency must provide a proper PRA analysis based on reasonable and factually valid data and in accordance with an identifiable methodology.

Thank you for the opportunity to comment on this important aspect of the proposed rules.

Sincerely,

Brian Campbell

Brian Campbell, Administrator
Division of Commerce