



**Prairie Band Potawatomi
Tribal Gaming Commission**

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June 03, 2022

Mr. E. Sequoyah Simermeyer, Chair
National Indian Gaming Commission
1849 C. Street NW
Mail Stop #1621
Washington, D.C. 20240

Re: Prairie Band Potawatomi Nation Comments on the NIGC's Proposed Rule and Amendments to 25 C.F.R. Part 518 Self-Regulation of Class II Gaming

Dear Chairman Simermeyer and Members of the Commission:

Included in with this letter are the Prairie Band Potawatomi Nation Tribal Gaming Commission's comments on the National Indian Gaming Commission's proposed amendments to its regulations and policies as related to the self-regulation of Class II gaming, which were discussed and presented via video conference on September 21-22, 2021, and October 21, 2021, during its Series B Consultation. We appreciate the NIGC's efforts in consulting with Tribal governments and Tribal gaming regulatory agencies on these matters, which will have a tangible effect on the regulation of gaming, as well as the opportunity to comment on such potential changes.

Sincerely,

A handwritten signature in black ink, appearing to read "Rey Kitchkumme", with a long horizontal line extending to the right.

Rey Kitchkumme, Chairman
Prairie Band Potawatomi Tribal Gaming Commission

Enclosure.

Comments of the Prairie Band Potawatomi Nation Tribal Gaming Commission on the National Indian Gaming Commission's Proposed Revisions to its Regulations.

I. Introduction

These comments are submitted in response to the notice of proposed amendments to 25 C.F.R. Part 518, published by the NIGC in the Federal Register on April 7, 2022. We are pleased to provide input on the proposed changes to the NIGC's proposed changes to its regulations. The Prairie Band Potawatomi Nation Tribal Gaming Commission ("PBPGC") therefore submits the following comments, provided below the NIGC's related prompts and/or suggested amendments.

II. Comments

a. Certification and Review Process (25 C.F.R. § 518.7)

The PBPGC is generally in favor of the proposed clarification as to when the NIGC may issue a final decision with regard to whether a self-regulation certificate should issue, particularly the recent edification that decisions would be made within thirty (30) days of the Commission's preliminary findings. More generally, we would strongly recommend that the NIGC expand, in detail, the standards to which it holds tribes seeking a self-regulation certificate in 25 C.F.R. § 518.5 when assessing the provided information against the terms of 25 C.F.R. § 518.3 (a)-(e). Particularly, the PBPGC is concerned that, despite the fact that tribes must meet or exceed many of these standards to remain in compliance with federal and tribal law and regulations, a disproportionately low number of tribes have been granted a certificate of self-regulation. We are concerned, then, that the full scope of what is assessed by the NIGC in these circumstances is not outlined in the pertinent regulation. If this is not the case, we would recommend that, during the process of determining what regulatory revisions are needed, the NIGC conduct an assessment of how accessible the process of electing to self-regulate is, and whether such bars run contrary to the principles of self-governance, the promotion of which is a central aim of IGRA.

b. Tribe's Duty to Advise the Commission (25 C.F.R. §518.11)

The PBPGC is not opposed to the proposed change making the Office of Self-Regulation the entity that self-regulated tribes notify of relevant information under this section. However, after the recent round of editing and drafting, we did note a change that created a bit of confusion and, possibly, concern.

After the last round of consultations, several tribes noted that the first draft of the rule changes requested "information relevant to any material change in circumstance." Like other tribal government agencies, we too had issue with how broad and nebulous an ask that was, especially in the face of the potential consequence of losing a certificate of self-regulation. In the latest promulgation, the NIGC has excised that language, but it still leaves us with the concern as there are now no examples of what may constitute a material change. As written, the only instance when

a tribe must advise the Commission is if there is a “change in circumstances that are material to the approval criteria in § 518.5 and may reasonably cause the Commission to review and revoke the tribe’s certificate of self-regulation.” The PBPGC’s concern is determining whether a tribe, if there is a potential material change in circumstance that falls outside the criteria of § 518.5, has any duty to advise the Commission? Additionally, if there is that duty to advise and the tribe fails to do so, is the penalty a revocation? As the rule is silent on such instances, we want there to be a universal understanding of what tribes are required to do in order to avoid accidental non-compliance.

c. Determinations of Non-Compliance and Appeals of Revocations (25 C.F.R. §§ 518.13 and 518.14)

While the PBPGC is not necessarily opposed to this revision, which would see the Office of Self-Regulation “become the proponent of any case to revoke a certificate before the Commission,” we are concerned that the regulation, as written is vague and presents certain logistical issues.

First, we are opposed to the deletion of language outlining how the Office of Self-Regulation determines that a tribe “no longer meets or did not comply with the eligibility criteria” for self-regulation. We would strongly recommend including language outlining 1) the information utilized to bring about consideration of such a determination, 2) the process by which information is considered prior to the determination, and 3) the standard for making such a determination – specifically including whether the Office of Self-Regulation must make the determination by a majority vote, a consensus, or some other factor. This concern is further complicated by the current nature of staffing of the Office of Self-Regulation, which we understand is limited to a single person—the Director. We would strongly recommend that the NIGC assess how to populate or otherwise operate this office in a manner that does not risk offending principles of due process.

Next, we are concerned that having an active NIGC Commissioner serve as Director of the Office of Self-Regulation creates an insurmountable conflict in the context of how the determinations are made to pursue the revocation of a certificate of self-regulation. The PBPGC strongly believes that due process would be offended by an individual acting both in the role of “the proponent of any case to revoke a certificate” and a member of the body who decides whether such proponent has met their burden of proof under § 518.14. We do appreciate that, based on our reading of § 518.2, the Chair has the authority to appoint a director who is not currently serving as a Commissioner, which would address our due process concerns stated here. However, it appears such an appointment is not required, but merely is possible. It is our opinion that, in the event that the Director of the Office of Self-Regulation is also an active Commissioner of the NIGC, the Director/Commissioner must be required to recuse themselves from consideration of any matter before the Commission regarding revocation of a certificate of self-regulation. We would recommend including a provision to this effect in the revised regulations.

In general, we are pleased with the changes to § 518.14, which places the burden of proof on the Office of Self-Regulation to show why a tribe’s certificate should be revoked. However, the PBPGC believes that it is also important to describe here how the Commission will decide whether that burden has been met. Must the Commission come to a consensus? If the Commission does not

usually have to reach a consensus, does that change if one Commissioner recuses themselves as outlined above? We would recommend amending revisions to both §§ 518.13 and 518.14 to include information as to such practicalities.

III. Conclusion

The PBPGC is appreciative of the opportunity to provide comments on the NIGC's efforts to clarify and streamline the process for self-regulation. We believe that through such continued collaborative efforts, the NIGC will achieve regulations that protect the integrity of gaming without imposing undue burdens on TGRAs and Tribal governments. We look forward to continuing to engage in meaningful conversations with the NIGC regarding these proposed revisions and furthering the government-to-government relationship between the Nation and the United States.