



Appeals

**San Manuel Band of Mission Indians
Tribal Gaming Commission
OFFICE OF THE COMMISSION**

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August 2, 2011

Ms. Tracie Stevens, Chairwoman
National Indian Gaming Commission
1441 L Street, Suite 9100
Washington, D.C. 20005

Dear Madam Chairwoman,

The San Manuel Gaming Commission has reviewed the NIGC's preliminary draft of a new regulations, 25 CFR Parts 580, 581, 582, 583, 584 and 585 which address "proceedings before the Commission". We would like to respectfully submit the following written comments.

Starting with Part 580, we would suggest that 580.1 (definitions) be expanded to include many other words used in subsequent parts, i.e. "leave", "motions", "movant", "brief", "file", "petition", "limited participant", "presiding official", etc.

Section 580.3 restricts those who are allowed to appear before the Commission to the party(s) in person or attorney(s) "admitted to practice before any court of the United States.....". This seems unnecessarily restrictive. Many Tribes and entities have in house legal counsel that are not "admitted to practice" in any courts. We would suggest that a party be allowed to choose whomever they wish to represent them. As drafted, restrictions to "attorneys" as defined, also may impose significant costs to a proceeding posing a financial burden that some Tribes may not be able to bear.

Part 581.4 (c) allows 10 days to file a brief of opposition to a motion. It would seem that then (10) days would not be sufficient to analyze a motion (after service), prepare a brief, and get it filed. Since "day" is defined as a "calendar" day, then at least four of the ten days are weekend days, leaving only six business days. This same comment is applicable to all subsequent provisions allowing for ten days to file opposition briefs.

Part 582.3 would seem to imply that it is assumed that an appeal will always automatically be accepted or granted by the Commission upon timely receipt of a "notice of appeal and brief". Our question is, can the Commission refuse to accept or grant an appeal? We would suggest that this point be addressed and clarified.

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Part 582.6 addresses how entities not permitted to appeal may request to participate in an appeal “on a limited basis”. Further, that the Commission or presiding official may or may not grant the request (motion). We are having a little difficulty understanding when, how, or why this scenario would or should be applicable. Some examples would be helpful for clarity.

Sections 582.9, 582.9 (a), 583.8, 583.8 (a), and 585.8 (a) should all substitute the word “bases” with the word “basis”.

Sections 583.1 thru 583.3 address how a party to a management contract can appeal the “approval or disapproval” of a management contract. We are struggling to conceptualize how or why parties who have submitted a management contract for approval would then want to appeal the “approval” of that contract. It would seem to make more sense if these sections were limited to appealing the “disapproval” of management contracts.

Section 583.3 (a) again raises the question of whether the Commission can refuse to accept or grant an appeal, or is it assumed that every notice of appeal will be granted. Section 583.3 (b) seems to have a more reasonable two step time frame for filing notices of opposition and opposition briefs. We would suggest that this be consistently used in all applicable parts allowing opposition briefs.

Section 583.5 attempts to answer the question “are motions permitted”. The answer is very confusing. First “yes”, then “no” except to supplement the record in proceedings of an entirely different part (581). This section needs some language wordsmithing.

Part 584 addresses appeals before a presiding official. It would be helpful to explain how/why a presiding official is an option vs. Commission. Section 584.2 (a) seems to specify who is eligible to make an appeal. Without a clear definition of the meaning of “tribal operator”, this paragraph would seemingly preclude a Tribe’s governing body, and their representatives or designees which could include their legal counsel or regulatory officials. Historically, they have most often been the representatives dealing with settlement discussions over enforcement actions. We would recommend that this section allow the Tribe’s governing body to decide who will appeal on its behalf.

Section 584.3 (b) (2) may read better with the use of the word “thereof” rather than “therefor”. Same comment applicable to 585.3 (b) (2).

Section 584.6 (e) we recommend inserting the word “intervening” in front of the word “parties” for added clarity.

Section 584.6 (f) discusses accepting or denying a petitioner’s motion to intervene. The last sentence states in part “if the petition is denied, the presiding official.....may then treat the petition as a request for participation as amicus curiae (that

is, friend of the court)". We find this provision troubling. It would seem to allow anyone the opportunity to essentially have an amicus petition (brief) become part of the record for consideration, even if they are denied participation.

Section 584.15 (a) address a time limit of 90 days for the Commission to render decisions except for "making permanent" a temporary closure order, in which case a decision must be made within 30 days. We believe that if a decision is being made to lift or dissolve a temporary closure order, it is even more important to render that decision within 30 days. A Tribe should not have to remain closed for 90 days if the appeal of a temporary closure order results in a favorable decision. Section 584.15 (c) is not clear. If no decision is made within 90 days, does a Tribe have to wait 90 days for the temporary closure order to be dissolved?

In part 585 and its applicable sub parts it would seem that all references to voiding or modifying management contracts could be included in Part 583 which deals with appeals of disapprovals of management contracts. This would consolidate all appeals related to management contracts in one place or part.

Section 585.2 again seems unnecessarily restrictive in limiting who is allowed to appeal. It would seem that a Tribe's governing body should be able to designate anyone it wishes to make an appeal. A similar comment was submitted relative to Section 584.2 (a).

In Section 585.7 (a) and (b) the same comments submitted for 584.15 (a) and (c) above should apply.

This concludes our specific and detailed comments on the draft language. We might add a general comment that these new parts dealing with appeals seem to include considerable redundancy and impose considerable formality.

Thank you for the opportunity to comment on your draft, and we hope that you may find these comments helpful.

Sincerely,

A handwritten signature in cursive script, reading "Norman H. DesRosiers".

Norman H. DesRosiers
Gaming Commissioner

cc: Ms. Stephanie Cochran, Vice Chair
Mr. Daniel Little, Commissioner
San Manuel Business Committee