

The SHOSHONE-BANNOCK TRIBES



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GAMING COMMISSION
P.O. BOX 306
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February 10, 2022

Samuel Wetzler, NIGC Regional Director
Salomon Building, Suite 212
620 South Main Street
Portland, Oregon 97205-3037

Subject: NIGC Tribal Consultation Series "C"

Dear Mr. Wetzler,

The Shoshone-Bannock Gaming Commission submits the following comments in response to the National Indian Gaming Commission's Tribal Consultation Series "C" topics provided in the December 10, 2021 letter.

We recognize the risks associated with tribal gaming and the need to protect our computer systems and to prevent any cyberattacks to the gaming systems. An important NIGC proposal to the regulations, which concerns us, is the "Temporary Closure of Gaming for misuse of net gaming revenue" as provided in the series C discussion. The proposal fails to define what "misuse of net gaming revenue" means, and what tribal actions or conduct would amount to a violation and closure of a gaming facility.

If you have any questions regarding our comments, please contact Marvin D. Osborne, Executive Director, of our office at (208) 238-4800, ext. 3025 e-mail address MOsborne@sbtgc.com.

Sincerely,

Lawrence Bagley, Chairman
Shoshone-Bannock Gaming Commission

Cc: file
Attachment:

Comments of the Shoshone-Bannock Tribes Gaming Commission

25 C.F.R. §§ 543 and 547 - Minimum internal control standards and minimum technical standards: Gaming technology and risks have changed significantly since the NIGC implemented its current minimum internal control standards and technical standards. The Commission is seeking your input on matters related to technological enhancements and technology threats.

1. In addition to or instead of regulatory requirements, should the NIGC consider other tools such as additional guidance or additional training efforts in order to promote awareness and strengthen cyber security practices?

In response to item #1, we believe it is important for the Indian gaming industry to full recognize the ongoing cyberattacks and the necessity to protect the integrity of gaming. Online training and other means for employees to gain updates, new technologies, and learn about potential cyber threats is imperative. For example, we have had experience with an employee failing to follow protocols by opening up computer programs on the internet which allowed a cyberattack and required a shutdown of our operations for at least two weeks. Updates and training are crucial to remind employees of the risks and threats to gaming technology systems.

25 C.F.R. § 522.4(b)(7); 25 C.F.R. § 573.4(a)12 – Approval requirements for class II ordinances; 25 C.F.R. § 573.4(a)12 – When may the Chair issue an order of temporary closure; The Commission seeks your input on whether the requirement that a tribe construct and operate its gaming operation in a manner that adequately protects the environment, public health, and safety extends to issues related to cybersecurity.

We do not agree that cybersecurity should be added to the approval requirements when a tribe is seeking approval of a class II ordinance. Class II gaming relating to bingo, pull tabs, tip jars do not require the complex systems as class III gaming entails and should not have this included in the NIGC approval.

Part 543 & 547: Cybersecurity continues to be at the forefront of everyone's minds. We believe that the guidance, training efforts, and suggestion of best practices would serve as a valuable asset to gaming operations, rather than forced regulatory requirements. NIGC should take a stance of encouraging and guiding TGRAs and gaming operations to bolster their cybersecurity while still respecting the unique approach and sovereignty of each tribe. Some tribes who have the financial resources are way ahead of tribes who have small gaming operations or barely beginning their operations. The NIGC must recognize the uniqueness of tribes and not seek a one size fits all approach.

25 C.F.R § 573.4(a) – When may the Chair issue an order of temporary closure: The Commission is seeking your input on adding misuse of net gaming revenues to the list of substantial violations for which the NIGC Chair may issue a temporary closure order.

NIGC proposes that the NIGC Chairman may issue an order of temporary closure based upon misuse of net gaming revenues. In our opinion, in order for this to happen, we first must look to the term “misuse of net revenue”. The term “net revenues” is defined in IGRA as “gross revenues of an Indian gaming activity less amounts paid out as, or paid for, prizes and total operating expenses, excluding management fees.” 25 U.S.C. § 2703(9); 25 C.F.R. § 502.16. “Misuse of” is not defined in IGRA and thus the parameters of NIGC’s authority is undefined. It is unclear whether “misuse” will include intentional and unintentional uses, and whether occurring by a tribal government unintentionally mismanaging funds or an individual who intentionally commits fraud, misappropriates or embezzles gaming revenue. The proposal fails to define what role the Bureau of Indian Affairs plays in this situation.

IGRA requires that net gaming revenues from Indian gaming be used for public purposes that are consistent with those typically provided by governments. The five public purposes specified by IGRA for a tribe’s use of net revenues from its tribal gaming operations are:

1. To fund tribal government operations or programs;
2. To provide for the general welfare of the Indian tribe and its members;
3. To promote tribal economic development;
4. To donate to charitable organizations; and
5. To help fund operations of local government agencies.

Tribes may distribute gaming proceeds to individual tribal members if the tribe has a Revenue Allocation Plan, or “RAP,” that authorizes per capita payments and has been formally approved by the Secretary of the Interior (“Secretary”). 25 U.S.C.

“Per capita payment,” within this context, is defined as “the distribution of money or other thing of value to all members of the tribe, or to identified groups of members, which is paid directly from the net revenues of any tribal gaming activity.” 25 C.F.R. § 290.2. The responsibility for reviewing and approving RAPs is delegated by federal regulations to the Bureau of Indian Affairs (“BIA”) and the Secretary of the Interior, and not the NIGC. 25 C.F.R. Part 290. The Shoshone-Bannock Tribes have an approved Revenue Allocation Plan with a tribal government resolution establishing the percentages of revenue devoted to each governmental services and per capita Tribal members.

The Tribes are committed to the highest standards of accountability and responsibility. The Tribal Government’s accounting office has an accounting system designed to implement the authorizing resolution with approved allocation percentage plans. The Tribal Finance Office is responsible for providing monthly reports to the Tribal Business Council, the local BIA Superintendent, and the department manager(s) in charge of appropriate allocated percentage. In our opinion, this is the most credible outline use of allocated funds. The importance of this accounting process is the protection and safe guarding of Tribal assets and gaming revenue used according to the approved allocation plan. Each member of the governing body of the Shoshone-Bannock Tribes has taken an oath of Office to uphold the Tribal Constitution and By-Laws that all funds are accounted for and not misused outside the scope of authority approved in the Business Council Resolution, and approved by the Secretary of the Interior.

We are certainly aware of instances where some tribal leaders have embezzled or misappropriated tribal gaming revenue and the federal prosecutions that have occurred. We wonder if these events have also led NIGC to consider closure of gaming operations as a remedy to a few leaders committing offenses. We have been provided no background for the proposed regulation and are concerned about its far-reaching impact on tribal gaming communities. The failure to define the word "misuse of gaming revenue" raises several questions about what areas the NIGC is seeking to address, and whether the NIGC has authority to control such conduct through a blanket closure of a gaming facility. We set out three scenarios below.

First, given that the Tribes have a well-established fiscal accounting system in place, it greatly concerns us that the NIGC may intend to undertake some review of annual tribal audits or tribal accounting systems, over which it has no authority, and then in its discretion, determine that the Tribes have misused revenue funding. The tribal governing body has sole authority to determine whether a mismanagement of funds is occurring and will take corrective measures. The annual audits should detect any unintentional mismanagement and enable the tribe to address the integrity of the system and employees operating the accounting. NIGC's proposal does not address the system's mismanagement situation.

If the NIGC is concerned about this unintentional mismanagement of gaming revenue occurring in a tribal accounting system it should perhaps hold a training for tribal accounting departments to learn about the importance in securing tribal gaming revenues; provide a due diligence assessment or checklist; and risk management standards to effectively manage the gaming revenue. An identification of risk areas for a tribal finance department directly covering fraud, corruption, or theft of revenue as well as other risks to further inform the risk of misuse, particularly those covering inadequate recipient governance and oversight, poor financial reporting, and treatment disruptions would be very helpful.

Second, the NIGC proposal (it is unclear) may be seeking to address a tribal situation where there is ongoing intentional misuse of gaming revenue occurring by individual(s), either tribal leaders or employees, resulting in an effect on the tribal government. For example, misappropriation is an intentional misuse of funds where an individual(s) knowingly and intentionally takes the money or intended to take the money. Similarly, embezzlement occurs when: (1) the property must belong to a person other than the accused, such as an employer or principal; (2) the property must be converted subsequent to the defendant's original and lawful possession of it; (3) the defendant must be in a position of trust, so that the property is held by him or her pursuant to some fiduciary duty; and (4) the defendant must have an intent to defraud the owner at the time of the conversion. It is unclear if these are the types of "misuse of gaming revenue" the NIGC is targeting or some other federal offense.

The NIGC should clarify in its proposal what types of federal offenses amount misuse of gaming revenue rather than giving the NIGC a broad undefined discretion to take drastic action of closing a gaming operation which is often the sole and primary source of revenue for tribal governments. If there is widespread federal offenses occurring by tribal leaders or employees it seems harsh to close the gaming operations to stop the offenses. It seems any federal

investigation should be able to occur without a closure.

Third, another situation may occur where NIGC may accuse a tribal government of misusing gaming revenue meaning the tribe used the revenue wrongly or improperly, or general misspending of revenue. Again, it is unclear what NIGC is intending. If a tribe has a Revenue Allocation Plan and during the COVID pandemic determines that it needs to eliminate charitable giving and local government funding, and reallocates the funding without Bureau of Indian Affairs approval, is this a misuse of gaming revenue? Or what if the Bureau of Indian Affairs fails or delays action on a tribal request to reallocate but the tribe using its revenue totally for government services, is that a misuse of gaming revenue? And, what roles does the Bureau of Indian Affairs play in this process other than approval? Does the NIGC intend to play a role in overseeing use of gaming revenue under the BIA approved Revenue Allocation Plans? It is unclear.

The NIGC must define what “misuse of gaming revenue” means for enforcement purposes particularly since it seeks to close a tribal gaming operation based on this phrase. Fair due process notice of what the NIGC intends is crucial. We would like the opportunity to provide additional comments once NIGC clarifies its proposal to initiate a temporary Closure process for misuse of gaming revenue.

25 C.F.R. Part 537 – Background investigations for person or entities with a financial interest in, or having management responsibility for, a management contract: Since the NIGC first issued regulations related to contract review, the practices and procedures the agency uses in conducting those reviews has continued to evolve. The Commission seeks to engage in a discussion as to how the NIGC may modify its regulations to provide more transparency, accountability, and efficiency in its contract reviews.

1. What regulatory updates would provide additional transparency, accountability, and efficiency in the NIGC Chair’s contract review and background investigation process?
2. How might technology provide more efficiency and lower cost in this process?
3. Should the NIGC consider adopting other jurisdictions’ best practices in the area of background investigation processes?

In response to item #1, currently, our Gaming Operation does not have a Management Contract with any outside agency, group or entity. We would oppose any entity with a financial interest in a management contract (in the case of any tribe, a wholly owned tribal entity, national bank, or institutional investor that is federally regulated or is required to undergo a background investigation and licensure by a state or tribe pursuant to a tribal-state compact, in our opinion, would be the last resort). Otherwise, in order to control and ensure regulatory requirements are met, a good manager must adhere to proper administrative management practices, human resources, fiscal management control and day-to-day operational practices with honest intentions, high integrity and considerable amount of knowledge in Indian gaming on tribal reservations.

In item #2, NIGC should provide recommended favorable technology to consider and to lower cost rather having Tribes re-inventing the wheel. There are enough regulatory requirements in existence as it is. Side stepping all these land mines makes it unreasonable. If there are favorable technology, we would welcome a chance to review the technology and may very well considerate it uses.

Thank you for the opportunity to comment on the proposed NIGC regulations.