



**THE SUQUAMISH TRIBE**  
**OFFICE OF TRIBAL COUNCIL**  
**LEONARD FORSMAN, CHAIRMAN**

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Post Office Box 498  
Suquamish, WA 98392-0498  
Phone (360) 598-3311  
Fax (360) 598-6295

August 9, 2011

Tracie Stevens, Chairwoman  
National Indian Gaming Commission  
1441 L Street N.W., Suite 9100  
Washington, D.C. 20005

**Via Electronic Mail**  
**reg.review@nigc.gov**

*Re: Comments on Preliminary Drafts of Parts 537, 556, 558, 571, and 573*

Dear Chairwoman Stevens:

The Suquamish Tribe (“Tribe”) once again thanks you for the opportunity to comment on the preliminary drafts of the following regulations or proposed revisions thereto:

- 25 C.F.R. Part 537—Background Investigations for Persons or Entities with a Financial Interest In, or Having Management Responsibility For, a Management Contract
- 25 C.F.R. Part 556—Background Investigations for Primary Management Officials and Key Employees
- 25 C.F.R. Part 558—Gaming Licenses for Key Employees and Primary Management Officials
- 25 C.F.R. Part 571—Monitoring and Investigations
- 25 C.F.R. Part 573—Enforcement

The Tribe will address each Part in turn.

**Part 537 (Background Investigations for Management Contracts)**

As the Tribe noted in previous comments, the Tribe has little direct interest in the proposed revisions to Part 537, because the Tribe does not have any management contracts for its gaming operation. As a general matter, however, the Tribe believes that IGRA does not grant the NIGC the authority to conduct background investigations in connection with contracts for the management of class III gaming activities.<sup>1</sup> Having said that, the Tribe believes the proposed revisions to Section 537.1(a), clarifying that the NIGC will conduct a background investigation in connection with contracts governing the management of *both* class II and class III gaming, are

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<sup>11</sup> See 25 U.S.C. § 2710 (d)(9) (excluding background investigations from the review and approval process for class III management contracts).

appropriate and logical, provided they are not applied in an overreaching manner.

As another commentator has also noted, the actual language of the statement required by Section 537.1(c)(4) appears to have been inadvertently omitted at some point, and should be reinserted.

The Tribe believes the proposed addition of Section 537.1(d), allowing the Chair to reduce the background investigation requirements for certain types of entities, is appropriate. The Tribe suggests replacing the word “may” with the word “should,” in order to give the provision more weight. The Tribe also suggests adding “or a tribal gaming ordinance” to the end of the provision. If a background investigation is already required by a tribal-state compact *or* by a tribal gaming ordinance, then the NIGC’s background investigation may well be redundant. This would also better recognize the status of tribes as the primary regulators of their own gaming operations. Finally, there appears to be a typographical error in the phrase “for any a tribe,” which follows the reference to “subsection (b).”

The Tribe has no objection to the removal of the bond and letter of credit options for management contractors’ deposits.

#### **Part 556 (Background Checks for Primary Management Officials & Key Employees)**

On a general level, IGRA merely requires that a tribal gaming ordinance provide for “an adequate system” for background investigations and licensing of the primary management officials and key employees of a gaming enterprise, and for notifying the NIGC of the results of the background investigations before issuing licenses.<sup>2</sup> IGRA does not authorize the NIGC to *itself* establish such a system. Nevertheless, the NIGC has previously established detailed requirements for background investigations, eligibility determinations, notification to the NIGC, and more. The Tribe questions whether such detailed requirements are either authorized or necessary. If anything, the Tribe urges the NIGC to move towards *reducing* the requirements set forth in Part 556. After all, tribes have the strongest interest in ensuring that their management officials and key employees are properly screened, and are surely capable of establishing appropriate requirements for that. But the Tribe also appreciates that, while the proposed revisions to Part 556 might appear rather substantial, they do not substantively increase the requirements that exist in IGRA and/or the current Parts 556 and 558. And, the revisions seem to improve the flow and clarity of Part 556.

The Tribe also makes the following specific comments regarding various provisions of Part 556:

- The Tribe wonders if the NIGC meant to say in Section 556.1 that the procedures and standards apply “only” to primary management officials and key employees. This was the language of the original provision in Section 558.1(b).

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<sup>2</sup> 25 U.S.C. § 2710(b)(2)(F) and (d)(1)(A)(ii).

- Section 556.4(b) is rather confusing, both because of its wording and because the “notification of results” and the “investigative report” have not yet been discussed by the time the reader gets to that provision. It could perhaps be improved by moving it to a later section, and by rewording it something like the following:

“If one tribe has previously submitted a notification of results for an individual now seeking to be employed by a second tribe as a primary management official or key employee, and the second tribe (1) has access to the investigative materials held by the first tribe; or (2) obtains the investigative materials from the NIGC, the second tribe may update the investigation under § 556.4(a) and investigative report under § 556.6(b)(1) of this part.”

- The Tribe suggests revising Section 556.6(b)(2)(ii) to read “Date on which applicant began or will begin work...” This is more consistent with the requirement that the notification of results be submitted “no later than sixty (60) days after the applicant begins work.”
- If the NIGC retains the proposed Section 556.8, it should consider deleting Sections 556.2(c) and 556.3(c), which are limited to privacy notices and notices regarding false statements, respectively, but which state the same thing. It seems that the proposed Section 556.8 would adequately cover both issues.

### **Part 558 (Gaming Licenses for Key Employees and Primary Management Officials)**

The Tribe’s general comments with respect to Part 556, above, apply to Part 558 as well. Therefore, as a general matter, the Tribe urges the NIGC to move towards *reducing* the requirements set forth in Part 558. But the Tribe also recognizes that the NIGC has not substantively increased the requirements, and that it has improved upon the current Part 558.

In addition, the Tribe makes the following specific comments regarding the proposed revisions to Part 558:

- In the interest of consistency, the Tribe suggests changing the title of this Part to “Gaming Licenses for Primary Management Officials and Key Employees.”
- In several places throughout Part 558, the NIGC establishes time periods such as “within 30 days of” an event. It would be clearer to say “within 30 days after” an event.
- IGRA requires notification to the NIGC when a tribe licenses a primary management official or key employee, but it does not require notification to the NIGC when a tribe does *not* license such an individual. Therefore, the Tribe supports deleting the requirements of 558.2(c), which require notice to the NIGC if a tribe does not license an applicant. If the NIGC retains Section 558.2(c), the Tribe advocates the use of the word “may” as opposed to “shall.”

- In Section 558.3, there are several references to “notice of results,” which should be revised to read “notification of results,” which is the term used elsewhere in Parts 556 and 558.
- Section 558.3(d) should be revised to clarify that the notice and hearing requirements do not apply to a temporary or provisional license, in order to reflect the reality that some tribes issue temporary or provisional licenses pending the results of the complete background investigation.

### **Part 571 (Monitoring and Investigations)**

The Tribe views the addition of proposed Section 571.4 as positive, and believes tribes would find it helpful to know when an investigation has terminated. The tribe wonders, however, about the need for the rather tentative wording of the provision—why not just say that “the Commission’s authorized representative will advise the party by letter that the investigation has been terminated”?

The Tribe does *not* support the other proposed revisions to Part 571, pursuant to which the NIGC would grant itself access to records at off-site locations, including sites maintained or owned by third parties. IGRA does not grant the NIGC such authority. Moreover, as the Tribe has previously commented, the Tribe views Section 571.6(b) as already adequately addressing the availability of off-site records. That section requires the gaming operation to make off-site records available. The distinction is that under 571.6(b) the onus is on the *gaming operation*, and the gaming operation accordingly retains control over the NIGC’s access to its records. If a gaming operation and the NIGC disagree over whether the NIGC is entitled to access particular records, either party may avail itself of standard legal avenues. Under the proposed revisions, however, the NIGC could entirely circumvent the gaming operation, and obtain access to off-site documents without the gaming operation’s consent or even knowledge. This dramatically reduces the ability of tribes to protect their information and records. Third parties already have less of an incentive to protect tribes’ information. The proposed revisions to Part 571 would allow the NIGC to exploit this advantage, and potentially to obtain information that it does not have the right to access.<sup>3</sup> The Tribe recognizes that some gaming operations might sometimes be uncooperative without good reason, and that the proposed revisions to Part 571 would make the NIGC’s job easier in these circumstances. However, there are other ways of dealing with those particular circumstances, and mere convenience to the NIGC does *not* justify impairing all tribes’ ability to protect their information and records in appropriate circumstances.

### **Part 573 (Enforcement)**

The Tribe agrees with the NIGC’s proposed statement in Section 573.1 that voluntary compliance should be the goal, and that enforcement action should be taken only if voluntary compliance has not succeeded. The Tribe also supports the addition of Section 573.2, permitting

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<sup>3</sup> See, e.g., *Colorado River Indian Tribes v. National Indian Gaming Commission*, 383 F.Supp.2d 123 (D.D.C. 2005). While the CRIT case does not involve an audit of off-site records, it is an example of the potential for the NIGC to exceed the scope of its authority and demand access to records that it does not have the authority to access.

the NIGC to issue a “letter of concern” before issuing a notice of violation. But the Tribe is concerned about what effect a “non-compliance notice” could have on tribes. It appears that a non-compliance notice would include NIGC findings, with no right of appeal, which is potentially problematic. The Tribe would also like to see the NIGC go farther with the “letter of concern” provisions. For one thing, the purely discretionary nature of Section 573.2 means that it could too easily be disregarded. It would be preferable to establish a standard of some kind, such as “unless  $x$  (with  $x$  being some reasonable description of the type of serious, immediate circumstances that would justify the issuance of a notice of violation without previous efforts to resolve the issue), the Chair will issue a letter of concern to the respondent before issuing a notice of violation....” Likewise, the Chair should be permitted to issue a notice of violation under Section 573.3 only if the previous efforts to resolve the issue have failed, or in the event of serious, immediate circumstances justifying the issuance of a notice of violation without previous efforts to resolve the issue. Without taking this additional step, the provisions of the proposed Section 573.2 are merely hortatory, and do not actually change much. Thus, the Tribe would prefer to see the “non-compliance notice” provisions deleted, and the “letter of concern” provisions retained and strengthened.

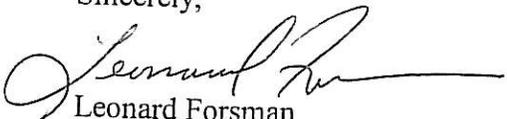
In addition, the Tribe makes the following comments regarding Part 573:

- As the Tribe has previously commented, it would be helpful to include a heightened standard regarding what types of circumstances justify a notice of violation or order of closure, so that tribes do not receive serious penalties for relatively minor issues.
- As another commentator has noted, it seems that proposed Section 573.5 does not address all circumstances under which a notice of violation would become a final agency action.
- Proposed Section 573.5 also references the possibility of a notice of violation being withdrawn by the Chair. There has been discussion during the consultation process regarding whether the Chair has the authority to withdraw a notice of violation and, if so, whether this should be clarified. As the Tribe previously commented, it believes the Chair is implicitly authorized to withdraw a notice of violation, but it would not object to making that authority explicit and perhaps addressing under what circumstances a notice of violation should be withdrawn. It is not clear whether the reference in proposed Section 573.5 is intended to accomplish something along those lines. If so, perhaps some further clarification is in order.
- The Tribe would like to see a provision added that permits the expungement from the public record of notices of violation after an appropriate period of time has passed, and suggests that Part 573 might be a good place for this.

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The Tribe has no further comments at this time. Once again, the Tribe thanks you for the opportunity to help the NIGC develop the best possible regulations and polices, and looks forward to commenting further as this process unfolds.

Sincerely,



Leonard Forsman  
Chairman