

# The SHOSHONE-BANNOCK TRIBES



FORT HALL INDIAN RESERVATION

PHONE: (208) 237-8778 Ext. 3024

FAX: (208) 637-6623

FAX: (208) 637-6622

GAMING COMMISSION

P.O. BOX 306

FORT HALL, IDAHO 83203

July 28, 2011

SBGC11 (NIGC)-4181

Via Electronic Mail:[consultation.policy@nigc.gov](mailto:consultation.policy@nigc.gov)

Kathy Zebell  
National Indian Gaming Commission  
141 L Street, NW, Suite 9100  
Washington, DC 20005

Re: Comments on Preliminary Draft NIGC Regulations

Dear Ms. Zebell:

Shoshone-Bannock Chairman Nathan Small participated in and provided oral comments during the recent National Indian Gaming Commission's ("NIGC") consultation hearing held at Tulalip, Washington on July 14-15, 2011. The Shoshone-Bannock Tribes Gaming Commission ("Gaming Commission") writes to provide a few follow-up comments on the Preliminary Draft Regulations.

Let us begin by stating that it is quite refreshing to have a federal agency provide, in our view, a true consultation process where tribes are invited to comment on preliminary drafts of regulations prior to them being published for more formal rulemaking. This seems to be first, and we commend the NIGC for its efforts.

**Part 514 Fees.** We recommend that the fees be collected quarterly, and based upon a tribe's fiscal year rather than calendar year. Also, net revenues used to calculate the management fee when the fee is a percentage on net revenue should be defined as "Net income as it is presented in audited GAAP Financial Statement plus any Management Fee that has been included to calculate that Net Income. This will make the calculation consistent, easy to document and readily available.

We also recommend that net revenues used to calculate cash available for allowable uses should be defined as closely as possible to the GAAP Net Cash Provided by Operating Activities (from the GAAP Statement of Cash Flows) less Principal Loan Payments (or Debt Reduction amount from the Financing Activities Section of the GAAP Cash Flows Statement for the same year). This will provide a degree of independent assurance that the numbers used to calculate dollars available for allowable uses is timely and accurate because the numbers can be tied directly those in the latest independently audited financial statements.

We agree that calculation of the NIGC fee should be based on the numbers from a GAAP audited financial statement for the fiscal year of the reporting Gaming Operation and that the definition of “gross gaming revenue” should also be defined consistently with GAAP making it simpler to reconcile and document.

Finally, we believe that the late fee should be a percentage of the amount earned by a casino rather than a fixed dollar amount.

**Part 573.2 Letter of Concern and/or non-compliance notice.** Under this Part the NIGC proposes to issue two different types of letter/notices of enforcement depending upon the severity of the incident or situation at a tribal gaming operation. We suggest that 573.2(b)(2) be revised to read, “A ‘non-compliance notice’ which confirms an assessment, **determines a violation**, and states the necessary corrective action the respondent needs to take, agrees, to take, or has taken.”

We recommend that Part 573.2(c) should spell out a time period for the respondent to come into voluntary compliance.

During the consultation hearing, a tribal representative asked that a close out letter be provided by NIGC to the tribe following corrective action. The NIGC referred to Part 571.4, but this section covers investigation closures which are different than enforcement actions and the issuance of non-compliance letters/notices. We recommend a subsection (e) be added to Part 573 that states, “If the Commission determines that the respondent has voluntarily taken all actions to address the letter of concern or non-compliance letter, it will issue a final close out letter to the respondent terminating the enforcement action.”

We request that any letters of concern or non-compliance notices to the Tribal Council, Chairman or Gaming Manager also be copied to the Gaming Commission.

**Part 542 Class III Minimum Internal Control Standards.** We recognize that a handful of tribes may reference the federal MICS Section 542 in their gaming ordinances or tribal-state gaming compacts. We recommend that the NIGC should strike the current MICS rules and replace them with a regulation with language stating that it only affects those tribes who may have incorporated the federal MICS. Section 542 should be updated stating clearly that the provisions are advisory only but that specific tribes may choose to adopt the regulations along with NIGC oversight by written agreement. Of course, this would require continuing update and revisions of Section 542. Additionally, any costs or expenses incurred by the NIGC under this Part should be paid for by only the affected tribes adopting the federal MICS. In other words, the majority of tribes who have not adopted the federal MICS should not be required to share in any of these NIGC costs.

**Part 571.1 – 571.7 – Inspection and Access.** In *Colorado River Tribes v. NIGC*, 466 F.3d 134 (D.C. Cir. 2006), the Court of Appeals for the District of Columbia held that the Chairman and NIGC have no authority to adopt regulations governing the day to day operations of a Class III gaming facility operating pursuant to a tribe-state compact that is in effect since Congress intended that such matters were to be determined via the tribal-state compact. 466

F.3d at 137-40. This decision forecloses inspection of and examination of papers, books regarding gross revenues of Class III gaming. Many tribes, including the Shoshone-Bannock Tribes, do not separate their Class II and Class III gaming records and documents regarding gross revenue. Therefore, the inspection of Class II gaming records by NIGC will likely result in the examination and inspection of Class III records. In so far as the NIGC actions may touch upon Class III gaming it is prohibited under the *Colorado River Tribes* decision.

The challenge that NIGC faces is to conduct such inspection of Class II gaming records without inspecting Class III records. And, we recognize that the NIGC has expressly stated “gross revenues of class II gaming conducted on Indian lands.” Any regulations must be carefully crafted so as to not interfere in Class III gaming. The preliminary draft regulations do not address this issue of gaming and audit records which do not separate class II and class III gaming such as ours. The Commission should at least give sufficient notice to the gaming operation to enable it to separate its records and then make such records available.

Pursuant to Part 571.5(b) and 571.6(d) the NIGC intends to seek access to gaming records at Certified Public Accountant firms and other facilities. We do not support such action and see it as an expedient way to circumvent the *Colorado River Tribes*’ ruling prohibiting NIGC to engage itself in Class III matters.

Moreover, as asked in the *Colorado River* case, “what is the statutory basis empowering the Commission to regulate class III gaming operations? Finding none, the court held the NIGC could not regulate Class III gaming. *Colorado River* is instructive because like the Class III gaming regulations, we are unable to find any Class II *regulatory* authority in the Indian Gaming Regulatory Act, 25 U.S.C. § 2706 for the NIGC to seek access off-reservation to records and other facilities.

NIGC seeks by regulation to enter or inspect tribal gaming documents at “other facilities” or requires a “person other than the gaming operation” to provide the documents. Sections 2706(b)(1), (2) and (4) specifically limit the Commission’s authority of inspection and examination of documents, and demand for access to “class II gaming conducted on Indian lands,” not any other facility, business or person located outside the reservation. Thus, the Commission would be acting beyond its authority. We recommend the NIGC reconsider these proposed regulations and delete it.

Thank you for the opportunity to provide comments on the preliminary draft NIGC regulations.

Sincerely,



Lionel Q. Boyer, Chairman  
Shoshone-Bannock Tribes Gaming Commission

Cc: Fort Hall Business Council  
Andrea Ramone, General Manager