



*Nez Perce*

**TRIBAL EXECUTIVE COMMITTEE**

P.O. BOX 305 • LAPWAI, IDAHO 83540 • (208) 843-2253

January 21, 2011

Lael Echo-Hawk  
1441 L Street N.W., Suite 9100  
Washington D.C. 20005

Re: NIGC Regulatory Review Comments

Dear Chairwoman Stevens,

The Nez Perce Tribe appreciates the opportunity to provide comments to the National Indian Gaming Commission (NIGC) during its regulatory review process. The Nez Perce Tribe also appreciates NIGC's recognition and respect of the sovereignty of tribes and their role in the oversight and regulation of gaming. This oversight by tribal governments and the government-to-government relationship are important foundational concepts that should serve as the basis for the decisions that the NIGC makes relative to its interpretations of its mandate under the federal law and its interpretations and amendment of the regulations the NIGC is charged with enforcing. Overall, the Nez Perce Tribe believes that the NIGC should strive to ensure that its rules are fair, reasonable, and consistent with the goals and purposes of IGRA.

With regards to the definitions in Part 502, the Nez Perce Tribe has the following comments:

The NIGC proposes to examine the definition of "net revenues---management fee. NIGC should ensure that its regulatory definitions are consistent with the definitions contained in IGRA. The definition of net revenue was changed in the last revision of part 502 in a manner that does not track the statute

The NIGC proposes to examine the definition of "net revenues---allowable uses" by expanding the definition to account for the cash flow of the enterprise. The Tribe believes that the definition of "net revenues --allowable uses" of net gaming revenue are specified in the statute.

When statutory language is plain and clear on its face, as in the case of IGRA, there is no void in the law requiring regulatory clarification.

With regards to the regulations related to fees in Part 514, the Nez Perce Tribe has the following comments:

The Nez Perce Tribe currently operates on a fiscal year that is identical to the federal fiscal year, October 1—September 30. The fee is calculated on calendar year basis which causes the Tribe difficulty. Altering the definition to match the fees to the fiscal year that our enterprise operates on will reduce the difficulties for the Nez Perce Tribe that are created under the current definition. It would appear that in making a change to the definition of how this fee is calculated, amendments to the reporting dates for the Tribe and the date on which the NIGC sets the rate will need to be examined.

In reference to the NIGC revising the definition of “gross gaming revenues”, the Tribe believes it would be good business practice to make the term conform to the Generally Accepted Accounting Principles (GAAP) definition.

The Tribe believes that NIGC should consider establishing a late payment system for tribal governments in lieu of a Notice of Violation (NOV) for submitting fees late. The Tribe appreciates the NIGC questioning the necessity for the issuance of a Notice of Violation (NOV) for the paying of a fee after a deadline. The issuance of a NOV is a severe penalty, whereas a late payment in most instances is a minor infraction or simply an administrative error. Creating a system that gives flexibility to the NIGC in its enforcement of the fee schedule deadline is appropriate. A ticket or late payment system would be endorsed by the Tribe. This type of alternative enforcement mechanism would prevent Tribes from suffering the public backlash that ensues with the issuance of a NOV while still giving the NIGC the tools necessary to ensure compliance with the rules and the timely filing of the fees. It would also be expected that frequent or repeat violators of this rule would be issued a NOV to prevent abuse of this system.

In reference to the review of parts 543 and 547, the Tribe has the following comments:

Since 2008, the NIGC has drafted proposed revisions to existing MICS for Class II and III gaming and presented them to the MICS Advisory Committee. Tribal representatives to the MICS Committee have utilized a working group known as the Tribal Gaming Working Group (TGWG) to solicit information from manufacturers, tribal regulators, and operators. This group has been working with the Technical Standards Tribal Advisory Committee and the MICS Tribal Advisory Committee in revising and drafting regulations that meet agency objectives without infringing on tribal government rights to use Class II Technologic Aids. During this consultation period, the NIGC should revisit some of the issues listed below that were not addressed during the proposed rulemaking of Class II regulations.

Existing Class III MICS are incorporated by reference in Section 543.1 of the Class II MICS. In 2008, the NIGC convened a tribal working group to assist in the revision of Part 542, but late in the process, now concluded, the NIGC announced its intent to simply paste the Part 542 revisions into Part 543 without an adequate examination of whether such a wholesale approach was appropriate in light of the distinctions between Class II and III gaming. Moreover, the NIGC did not achieve a consensus draft in relation to its proposed Part 542 revisions nor did this committee have a significant representation of members from Class II gaming tribes, a fact noted by the Tribal Advisory Committee and addressed to the NIGC by the TGWG.

The NIGC should work with tribes to ensure that Part 542 regulations referenced in Part 543 are consistent with the IGRA, make distinctions between the various Classes of gaming, and the policy that tribes are the primary regulators of their gaming operations.

The NIGC should review the inconsistencies in definitions provided in the Class II MICS and Class III MICS, such as the differences in the definition of "random number generator" in Part 543 from that used in Part 542.

The NIGC should consider whether this regulation in Part 559 regarding facility license notifications, renewals and submissions is necessary given that tribal governments have their own processes and procedures that are more than sufficient to meet the concerns underlying facility licensing on their reservation.

In addition, tribes should be able to issue their own licensing certificates for new facilities without having to comply with additional requirements from the NIGC. For instance, Part 559 requires tribes to submit paperwork on the trust status of the land to the NIGC to demonstrate that all new gaming operations are located on eligible Indian lands. The NIGC should consider whether such additional requirements are necessary.

The NIGC finalized this regulation with a short comment period and no opportunity for meaningful tribal consultation. The NIGC should re-open these regulations and meaningfully consult with tribes to ensure that the regulations are consistent with the purpose of the IGRA.

In part 573, the Tribe supports the prospect of the regulations providing for a withdrawal of a NOV after it has been issued. As discussed before, the issuance of a NOV is a severe action that has consequences to a Tribe beyond the subject matter of the NOV itself. Questions regarding the NOV and its effect on all future aspects of the enterprise will remain as long as the NOV has been issued. Providing a mechanism to withdraw a NOV under the appropriate circumstances such as an entity providing a remedy for the stated violation is an appropriate option in enforcement that should be available. Such action would have to be conditioned upon the entity in question's compliance with an investigation and its role in addressing the identified violations. Withdrawal of the NOV would also need to be taken by an action of the Commissioners based on a request by the Tribe subject to the NOV.

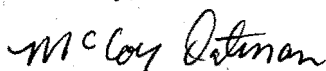
The Nez Perce Tribe also strongly recommends that the NIGC develop a policy for its communications with Tribes. A consistent policy of communication with Tribes will benefit both parties in making sure that Indian Country is on the same page with the NIGC. Although the day to day implementation of the rules and regulations occurs between the NIGC and the regulatory body, the large policy considerations that dictate these day to day regulatory activities comes from the interaction of the NIGC with tribes. Communicating through these tribal consultations is an important component of a communication policy, however, expanding the role of communication through the NIGC website and email will better facilitate the exchange of information and ideas. Also, recognition of a tribe's consultation protocols is needed. Many tribes have their own policies and procedures on consultation. Abbreviated deadlines may make it impossible for a tribal government to submit cleared comments. In addition, these tribal procedures should be made available to the regional agencies.

Finally, establishing a reasonable timeframe for implementation of any new or amended regulations should be mindful of the fact that tribal governments operate on an annual funding cycle and sufficient time to budget for the implementation of new regulations is essential to compliance. It is also important to adopt a more cost conscious approach in the NIGC's regulatory work. This would include the preparation of a cost benefit and economic impact analysis prior to the promulgation of rules and regulations.

The Tribe supports the efforts of the NIGC to give preference to Indian-owned businesses in the purchase of goods and services. This would be an important gesture in recognizing that tribes and tribal businesses are at the heart of the mandate that created the NIGC.

Thank you for the opportunity to provide these comments to the NIGC for its regulatory review. The Tribe looks forward to working with the NIGC as they move towards having a stronger relationship with tribes as partners.

Sincerely,

A handwritten signature in cursive script that reads "McCoy Oatman".

McCoy Oatman  
Chairman