



THE SUQUAMISH TRIBE
OFFICE OF TRIBAL COUNCIL
LEONARD FORSMAN, CHAIRMAN

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

August 18, 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 25 C.F.R. Parts 580-585

Dear Chairwoman Stevens:

The Suquamish Tribe ("Tribe") thanks you for the opportunity to comment on the preliminary drafts of proposed 25 C.F.R. Parts 580-585. The Tribe's general comments will be followed by its comments on specific provisions. The Tribe may also have additional comments as the review process unfolds.

Proposed Parts 580-585 would establish an entirely new set of regulations governing proceedings before the Commission. The proposed Parts would impose a significantly heightened level of formality, and contain many substantive provisions that would impact the rights and interests of tribes and others. The Tribe therefore believes it is crucial that the provisions be carefully thought out, and their impacts thoroughly considered from all possible angles, using the benefit of many different minds. The Tribe accordingly would like to see the NIGC convene a Tribal Advisory Committee, or otherwise work in a more focused manner with an appropriately diverse group of tribal representatives, on these proposed regulations. The process of holding consultations and requesting written comments is helpful, but the scope and substantive nature of these provisions seem to call for deeper review and input by tribes.

Furthermore and with all due respect, the structure and organization of these Parts may not be optimal. As other commentators have noted, there seems to be considerable redundancy. For example, throughout proposed Parts 582-585, the effect of late filings is always that the rights are waived, the standard of review is always de novo, the decision always takes effect immediately unless it states otherwise, the decision is always a final agency action, and the contents of briefs and decisions are always substantially similar. Yet these provisions are repeated, often verbatim, in each Part. Perhaps there would be a way to state them only once. It might also be helpful to standardize the time periods more throughout the proposed Parts. Currently, the various deadlines, response times, and other time periods alternate frequently between 10, 20, 30, and 90 days. The Tribe recognizes that different time periods are

appropriate for different things, but wonders if at least some of the time periods in these proposed Parts could be made a bit more uniform. In the Tribe's experience, having so many variations in filing/response times creates a real challenge for all attorneys involved in the process. Simplifications would eliminate the potential for many procedural motions, and eliminate traps for the unwary. Finally, the Tribe wonders whether another organizational structure might be clearer. Just as a conceptual outline, consider the following:

- *A, B, and C types of appeals may only be brought before the Commission on written submissions; X, Y, and Z types of appeals may be brought either before the Commission on written submissions, or before a presiding official with a hearing.*
- *Here are the procedures (including motion practice) for appeals before the Commission on written submissions.*
- *Here are the procedures (including motion practice) for appeals before a presiding official with a hearing.*

Another organizational structure such as that might be clearer conceptually, and might eliminate some of the redundancies in the proposed Parts 581-585.

In addition, the Tribe makes the following specific comments regarding the proposed Parts:

25 C.F.R. Part 580

- In Section 580.1, it may be helpful to define some additional terms. For example, one term that appears frequently throughout Parts 580-585 without being clearly defined is "limited participant." Because limited participants have the right to participate in some capacity in proceedings under this Part, a better understanding of who these limited participants are and what level of participation they are to be permitted seems necessary. Another term that appears repeatedly and would be helpful to define is "presiding official."
- Section 580.4 should be amended so that service on tribes or other parties to proceedings by facsimile or email is not effective unless the tribe or other party has previously consented to such service.
- The prohibition on ex parte communications in Section 580.5 is somewhat concerning. While the Tribe has not identified any specific scenarios in which the prohibition could be problematic, it questions the necessity of such a prohibition (particularly such a broadly worded one) when the proceedings are not adversary proceedings between parties, but rather appeals of administrative actions that will often involve only a tribe and the NIGC. In the Tribe's view, tribes and the NIGC should ideally have a respectful and cooperative relationship with one another, not a relationship in which tribes are not permitted to communicate with the NIGC without following strict procedural requirements. Moreover, there could easily be circumstances in which it is necessary for a tribe and the NIGC to communicate about issues that happen to also be related to a

proceeding. At the very least, this provision is overbroad. Some restrictions on ex parte communications might be appropriate, but the prohibition in Section 580.5 should be more carefully crafted.

- Also, in the event of an ex parte communication, Section 580.5 requires that the communication be served on all parties and placed in the record of the proceeding. Yet it is possible that the communication might be confidential in nature. In general, it seems that there should be some mechanism for protecting confidential information in proceedings under Parts 580-585, particularly confidential information belonging to tribes.

25 C.F.R. Part 581

- It is unclear why Section 581.1(b) is necessary, when Section 581.1(a) already includes appeals of the Chair's decision to void or modify a management contract within the scope of Part 581. If there is a distinction, some clarification would be helpful.
- Section 581.4(a) is somewhat confusingly worded.
- The Tribe suggests inserting the word "timely" before the phrase "filing of oppositions" in Section 581.7(f)

25 C.F.R. Part 582

- The Tribe is highly concerned with proposed Section 582.6, which allows "limited participation" by an entity other than a tribe in an appeal of the disapproval of a tribe's gaming ordinance, resolution, or amendment. The passage of a tribal gaming ordinance, resolution, or amendment, like the passage of any tribal law, is strictly an internal tribal matter. IGRA already infringes on tribal sovereignty by allowing the NIGC to influence whether a tribal gaming ordinance or resolution can be applied for its intended purposes. Yet this infringement is limited by enumerating specific requirements, and by requiring the Chair to approve the ordinance or resolution as long as it meets those requirements.¹ The Tribe accordingly does not understand how an entity other than the tribe would have grounds for even "limited participation" in an appeal of the disapproval of a tribe's ordinance, resolution, or amendment. Moreover, what does it mean that the entity may file its motion within 10 days after it knew or should have known about the appeal? Will that provision allow a random entity to come out of the woodwork and derail or delay the process at an advanced stage? And why is the moving party required to state who will appear for it in the proceeding, when Section 582.5 states that these appeals are "summary proceedings," which do not involve a hearing?
- Assuming a summary proceeding on written submissions is the only option for this type of appeal, it might be helpful to specify that.

¹ 25 U.S.C. §§ 2710(b)(2) and (d)(2)(B).

- What is the burden of proof for appeals under this Part? Is the Chair permitted to file or respond to motions? *Compare* to 25 C.F.R §§ 585.5 and 585.6.

25 C.F.R. Part 583

- In Section 583.3(b), if another party to a management contract has the right to oppose an appeal, it seems that it would make sense for the party to also have the right to support the appeal.
- For purposes of clarity and consistency, the Tribe suggests deleting “Yes” from Section 583.5.
- Section 583.7(a) seems to conflict with 25 C.F.R. Part 539, which states that the Commission will render a decision on an appeal of the approval or disapproval of a management contract within 30 days after its receipt of the appeal. This Section should also be revised to reflect the possibility of no opposition brief being filed. It does not make sense to measure a time period solely from an event that may or may not occur. *Compare*, for example, this section to proposed Section 582.8(a).
- It seems somewhat inconsistent to treat appeals from the Chair’s approval or disapproval of a management contract or amendment to a management contract, differently than appeals from the Chair’s decision to void or modify a management contract, as Parts 583, 584, and 585 do.
- Assuming a summary proceeding on written submissions is the only option for this type of appeal, it might be helpful to specify that.
- What is the burden of proof for appeals under this Part? Is the Chair permitted to file or respond to motions? *Compare* to 25 C.F.R §§ 585.5 and 585.6.

25 C.F.R. Part 584

- With respect to appeals from the Chair’s decision to void or modify a management contract, it is unclear what relationship Part 584 will have to the existing 25 C.F.R. Part 535. Under Part 535, the parties to a management contract have the right to request a hearing or respond with objections within 30 days after receiving notice of the Chair’s decision to void or modify a management contract. Part 535 further provides that the Chair will hold a hearing on the matter within 30 days thereafter. It is not clear whether proposed Part 584 is intended to govern that process, or to add another level to the process. This should be clarified. Also, if Part 584 is intended to govern the process, then it would seem that the “presiding official” would have to be the Chair for purposes of these appeals, if Parts 535 and 584 are to be consistent with each other.
- Similarly, it is unclear what relationship proposed Part 584 will have to the existing 25 C.F.R. Part 577. There is a significant amount of overlap between the provisions of these two Parts. Would Part 577 be replaced by Part 584?

- In Section 584.6(f), the Tribe suggests adding a time period for the issuance of the presiding official's decision on a motion to intervene. There is also a passing reference to the possibility of an entity who is not permitted to appeal, and whose motion to intervene has been denied, nevertheless being able to participate as an amicus curiae. This provision and the lack of further information about participation as an amicus curiae are somewhat troubling.
- In Section 584.9(c), the Tribe believes there should be an additional requirement of necessity or a similar standard in order to hold the record open. Otherwise, with no set limit on the length of time for which the record can remain open, a decision could be unnecessarily delayed, possibly for an extended period of time.
- Section 584.10(a)(3)(ii) should be amended to clarify that the request served on other parties does not need to include the confidential information.
- Particularly in the case of confidential information belonging to a tribe, a party requesting the information should have to show that it is somehow entitled to the information. As Section 584.10(b) is currently written, a party only has to promise not to disclose confidential information and to return it at the conclusion of the proceeding in order to obtain access to confidential information. Those requirements are appropriate, but there should be something more.
- Section 584.15(a) should be amended to require the Commission to issue any decision regarding a temporary closure order (i.e., to make permanent, to lift or dissolve, etc.) within 30 days. A temporary closure order is a serious matter that may have a significant impact on a tribe's economic welfare. A tribe should not have to wait 90 days for a decision on something like that, particularly if the decision ends up being favorable to the tribe.

25 C.F.R. Part 585

- With respect to appeals from the Chair's decision to void or modify a management contract, it is unclear what relationship proposed Part 585 will have to existing 25 C.F.R. Part 535. As discussed above, Part 535 give the parties to a management contract the right to request a hearing or respond with objections within 30 days after receiving notice of the Chair's decision to void or modify a management contract. Part 535 further provides that the Chair will hold a hearing on the matter within 30 days thereafter. It is not clear whether Part 585 is intended to govern that process, or to add another level to the process. This should be clarified. Also, if Part 585 is intended to govern the process, then inconsistencies between it and Part 535 should be addressed.
- Section 585.7(a) should be amended to require the Commission to issue any decision regarding a temporary closure order (i.e., to make permanent, to lift or dissolve, etc.) within 30 days. A temporary closure order is a serious matter that may have a significant impact on a tribe's economic welfare. A tribe should not have to wait 90 days for a

decision on something like that, particularly if the decision ends up being favorable to the tribe.

Throughout 25 C.F.R. Parts 580-585

- These Parts deal with both proceedings before the Commission and proceedings before a presiding official. Various provisions refer generically to “proceedings before the Commission.” Yet in some instances it seems that the provisions are intended to cover both proceedings before the Commission and proceedings before a presiding official. Some clarification might be beneficial.
- The Tribe questions the appropriateness of using the first person (e.g., “How do I...”) in the captions of the Sections throughout Parts 580-585. It is particularly questionable when the provisions relate to actions a tribe would take. In Part 582, for example, it is clear that only the tribe whose gaming ordinance, resolution, or amendment is disapproved has the right to appeal. Yet several of the provisions in that Part regarding the appeal process are framed in the first person. Rather than saying, for example, “How do I...” it would be more appropriate to state “How does a tribe....”
- Throughout Parts 580-585, it would be clearer to state relevant time periods as “within x days after....”
- Throughout Parts 580-585, certain briefs have to be filed within 10 calendar days after service of a motion. This is a rather short response time.
- It is not entirely clear which proceedings may involve limited participants. They are discussed specifically in Section 582.6. However, they are also briefly referenced in some of the other Parts as well.
- Will there be any specifications regarding the length or format of briefs?
- There are a number of typographical errors throughout these Parts, which the Tribe presumes will be corrected before the final regulations are promulgated. These include some incorrect cross-references (e.g., in Section 584.9, references to Section 584.12 should actually reference Section 584.13).

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