

constitute a waiver of the right to a hearing.

Tracie L. Stevens,
Chairwoman.

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Vice-Chairwoman.

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Associate Commissioner.

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DEPARTMENT OF THE INTERIOR

National Indian Gaming Commission

25 CFR Parts 524, 539, 577, 580, 581, 582, 583, 584, and 585

RIN 3141-AA47

Appeal Proceedings Before the Commission

AGENCY: National Indian Gaming Commission, Interior.

ACTION: Proposed rule.

SUMMARY: The National Indian Gaming Commission proposes to add a new subchapter to its regulations to create a clear process for appeal proceedings before the Commission. It would, among other things, define certain terms, set forth the burden of proof and standard of review, explain what information a Commission decision will contain, and what happens if the Commission does not issue a majority decision, and provide that an appeal of the Chair's decision does not stay the effect of that decision. The proposed regulations set forth rules for motion practice in appeals before the Commission, addresses how an entity other than a tribe would request to participate on a limited basis in ordinance appeals, how parties file motions to intervene, to supplement the record, and for reconsideration, and how to file motions before the presiding official. Additionally, the proposed regulation sets forth more specific rules for different types of appeals. Rules for appeals of ordinance disapprovals, management contract approvals and disapprovals, appeals before a presiding official, and appeals before the Commission on written submission only each receive somewhat different treatment.

DATES: The agency must receive comments on or before April 2, 2012.

ADDRESSES: You may submit comments by any one of the following methods, however, please note that comments sent by electronic mail are strongly encouraged.

• *Email comments to:*
reg.review@nigc.gov.

• *Mail comments to:* Maria Getoff, National Indian Gaming Commission, 1441 L Street NW., Suite 9100, Washington, DC 20005.

• *Hand deliver comments to:* 1441 L Street NW., Suite 9100, Washington, DC 20005.

• *Fax comments to:* Maria Getoff, National Indian Gaming Commission at (202) 632-0045.

FOR FURTHER INFORMATION CONTACT:

Maria Getoff, National Indian Gaming Commission, 1441 L Street NW., Suite 9100 Washington, DC 20005. Telephone: (202) 632-7003; email: reg.review@nigc.gov.

SUPPLEMENTARY INFORMATION:

I. Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal.

II. Background

On November 18, 2010, the National Indian Gaming Commission (NIGC) issued a Notice of Inquiry and Notice of Consultation (NOI) advising the public that the NIGC was conducting a comprehensive review of its regulations and requesting public comment on which of its regulations were most in need of revision, in what order the Commission should review its regulations, and the process NIGC should utilize to make revisions. 75 FR 70680 (Nov. 18, 2010). On April 4, 2011, after holding eight consultations and reviewing all comments, NIGC published a Notice of Regulatory Review Schedule (NRR) setting out a consultation schedule and process for review. 76 FR 18457. The Commission's regulatory review process established a tribal consultation schedule with a description of the regulation groups to be covered at each consultation. Part 519—Service; Part 524—Appeals; Part 539—Appeals; and Part 577—Appeals before the Commission were included in this regulatory review. The Commission will address changes to part 519—Service in a separate rulemaking action because part 519 sets forth rules for service of actions and decisions by the Chair and therefore does not implicate the appellate review process.

III. Development of the Proposed Rule

The Commission conducted a total of 10 tribal consultations as part of its

review of Part 519—Service; Part 524—Appeals; Part 539—Appeals; and Part 577—Appeals before the Commission. Tribal consultations were held in every region of the country and were attended by numerous tribes and tribal leaders or their representatives. In addition to tribal consultations, on July 22, 2011, the Commission requested public comment on a Preliminary Draft of new Subchapter H. After considering the comments received from the public and through tribal consultations, the Commission will remove Part 524—Appeals; Part 539—Appeals; and Part 577—Appeals before the Commission and will add a new subchapter H—Appeal Proceedings before the Commission.

Currently, rules for appeals before the Commission are found in three separate places: Part 524 governs appeals of ordinance actions; part 539 addresses appeals of management contract actions; and part 577 sets forth procedures for appeals of enforcement actions and actions to void an approved management contract. The Commission believes that consolidating all appellate procedures in a new subchapter promotes clarity and effectiveness for the regulated community.

Proposed subchapter H consists of six parts: 580—Rules of general application in appellate proceedings before the Commission; 581—Motions in appellate proceedings before the Commission; 582—Appeals of disapprovals of gaming ordinances, resolutions, or amendments.; 583—Appeals of approvals or disapprovals of management contracts or amendments to management contracts; 584—Appeals before a presiding official of notices of violation, proposed civil fine assessments, orders of temporary closure, the Chair's decision to void or modify a management contracts, the Commission's proposal to remove a certificate of self-regulation, and notices of late fees and late fee assessments; and 585—Appeals to the Commission on written submissions of notices of violation, proposed civil fine assessments, orders of temporary closure, the Chair's decision to void or modify management contracts, the Commission's proposal to remove a certificate of self regulation, and notices of late fees and late fee assessments.

Part 580—Rules of General Application in Appeal Proceedings Before the Commission

This new part sets forth rules that are generally applicable to all appellate proceedings before the Commission. First, it defines terms used throughout the subchapter. Several commenters

suggested that the terms “limited participant” and “presiding official” be defined. The Commission has defined those terms. Other terms commenters suggested be defined are “petition”, “leave”, “motion”, “movant”, and “brief.” The Commission believes that these terms are generally understood and has chosen not to define them. The Commission has also defined the terms “day”, “de novo review”, “preponderance of the evidence”, “proceeding”, and “summary proceeding.”

In the Preliminary Draft, several of these generally applicable sections were repeated throughout the regulations. One commenter suggested that, to reduce redundancy, those sections should be stated only once. The Commission agrees and has removed the redundancies and grouped those generally applicable sections here.

A commenter suggested that the Commission utilize a tribal advisory committee to develop these regulations. While the Commission has used advisory committees in the past, it choose not to do so here. Advisory committees are best utilized for technical issues or where tribes might have particular experience or a unique perspective. The Commission acknowledges that Tribes and their representatives have valuable information to contribute to this regulation, as repeatedly demonstrated during the consultation process. We believe, though, that the best way to ensure that all of the comments throughout Indian country, as well as the public at large, are considered, is to develop the regulations through notice and comment rulemaking.

Part 580 includes a section entitled “When may the Commission suspend, revoke, amend, or waive its rules governing proceedings before the Commission?”, and provides that the Commission may do so in certain circumstances for good cause shown, if the interest of justice so requires. This provision allows flexibility in situations where adherence to the rules would work an injustice or would impair the orderly conduct of the proceedings.

Part 580 also includes a section which explains who may appear before the Commission. One commenter suggested the language in the Preliminary Draft was too restrictive and did not allow for representation by an advocate who was not an attorney admitted to practice in a Federal court. The Commission revised the language to allow for representation by an attorney or other authorized representative, and included attorneys licensed to practice in tribal courts.

Existing section 577.6 addresses service of documents by appellants in appeals before the Commission regarding notices of violation, civil fines, temporary closure orders, and decisions to void or modify a management contracts. There are currently no rules of service by appellants in actions other than those governed by section 577.6. As a result, appellants in ordinance disapprovals and management contract actions have in practice relied on the existing service rules for all appeals. Proposed part 580 improves the rules of services and makes them generally applicable.

Proposed part 580 requires that copies of the notice of appeal and appeal brief shall be filed personally or by registered or certified mail, return receipt requested. All subsequent documents shall be served personally, by facsimile, by email to an address designated by a Commission employee, or by first class mail. This is a change from § 577.6, which allows notices of appeal and appeal briefs to be filed via these methods and also via fax. The Commission has removed fax service as an option for these filings and has added email service as a option for the filing of all subsequent documents.

One commenter proposes the Commission amend the service rule so that service on parties by fax or email is only effective if prior consent is given to be served in such ways. Another commenter suggests that email is acceptable as a method of service if there is agreement between the parties. Yet another commenter proposes that if email or fax are used, a hard copy should follow. First, part 580 applies to parties, not the Commission. Furthermore, fax and email service is available only after the initial notice of appeal and brief are filed personally or by registered or certified mail. If a party does not wish to serve subsequent documents via email or fax, it can utilize the other methods of service (personal service or first class mail). One benefit of email filing is that the filer can request a “read receipt” email from their email service and have proof that the email was received. The Commission declines to require that a hard copy follow, but parties are free to send follow-up hard copies if they wish, however the date of filing will be the date service was first accomplished.

The Commission proposes to refer to all parties who file appeals as “appellants.” Part 577 refers to those who file appeals of actions governed by that section “respondents”, while parts 524 and 539 do not assign a name to those who file appeals. The Commission believes it makes sense to refer to all

appellants consistently and to use “appellant” rather than “respondent.” This proposed change has been made throughout the subchapter.

The Preliminary Draft provided that in computing any period of time prescribed for filing and serving a document, the first day of the period so computed shall not be included. The last day shall be included unless it is a Saturday, Sunday, or Federal legal holiday, in which case the period shall run until the end of the next business day. The Proposed rule adds that except for appeals of temporary closure orders, when the period of time prescribed allowed is less than 11 days, intermediate Saturdays, Sundays, and Federal legal holidays shall be excluded in the computation.

The Preliminary Draft included a section prohibiting ex parte communications. Several commenters questioned the reach and application of the prohibition, and expressed concern that it could stifle otherwise lawful communications. The Commission has not included the provision in this proposed rulemaking and invites comment on how to address ex parte communications.

One commenter suggested that the Commission should include a section on recusal. The Commission disagrees. Commission members must follow ethical rules applicable to all government employees as set forth in Federal law. *See* 5 CFR 2635.501 *et seq.*

Proposed § 580.5 provides that failure to file an appeal and brief within the time provided shall result in a waiver of the right to appeal and failure to meet any deadline for the filing of any motion or response thereto shall also result in a waiver of the right to file.

Proposed part 580 includes several additional sections designed to improve the appellate practice process. The Commission explains what is the burden of proof and standard of review, what a final decision will contain, the effective date of a decision, the finality of Commission decisions, what happens if the Commission does not issue a majority decision, and that an appeal of a Chair’s decision does not stay the effect of that decision.

One commenter suggested that the filing of an appeal to the Commission should stay the effect of the Chair’s decision. The Commission disagrees. The Commission believes that effective regulation of the industry will be fostered by requiring compliance with decisions of the Chair pending the resolution of an appeal to the Commission. Accordingly, the filing of a motion shall not stay the effect of any decision or order nor shall it affect the

finality of any decision or order for purposes of judicial review.

Section 580.10 provides that in the absence of a decision by a majority of the Commission within the time provided, the Chair's decision shall constitute the final decision of the Commission. The Preliminary Draft included the presiding official's recommended decision would also become final in the absence of a majority decision in the time provided. This was removed because the recommended decision is just that, a recommendation, and does not constitute a decision that would become final upon inaction.

Part 582 also explains what the final decision will contain, what the effective date of the decision will be, and that the decision is final for purposes of judicial review. It also sets forth the standard of review, which is *de novo*.

Part 581—Motions in Appeal Proceedings Before the Commission

Existing regulations do not set forth motion practice other than motions to intervene in appellate proceedings before a presiding official and motions for limited participation in ordinance appeals. Of course, during the course of an appeal appellants file typical appellate litigation motions and the Commission rules on those motions. Part 581 sets forth rules for this routine practice. This proposal is consistent with comments suggesting the Commission provide more rules governing appellate practice.

In the Preliminary Draft, motions to intervene were allowed in appeals before the presiding official, and motions for limited participation were allowed in appeals before the Commission on written submission. Proposed part 581 provides for the right to intervene in cases before the Commission on written submission as well as cases before the presiding official. Because intervention affords more process to litigants than limited participation, the Commission has removed limited participation from written submission appeals.

Proposed part 581, then, sets forth the procedure for filing a motion in an appeal on written submissions, a motion to supplement the record, and a motion for reconsideration. For requests for limited participation in ordinance appeals, motions to appeal before a presiding official and on written submissions before the Commission, and other motions before a presiding official, part 581 refers to the sections that govern those actions, where the process is set forth in detail: §§ 582.6,

584.6, and 584.5, and 585.5 respectively.

One commenter suggested that the Commission should clarify whether leave is required to file a motion to intervene. Motions to intervene are made only in appeals before a presiding official, governed by part 584, and proceedings on written submission before the Commission, governed by part 585. Part 584 does not require that leave be made to file a motion to intervene. The Commission believes the regulations are sufficiently clear in this regard.

One commenter noted that the terms "motion for reconsideration" and "petition for reconsideration" were used interchangeably throughout this part. The Commission has changed the language so that only "motion for reconsideration" is used.

The Commission believes that a full record enhances due process and effective decisionmaking. Consequently, in past matters the Commission has allowed the submission of additional evidence. No rules currently govern this area however. Thus, the Commission proposes that part 581 provide that parties may file motions to supplement the record at any time prior to a final Commission decision. The Commission may also supplement the record on its own motion.

One commenter proposed that the Commission should define the record and guarantee that parties have access to the record prior to filing an appeal. The Commission does not believe it necessary to include a definition of the record. The record is generally understood to include all documents relied on by the decisionmaker in arriving at the decision. The Commission believes that the current process of providing the record after an appeal has been filed conserves agency resources given that only a small number of decisions are appealed.

On occasion, the Commission has received and ruled upon motions for reconsideration of its decisions. Proposed part 581 sets forth rules for these motions. Under the proposed rule, motions for reconsideration may be made only in extraordinary circumstances, and a party may file only one such motion. The motion shall be filed within 30 days of the date of the final decision. Opposition briefs shall be filed within 10 days after the motion is filed. A reply brief must be filed within 5 days of service of the opposition brief. The Commission shall issue a decision within 30 days of the filing of the reply brief or the time to file a reply expires.

Part 582—Appeals of Disapprovals of Gaming Ordinances, Resolutions, or Amendments

The existing regulations governing appeals of disapprovals of gaming ordinances are set forth in part 524. The Commission proposes to repeal part 524, and replace it with part 582. Part 582 would be substantially similar to part 524, however some significant changes are proposed to improve the regulation. The existing rule does not provide a deadline by which one may request limited participation. Part 582 provides a deadline of 10 days after the filing of a notice of appeal. In addition, proposed part 582 requires the filing of a submission which shall state the entity's interest in the proceeding and why the Chair's decision should be upheld or reversed. In addition, part 582 provides that parties to the appeal may file briefs in opposition to the request for limited participation. New part 582 also requires the Commission rule on the request within 10 days of the last filing, or the expiration of the time to file.

Additionally, together, proposed §§ 582.3 and 582.6 provide that the record on which the Chair relied will be provided within 10 days of the filing of the notice of appeal, where practicable, and the appeal brief shall be filed within 15 days of service of the record.

Existing part 524 provides that the Commission will issue its decision within 90 days after receiving the appeal. Proposed part 582 provides that the Commission will issue its decision within 90 days of receiving the appeal brief, or within 90 days of its ruling on a request for limited participation. This affords the Commission sufficient time to allow full briefing of a request for limited participation while also allowing itself enough time to consider and rule on the merits of the matter.

One commenter noted that § 582.3 assumes that the Commission will always grant an appeal and asks whether the Commission could refuse to hear any appeal. No, the Commission may not refuse to hear an appeal. IGRA requires that the Commission provide an opportunity for an appeal and hearing for fines levied and for temporary closure orders. See 25 U.S.C. 2713(a)(2) and (b)(2).

Part 583—Appeals From Approvals or Disapprovals of Management Contracts or Amendments to Management Contracts

Existing part 539 provides that a party may appeal the approval or disapproval of a management contract or amendment. The appeal shall be filed

within 30 days after the Chair serves his or her determination. The appeal shall specify why the party believes the Chair's determination was erroneous, and the Commission shall issue a decision within 30 days unless the appellant elects to provide the Commission an additional 30 days. In the absence of a decision within the time provided, the Chair's decision shall constitute a final decision.

Proposed part 583 clarifies that only a party to the management contract or amendment may appeal pursuant to this part. It further requires a brief as well as a notice of appeal. The Commission amended the filing requirements of an appellant to demonstrate "why the appellant believes the Chair's approval or disapproval should be reversed." This change was made because the word "erroneous" in the current rule could be interpreted to mean that the standard of proof is "erroneous", a common standard of proof but not one that is applicable here.

Proposed §§ 583.3 and 583.6, together, provide that the record on which the Chair relied will be provided within 10 days of the filing of the notice of appeal, where practicable, and the appeal brief shall be filed within 15 days of service of the record. Proposed part 583 further provides that another party to the contract may oppose the appeal by filing an opposition brief within 20 days after service of the notice and brief. The appellant may file a reply brief within 10 days. The Commission will issue a final decision within 90 days after receipt of a notice of appeal and brief or within 90 days after the conclusion of briefing by the parties, whichever is later.

A commenter questioned why a party would wish to appeal an approval, and that appeals should be limited to disapprovals. The overwhelming majority of appeals in management contract cases are appeals of disapprovals. The Commission has, however, heard an appeal of an approval in a matter where two tribal factions were at odds. One faction argued that the other faction did not have authority to submit the management contract, and, based on that argument, appealed the approval of the contract.

Part 584—Appeals Before a Presiding Official of Notices of Violation, Proposed Civil Fine Assessments, Orders of Temporary Closure, the Chair's Decision To Void or Modify a Management Contracts, the Commission's Proposal To Remove a Certificate of Self-Regulation, and Notices of Late Fees and Late Fee Assessments

Existing part 577 governs appeals of enforcement actions and actions to void an approved management contract. Proposed part 584 provides that a party may appeal the issuance of a notice of violation, proposed civil fine assessment, order of temporary closure, decision to void or modify a management agreement, the Commission's removal of a certificate of self regulation, and late fee notifications and assessments.

Part 584 clarifies that appeals may be initiated by a tribe or the recipient of the action that is the subject of an appeal or in matters involving a management contract by a party to that contract.

The deadlines contained in proposed part 584 are substantially the same as in existing part 577. Appeals under part 584 must be brought within 30 days of the Chair or Commissions action or decision. The appeal must reference the action or decision that is being appealed. Part 584 provides that within 10 days after filing a notice of appeal the appellant must file a list of names of proposed witnesses, what they are expected to testify about, and whether a closed hearing is requested. Additionally, an appellant must submit a brief stating what relief they are seeking and why they think it should be granted. The brief may include supporting documentation including evidence in the form of affidavits.

Part 584 allows a party to waive the right to an oral hearing and instead elect to have the matter decided on the basis of written submissions. If a party elects to have the matter decided on written submissions, the proposed part 585 will govern the process by which the Commission reviews those appeals.

As with existing part 577, proposed part 584 allows an entity to intervene in the appeal if the presiding official finds that a final decision could directly or adversely affect it or the class it represents, it may contribute materially to the disposition of the proceedings, its interest is not adequately represented by existing parties, and the intervention would not prejudice the existing parties or delay the proceedings. As with existing part 577, proposed part 584 allows a tribe with jurisdiction over lands that are the subject of the appeal

to intervene as a matter of right if they are not already a party. Proposed § 584.5(c) provides that such motions must be filed within 10 days of the notice of appeal. The Commission plans to quickly post appeals to its Web site to inform the public.

Part 584 allows the Chair to file a list of witnesses and their expected testimony and request that a hearing be closed. The Chair must make this request within 10 days after it has been served the appellants brief. Part 584 requires that a presiding official be named and a hearing take place within 30 days after the Commission receives a timely notice of appeal.

Part 584 requires that if the subject of the appeal is whether an order of temporary closure should be made permanent or be dissolved then a hearing must be concluded within 30 days or receiving a timely notice of appeal unless the appellant waives this right.

Proposed part 584 establishes procedures for requesting that information be treated as confidential. If the presiding official determines that confidential treatment is not warranted a party will be given the opportunity to withdraw a document before it is considered by the presiding official or disclose it voluntarily to all parties.

As with existing part 577, part 584 allows the parties to defer the hearing to negotiate a settlement or consent decree.

Part 584 requires the presiding official to issue a recommended decision within 30 days after the record has closed. The recommended decision will include findings of fact and conclusions of law and a recommended grant or denial of relief. Within 10 days after the recommended decision has issued the parties may file an objection to the recommended decision with the Commission.

Part 584 requires the Commission to issue a decision within 90 days after the recommended decision has been issued. In cases of temporary closure orders the Commission must issue its decision within 30 days.

Part 585—Appeals to the Commission on Written Submissions of Notices of Violation, Proposed Civil Fine Assessments, Orders of Temporary Closure, the Chair's Decision To Void or Modify a Management Contracts, the Commission's Proposal To Remove a Certificate of Self Regulation, and Notices of Late Fees and Late Fee Assessments

Existing part 577 combines procedures for both appeals where an oral hearing is requested and appeals where a decision on written

submissions has been requested. The proposed changes to the existing regulation separates oral hearing procedures from written submission decisions. Part 585 allows a tribe or the recipient to appeal an action based on written submissions instead of an oral hearing. The Commission believes that this option can benefit some parties because it can shorten the time period between when an action is taken and when a final decision is issued.

Part 585 allows an entity other than one of the parties to participate in the appeal on a limited basis. The proposed part 585 requirements for intervention mirror the current requirements contained in existing part 577.

Proposed §§ 585.3 and 585.6, together, provide that the record on which the Chair relied will be provided within 10 days of the filing of the notice of appeal, where practicable, and the appeal brief shall be filed within 15 days of service of the record. Regarding motions to intervene, proposed § 585.5(c) provides that such motions must be filed within 10 days of the notice of appeal. The Commission plans to quickly post appeals to its Web site to inform the public.

Proposed § 585.4 was expanded to permit motions other than those specifically set out at the discretion of the Commission. This mirrors language in part 584 regarding motions before a Presiding Official.

Existing part 577 allows the parties to suspend a hearing so that a settlement or consent decree may be negotiated. Since proposed part 585 segregates appeals based on written submissions from oral hearings such procedures are not necessary.

Part 585 requires the Commission to issue its decision within 90 days of receiving a notice of appeal and appeal brief. For appeals of temporary closure orders, the Commission must issue its decision within 60 days.

A commenter expressed concern about Commission and staff turnover and the impact of such turnover on how appeals are handled and decided. This commenter argued that turnover leads to inconsistent outcomes. First, the terms of Commissioners are for a substantial period of time. Under the Act, the Chairman and one of the Commissioners have terms of 3 years. The other Commissioner has a term of one year.

However, Commissioners can serve after the expiration of their term until his or her successor has been appointed. That being said, changes in personnel, whether Commissioners after their term or Commission staff, are inevitable in any decision-making forum. The fact that Commission members and staff

change, however, should not lead to inconsistent results. Commission decisions establish precedent that the Commission must either follow or must provide a reasonable basis for its departure from.

Regulatory Matters

Regulatory Flexibility Act

This proposed rule will not have a significant economic effect on a substantial number of small entities as defined under the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* Indian tribes are not considered to be small entities for the purposes of the Regulatory Flexibility Act.

Small Business Regulatory Enforcement Fairness Act

This proposed rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule does not have an annual effect on the economy of \$100 million or more. This rule will not cause a major increase in costs or prices for consumers, individual industries, Federal, state or local government agencies or geographic regions and does not have a significant adverse effect on competition, employment, investment, productivity, innovation, or the ability of U.S. based enterprises to compete with foreign-based enterprises.

Unfunded Mandate Reform Act

The Commission, as an independent regulatory agency within the Department of the Interior, is exempt from compliance with the Unfunded Mandates Reform Act. 2 U.S.C. 1502(1); 2 U.S.C. 658(1).

Takings

In accordance with Executive Order 12630, the Commission has determined that this proposed rule does not have significant takings implications. A takings implication assessment is not required.

Civil Justice Reform

In accordance with Executive Order 12988, the Office of General Counsel has determined that the proposed rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Executive Order.

National Environmental Policy Act

The Commission has determined that this proposed rule does not constitute a major Federal action significantly affecting the quality of the human environment and that no detailed statement is required pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*

Paperwork Reduction Act

This proposed rule does not require information collection under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501, *et seq.*, and is therefore not subject to review by the Office of Management and Budget.

List of Subjects

25 CFR Parts 524, 539, and 577

Administrative practice and procedure, Gambling, Indians—lands, Reporting and recordkeeping requirements.

25 CFR Parts 580, 581, 582, 583, 584, and 585

Appeals, Gambling, Indians—lands.

For the reasons stated in the preamble, and under the authority of the Indian Gaming Regulatory Act, 25 U.S.C. 2701–2712, the National Indian Gaming Commission proposes to amend 25 CFR chapter III by removing 25 CFR parts 524, 539, and 577, and adding subchapter H, consisting of parts 580 through 585, as follows:

PART 524—[REMOVED]

1. Remove part 524.

PART 539—[REMOVED]

2. Remove part 539.

PART 577—[REMOVED]

3. Remove part 577.
4. Add subchapter H, consisting of parts 580 through 585 to read as follows:

Subchapter H—Appeal Proceedings before the Commission

PART 580—RULES OF GENERAL APPLICATION IN APPEAL PROCEEDINGS BEFORE THE COMMISSION

PART 581—MOTIONS IN APPEAL PROCEEDINGS BEFORE THE COMMISSION

PART 582—APPEALS OF DISAPPROVALS OF GAMING ORDINANCES, RESOLUTIONS, OR AMENDMENTS

PART 583—APPEALS FROM APPROVALS OR DISAPPROVALS OF MANAGEMENT CONTRACTS OR AMENDMENTS TO MANAGEMENT CONTRACTS

PART 584—APPEALS BEFORE A PRESIDING OFFICIAL OF NOTICES OF VIOLATION, PROPOSED CIVIL FINE ASSESSMENTS, ORDERS OF TEMPORARY CLOSURE, THE CHAIR'S DECISION TO VOID OR MODIFY A MANAGEMENT CONTRACTS, THE COMMISSION'S PROPOSAL TO REMOVE A CERTIFICATE OF SELF-REGULATION, AND NOTICES OF LATE FEES AND LATE FEE ASSESSMENTS

PART 585—APPEALS TO THE COMMISSION ON WRITTEN SUBMISSIONS OF NOTICES OF VIOLATION, PROPOSED CIVIL FINE ASSESSMENTS, ORDERS OF

TEMPORARY CLOSURE, THE CHAIR'S DECISION TO VOID OR MODIFY A MANAGEMENT CONTRACTS, THE COMMISSION'S PROPOSAL TO REMOVE A CERTIFICATE OF SELF-REGULATION, AND NOTICES OF LATE FEES AND LATE FEE ASSESSMENTS

PART 580—RULES OF GENERAL APPLICATION IN APPEAL PROCEEDINGS BEFORE THE COMMISSION

Sec.

- 580.1 What definitions apply?
- 580.2 When may the Commission suspend, revoke, amend, or waive its rules governing proceedings before the Commission?
- 580.3 Who may appear before the Commission?
- 580.4 How do I effect service?
- 580.5 What happens if I file late or fail to file?
- 580.6 What is the burden of proof and standard of review?
- 580.7 What will the Commission's final decision contain?
- 580.8 What is the effective date of the Commission's final decision?
- 580.9 Is the Commission's decision final agency action?
- 580.10 What if the Commission does not issue a majority decision?
- 580.11 Does an appeal of a Chair's decision stay the effect of that decision?

Authority: 25 U.S.C. 2706, 2713, 2715.

§ 580.1 What definitions apply?

Day: A calendar day.

De novo review: A standard of review where the Commission reviews the matter anew, as if it had not been reviewed by the Chair.

Limited participant: A party who successfully petitions the Commission to participate on a limited basis in either an ordinance appeal under § 582.5, or an appeal on written submissions under § 585.5.

Preponderance of the evidence: The degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.

Presiding official: The individual who presides over the hearing and issues the recommended decision under part 584.

Proceeding: All or part of an appeal heard by a presiding official or the Commission, and decided by the Commission.

Summary proceeding: A proceeding in which the appeal is on paper only, with no hearing.

§ 580.2 When may the Commission suspend, revoke, amend, or waive its rules governing proceedings before the Commission?

The procedural provisions of subchapter H of this chapter may be

suspended, revoked, amended, or waived for good cause shown, in whole or in part, on motion to the Commission, or on its own motion, if the interest of justice so requires, except that the Commission may not extend the time for filing a notice of appeal.

§ 580.3 Who may appear before the Commission?

In any appeal proceeding under parts 582 through 585 of this subchapter, a party or limited participant may appear in person or by an attorney or other authorized representative. An attorney must be in good standing and admitted to practice before any Court of the United States, the District of Columbia, any tribal court, or the highest court of any state, territory, or possession of the United States. Any person appearing as an attorney or authorized representative shall file with the Commission a written notice of appearance. The notice must state his or her name, address, telephone number, facsimile number and email address, if any; and the name and address of the person or entity on whose behalf he or she appears.

§ 580.4 How do I effect service?

(a) An appellant shall serve its notice of appeal on the Commission at the address indicated in the decision or notice that is the subject of the appeal.

(b) Copies of the notice of appeal shall be filed personally or by registered or certified mail, return receipt requested. All subsequent documents shall be served personally, by facsimile, by email to an address designated by a Commission employee, or by first class mail. In matters where a hearing has been requested, all filings shall be made with the Commission until a presiding official is designated and the parties are so notified, after which all filings shall be made with the presiding official.

(c) All documents filed after the notice of appeal shall be served on the Commission and copies simultaneously served on all parties, intervenors or limited participants.

(d) Service of copies of all documents is complete at the time of personal service or, if service is made by mail, facsimile, or email, upon transmittal.

(e) When a representative (including an attorney) has entered an appearance for a party, limited participant or intervenor in a proceeding initiated under any provision of parts 581 through 585 of this subchapter, service thereafter shall be made upon the representative.

(f) In computing any period of time prescribed for filing and serving a document, the first day of the period so computed shall not be included. The

last day shall be included unless it is a Saturday, Sunday, or Federal legal holiday, in which case the period shall run until the end of the next business day. Except for appeals of temporary closure orders, when the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and Federal legal holidays shall be excluded in the computation.

(g) The Commission may extend the time for filing or serving any document except a notice of appeal.

(1) A request for an extension of time must be filed within the time originally allowed for filing.

(2) For good cause, the Commission may grant an extension of time on its own motion.

(h) Rules governing service of documents by the Chair or Commission are governed by part 519 of this chapter.

§ 580.5 What happens if I file late or fail to file?

(a) Failure to file an appeal within the time provided shall result in a waiver of the right to appeal.

(b) Failure to meet any deadline for the filing of any motion or response thereto shall result in a waiver of the right to file.

§ 580.6 What is the burden of proof and standard of review?

(a) The Chair bears the burden of proof to support his or her action or decision by a preponderance of the evidence.

(b) The Commission shall review the Chair's actions or decisions *de novo*.

§ 580.7 What will the Commission's final decision contain?

The Commission may affirm, modify, or reverse, in whole or in part, the Chair's decision or presiding official's recommended decision, or may remove a certificate of self-regulation, and will state the bases of its decision. The final decision will be in writing and will include:

(a) A statement of findings and conclusions, with the bases for them on all material issues of fact, law, or discretion;

(b) A ruling on each material issue; and

(c) An appropriate grant or denial of relief.

§ 580.8 What is the effective date of the Commission's final decision?

The Commission's final decision is effective immediately unless the Commission provides otherwise in the decision.

§ 580.9 Is the Commission's decision final agency action?

The Commission's final decision is a final agency action for purposes of judicial review.

§ 580.10 What if the Commission does not issue a majority decision?

In the absence of a decision of a majority of the Commission within the time provided, the Chair's decision shall constitute the final decision of the Commission except that, if the subject of the appeal is a temporary closure order, the order shall be dissolved.

§ 580.11 Does an appeal of a Chair's decision stay the effect of that decision?

An appeal does not stay the effect of a Chair's decision. The appellant must comply with the Chair's decision pending the outcome of the appeal.

PART 581—MOTIONS IN APPEAL PROCEEDINGS BEFORE THE COMMISSION

Sec.

581.1 What is the scope of this part?

581.2 How does an entity other than a tribe request to participate on a limited basis in an ordinance appeals?

581.3 How do I file a motion to intervene in appeals?

581.4 How do I file a motion before a presiding official?

581.5 How do I file a motion to supplement the record?

581.6 How do I file a motion for reconsideration?

Authority: 25 U.S.C. 2706, 2713, 2715.

§ 581.1 What is the scope of this part?

(a) This part governs motion practice under:

(1) Part 582 of this chapter, appeals of disapprovals of gaming ordinances, resolutions, or amendments;

(2) Part 583 of this chapter, appeals of the approval or disapproval of management contracts or amendments to a management contract;

(3) Part 584 of this chapter, appeals before a presiding official of notices of violation, orders of temporary closure, proposed civil fine assessments, the Chair's decision to void or modify a management contracts, the Commission's proposal to remove a certificate of self-regulation, and notices of late fees and late fee assessments; and

(4) Part 585 of this chapter, appeals to the Commission on written submissions of, notices of violation, orders of temporary closure, proposed civil fine assessments, the Chair's decision to void or modify a management contracts, the Commission's proposal to remove a certificate of self-regulation, and notices of late fees and late fee assessments.

(b) This part also governs motion practice in hearings under § 535.3 of this chapter to review the Chair's decision to void or modify a management contract.

§ 581.2 How does an entity other than a tribe request to participate on a limited basis in an ordinance appeals?

Requests for limited participation in ordinance appeals are governed by § 582.5.

§ 581.3 How do I file a motion to intervene in appeals?

Motions to intervene in appeals before a presiding official are governed by § 584.5.

Motions to intervene in appeals before the Commission are governed by § 585.5.

§ 581.4 How do I file a motion before a presiding official?

Motion practice before a presiding official on appeals of notices of violation, orders of temporary closure, proposed civil fine assessments, the Chair's decision to void or modify a management contracts, and notices of late fees and late fee assessments is governed by § 584.4.

§ 581.5 How do I file a motion to supplement the record?

Upon its own motion or the motion of a party, the Commission may allow the submission of additional evidence. A party may file a motion for leave to submit additional evidence at any time prior to issuance of a final decision by the Commission. Such motion shall show with particularity that such additional evidence is material and that there were reasonable grounds for failure to submit such evidence previously. The Commission may adjust its time for issuing a final decision accordingly, unless the subject of the appeal is a temporary closure order.

§ 581.6 How do I file a motion for reconsideration?

(a) Motions for reconsideration may be made only for final decisions on appeal and only in extraordinary circumstances.

(b) A motion for reconsideration and accompanying brief shall be filed within 30 days of the date of the Commission's final decision and shall be served on all parties, limited participants, and intervenors, if any. A motion for reconsideration shall explain the extraordinary circumstances requiring reconsideration.

(c) A party may file only one motion and accompanying brief for reconsideration.

(d) Opposition briefs shall be filed within 10 days after the motion is filed.

(e) A reply brief to the brief in opposition shall be filed within 5 days of service of the brief in opposition.

(f) The Commission shall issue a decision on reconsideration within 30 days of the filing of the reply brief or the time to file a reply brief expires, whichever is later. The Commission shall issue a brief statement of the reasons for its decision.

(g) If the Commission grants the motion, it may reverse or modify the decision, in whole or in part, from which reconsideration is sought or may remand to the Chair for further consideration.

(h) The filing of a motion will not stay the effect of any decision or order and will not affect the finality of any decision or order for purposes of judicial review, unless so ordered by the Commission.

PART 582—APPEALS OF DISAPPROVALS OF GAMING ORDINANCES, RESOLUTIONS, OR AMENDMENTS

Sec.

582.1 What does this part cover?

582.2 Who may appeal the disapproval of a gaming ordinance?

582.3 How do I appeal the disapproval of a gaming ordinance?

582.4 Are motions permitted?

582.5 How does an entity other than a tribe request to participate on a limited basis?

582.6 When will I receive a copy of the record on which the Chair relied?

582.7 When will the Commission issue its final decision?

Authority: 25 U.S.C. 2706, 2710, 2713, 2715.

§ 582.1 What does this part cover?

This part applies to appeals from the Chair's decision to disapprove a gaming ordinance, resolution, or amendment under part 522 of this chapter.

§ 582.2 Who may appeal the disapproval of a gaming ordinance?

Only the tribe whose gaming ordinance, resolution, or amendment is disapproved by the Chair may appeal.

§ 582.3 How do I appeal the disapproval of a gaming ordinance?

Within 30 days after the Chair serves his or her disapproval, the appellant must file with the Commission a notice of appeal. The notice of appeal must reference the decision from which the appeal is taken. Unless the Commission has extended the time for filing an appeal brief pursuant to § 580.4(g), the appeal brief must be filed within 15 days of service of the record pursuant to § 582.6. The appeal brief shall state succinctly why the appellant believes the Chair's disapproval should be

reversed and may include supporting documentation.

§ 582.4 Are motions permitted?

Ordinance appeals are summary proceedings. Only motions for extension of time, motions for limited participation, motions to supplement the record under § 581.5, and motions for reconsideration under § 581.6 are permitted.

§ 582.5 How does an entity other than a tribe request to participate on a limited basis?

(a) An entity other than the tribe identified in § 582.2 may request to participate in an appeal of an ordinance disapproval on a limited basis by filing a submission with the Commission within 10 days of the filing of the notice of appeal.

(b) The submission may contain supporting documentation, and shall state:

(1) The entity's property, financial, or other interest at stake in the proceeding; and

(2) Why the Chair's decision should be upheld or reversed. The submission shall address the ordinance requirements under §§ 522.4, 522.5, 522.6, and 522.7 of this chapter.

(c) The submission shall simultaneously be served on the tribe consistent with § 580.4. Failure to properly serve the tribe may be a basis for denying limited participation.

(d) Within 10 days after service of the submission, any party to the appeal may file a brief and supporting material in response to the submission.

(e) Within 10 days of the filing of a response pursuant to paragraph (d) of this section, the Commission will notify the submitter in writing of its decision whether to accept and consider the submission and will state the basis for its decision, which it shall serve on the submitter and the tribe.

§ 582.6 When will I receive a copy of the record on which the Chair relied?

Within 10 days of the filing of a notice of appeal, or as soon thereafter as practicable, the record on which the Chair relied will be transmitted to the tribe.

§ 582.7 When will the Commission issue its final decision?

(a) Within 90 days after it receives the appeal brief or within 90 days of its ruling on a request for limited participation brought under § 582.5, whichever is later, the Commission shall issue its final decision.

(b) The Commission shall notify the tribe and any limited participant of its

final decision and the reasons supporting it.

PART 583—APPEALS FROM APPROVALS OR DISAPPROVALS OF MANAGEMENT CONTRACTS OR AMENDMENTS TO MANAGEMENT CONTRACTS

Sec.

583.1 What does this part cover?

583.2 Who may appeal the approval or disapproval of a management contract or amendment to a management contract?

583.3 How do I appeal the approval or disapproval of a management contract or amendment to a management contract?

583.4 Are motions permitted?

583.5 When will I receive a copy of the record on which the Chair relied?

583.6 When will the Commission issue its final decision?

Authority: 25 U.S.C. 2706, 2711, 2712, 2713, 2715.

§ 583.1 What does this part cover?

This part applies to appeals from the Chair's decision to approve or disapprove a management contract or amendment to a management contract under parts 533 and 535 of this chapter.

§ 583.2 Who may appeal the approval or disapproval of a management contract or amendment to a management contract?

Only a party to the management contract or amendment approved or disapproved by the Chair may appeal.

§ 583.3 How do I appeal the approval or disapproval of a management contract or amendment to a management contract?

(a) Within 30 days after the Chair serves his or her determination, the appellant must file with the Commission, and serve on all parties to the management contract, a notice of appeal. The notice of appeal must reference the decision from which the appeal is taken. Unless the Commission has extended the time for filing an appeal brief pursuant to § 580.4(g), the appeal brief must be filed within 15 days of service of the record pursuant to § 583.5. The brief shall state succinctly why the appellant believes the Chair's approval or disapproval should be reversed and may include supporting documentation.

(b) Another party to the management contract may oppose the appeal by:

(1) Filing an opposition brief with the Commission within 20 days after service of the appellant's brief. The opposition brief shall state succinctly why the party believes the Chair's approval or disapproval should be upheld and may include supporting documentation.

(c) The appellant may file a reply brief within 10 days.

§ 583.4 Are motions permitted?

Management contract and amendment appeals are summary proceedings. Only motions for extension of time under § 580.4(g), motions to supplement the record under § 581.6, and motions for reconsideration under § 581.7 are permitted.

§ 583.5 When will I receive a copy of the record on which the Chair relied?

Within 10 days of the filing of a notice of appeal, or as soon thereafter as practicable, the record on which the Chair relied will be transmitted to all parties.

§ 583.6 When will the Commission issue its final decision?

(a) The Commission shall issue its final decision within 90 days after service of the appeal brief, or within 90 days after the conclusion of briefing by the parties, whichever is later.

(b) The Commission shall notify the tribe and management contractor of its final decision and the reasons supporting it.

PART 584—APPEALS BEFORE A PRESIDING OFFICIAL OF NOTICES OF VIOLATION, PROPOSED CIVIL FINE ASSESSMENTS, ORDERS OF TEMPORARY CLOSURE, THE CHAIR'S DECISION TO VOID OR MODIFY A MANAGEMENT CONTRACTS, THE COMMISSION'S PROPOSAL TO REMOVE A CERTIFICATE OF SELF-REGULATION, AND NOTICES OF LATE FEES AND LATE FEE ASSESSMENTS

Sec.

584.1 What does this part cover?

584.2 Who may appeal?

584.3 How do I appeal a notice of violation, proposed civil fine assessment, order of temporary closure, the Chair's decision to void or modify a management contract, the Commission's proposal to remove a certificate of self-regulation, and notices of late fees and late fee assessments?

584.4 Are motions permitted?

584.5 How do I file a motion to intervene?

584.6 When will the hearing be held?

584.7 When will I receive a copy of the record on which the Chair relied?

584.8 What is the hearing process?

584.9 How may I request to limit disclosure of confidential information?

584.10 What is the process for pursuing settlement or a consent decree?

584.11 Will the hearing be transcribed?

584.12 What happens after the hearing?

584.13 May I file an objection to the recommended decision?

584.14 When will the Commission issue its final decision?

Authority: 25 U.S.C. 2706, 2710, 2711, 2712, 2713, 2715, 2717.

§ 584.1 What does this part cover?

(a) This part applies to appeals of the following where the appellant elects a hearing before a presiding official:

- (1) A violation alleged in a notice of violation under § 573.3;
- (2) Proposed civil fine assessments under part 575 of this chapter;
- (3) Orders of temporary closure under § 573.6;
- (4) The Chair's decision to void or modify a management contract under part 535 of this chapter subsequent to initial approval;
- (5) The Commission's proposal to remove a certificate of self regulation under part 515 of this chapter; and
- (6) Late fee notifications and assessments under part 514 of this chapter.

(b) Appeals identified in paragraph (a) of this section brought directly before the Commission on the written record and without a hearing are filed pursuant to part 585 of this chapter.

§ 584.2 Who may appeal?

(a) Appeals of notices of violation, proposed civil fine assessments, orders of temporary closure, proposals to remove a certificate of self-regulation and late fee notifications and assessments may only be brought by the tribe or the recipient of the action that is the subject of the appeal.

(b) Appeals of the Chair's decision to void or modify a management contract after approval may only be brought by a party to the management contract.

§ 584.3 How do I appeal a notice of violation, proposed civil fine assessment, order of temporary closure, the Chair's decision to void or modify a management contract, the Commission's proposal to remove a certificate of self-regulation, and notices of late fees and late fee assessments?

(a) Within 30 days after the Chair serves his or her action or decision, or the Commission serves its intent to remove a certificate of self-regulation, the appellant must file a notice of appeal with the Commission. The notice of appeal must reference the action or decision from which the appeal is taken.

(b) Within 10 days after filing the notice of appeal, the appellant shall file with the Commission:

- (1) A list of the names of proposed witnesses who would present oral testimony at the hearing, the general nature of their expected testimony, and whether a closed hearing is requested and why;
- (2) A brief that states succinctly the relief desired and the grounds in support thereof; and which may include supporting documentation and evidence in the form of affidavits.

(c) A party that has filed a notice of appeal may waive the right to an oral hearing before a presiding official and instead elect to have the matter determined by the Commission solely on the basis of written submissions. Appeals based on written submissions are governed by part 585 of this subchapter. If there is more than one party that has filed a notice of appeal, and any party that has filed a notice of appeal elects a hearing before a presiding official, the entire matter will proceed before a presiding official.

(d) The Chair may file a response brief and a list of the names of proposed witnesses who will present oral testimony at the hearing, the general nature of their expected testimony, and whether a closed hearing is requested and why within 10 days after service of the appellate brief.

§ 584.4 Are motions permitted?

Yes. Motions to intervene under § 584.5 are permitted. Motions for an extension of time that are filed before the appointment of a presiding official shall be decided by the Commission. All other motions may be scheduled and heard at the discretion of the presiding official.

§ 584.5 How do I file a motion to intervene?

(a) An entity not permitted to appeal may be permitted to participate as a party if the presiding official finds that:

- (1) The final decision could directly and adversely affect it or the class it represents;
- (2) It may contribute materially to the disposition of the proceedings;
- (3) Its interest is not adequately represented by existing parties; and
- (4) Intervention would not unfairly prejudice existing parties or delay resolution of the proceeding.

(b) A tribe with jurisdiction over the lands on which there is a gaming operation that is the subject of a proceeding under this part may intervene as a matter of right if the tribe is not already a party.

(c) A motion to intervene shall be submitted to the presiding official within 10 days of the notice of appeal. The motion shall be filed with the presiding official and served on each person who has been made a party at the time of filing. The motion shall state succinctly:

- (1) The moving party's interest in the proceeding;
- (2) How his or her participation as a party will contribute materially to the disposition of the proceeding;
- (3) Who will appear for the moving party;

(4) The issues on which the moving party wishes to participate; and

(5) Whether the moving party wishes to present witnesses.

(d) Objections to the motion must be filed by any party within ten days after service of the motion.

(e) A reply brief to the brief in opposition may be filed within 5 days of service of the brief in opposition.

(f) When motions to intervene are made by individuals or groups with common interests, the presiding official may request all such movants to designate a single representative, or he or she may recognize one or more movants.

(g) The presiding official shall give each movant and party written notice of his or her decision on the motion. For each motion granted, the presiding official shall provide a brief statement of the basis for the decision. If the motion is denied, the presiding official shall briefly state the grounds for denial. The presiding official may allow the movant to participate as *amicus curiae*, if appropriate.

§ 584.6 When will the hearing be held?

(a) The Commission shall designate a presiding official who shall commence a hearing within 30 days after the Commission receives a timely notice of appeal. At the request of the appellant, the presiding official may waive the 30 day hearing requirement upon designation.

(b) If the subject of an appeal is whether an order of temporary closure should be made permanent or be dissolved, the hearing shall be concluded within 30 days after the Commission receives a timely notice of appeal, unless the appellant waives this right. Notwithstanding any other provision of this part, the presiding official shall conduct such a hearing in a manner that will enable him or her to conclude the hearing, including any period the record is kept open following the hearing, within the period required by this paragraph consistent with any due process rights of the parties.

§ 584.7 When will I receive a copy of the record on which the Chair relied?

Upon designation by the presiding official, the Commission shall transmit the agency record on which the Chair relied to the presiding official and the parties.

§ 584.8 What is the hearing process?

(a) Once designated by the Commission, the presiding official shall set the matter for hearing. The appellant may appear at the hearing personally, through counsel, or by an authorized

representative consistent with the requirements of § 580.3 of this subchapter. The appellant, the Chair, and any intervenor shall have the right to introduce relevant written materials and to present an oral argument. At the discretion of the presiding official, a hearing under this section may include an opportunity to submit oral and documentary evidence and cross-examine witnesses.

(b) When holding a hearing under this part, the presiding official shall:

(1) Administer oaths and affirmations;

(2) Issue subpoenas authorized by the Commission;

(3) Rule on offers of proof and receive relevant evidence;

(4) Authorize exchanges of information (including depositions and interrogatories in accordance with 25 CFR part 571, subpart C) among the parties when to do so would expedite the proceeding;

(5) Establish and administer the course of the hearing;

(6) When appropriate, hold conferences for the settlement or simplification of the issues by consent of the parties;

(7) At any conference held pursuant to paragraph (b)(6) of this section, require the attendance of at least one representative of each party who has authority to negotiate the resolution of issues in controversy;

(8) Dispose of procedural requests or similar matters;

(9) Recommend decisions in accordance with § 584.12; and

(10) Take other actions authorized by the Commission consistent with this part.

(c) The presiding official may order the record to be kept open for a reasonable period following the hearing (normally ten days), during which time the parties may make additional submissions to the record. Thereafter, the record shall be closed and the hearing shall be deemed concluded. Within 30 days after the record closes, the presiding official shall issue a recommended decision in accordance with § 584.12.

§ 584.9 How may I request to limit disclosure of confidential information?

(a) If any person submitting a document in a proceeding claims that some or all of the information contained in that document is:

(1) Exempt from the mandatory public disclosure requirements under the Freedom of Information Act (5 U.S.C. 552);

(2) Information referred to in 18 U.S.C. 1905 (disclosure of confidential information); or

(3) Otherwise exempt by law from public disclosure, the person shall:

(i) Indicate that the document in its entirety is exempt from disclosure or identify and segregate information within the document that is exempt from disclosure; and

(ii) Request that the presiding official not disclose such information to the parties to the proceeding (other than the Chair, whose actions regarding the disclosure of confidential information are governed by § 571.3) except pursuant to paragraph (b) of this section, and shall serve the request upon the parties to the proceeding. The request to the presiding official shall include:

(A) A copy of the document, group of documents, or segregable portions of the documents marked "Confidential Treatment Requested"; and

(B) A statement explaining why the information is confidential.

(b) If the presiding official determines that confidential treatment is not warranted with respect to all or any part of the information in question, the presiding official shall so inform all parties. The person requesting confidential treatment then shall be given an opportunity to withdraw the document before it is considered by the presiding official or to disclose the information voluntarily to all parties.

(c) If the presiding official determines that confidential treatment is warranted, the presiding official shall so inform all parties.

(d) If the presiding official determines that confidential treatment is warranted, a party to a proceeding may request that the presiding official direct the person submitting the confidential information to provide that information to the party. The presiding official may so direct if the party requesting the information agrees under oath and in writing:

(1) Not to use or disclose the information except directly in connection with the hearing; and

(2) To return all copies of the information at the conclusion of the proceeding to the person submitting the information under paragraph (a) of this section.

(e) If a person submitting documents in a proceeding under this part does not claim confidentiality under paragraph (a) of this section, the presiding official may assume that there is no objection to disclosure of the document in its entirety.

(f) When a decision by a presiding official is based in whole or in part on evidence not included in the record, the decision shall so state, specifying the nature of the evidence and the provision of law under which disclosure was denied, and the evidence so considered

shall be retained under seal as part of the official record.

§ 584.10 What is the process for pursuing settlement or a consent decree?

(a) *General.* At any time after the commencement of a proceeding, but at least five days before the date set for hearing under § 584.6, the parties jointly may move to defer the hearing for a reasonable time to permit negotiation of a settlement or an agreement containing findings and an order disposing of the whole or any part of the proceeding.

(b) *Content.* Any agreement containing consent findings and an order disposing of the whole or any part of a proceeding shall also provide:

(1) A waiver of any further procedural steps before the Commission;

(2) A waiver of any right to challenge or contest the validity of the order and decision entered into in accordance with the agreement; and

(3) The presiding official's certification of the findings and agreement shall constitute dismissal of the appeal and final agency action.

(c) *Submission.* Before the expiration of the time granted for negotiations, the parties or their authorized representatives may:

(1) Submit to the presiding official a proposed agreement containing consent findings and an order;

(2) Notify the presiding official that the parties have reached a full settlement or partial settlement and have agreed to dismissal of the action or part thereof, subject to compliance with the terms of the settlement; or

(3) Inform the presiding official that agreement cannot be reached.

(d) *Disposition.* In the event a full or partial settlement agreement containing consent findings and an order is submitted within the time granted, the presiding official shall certify such findings and agreement within 30 days after his or her receipt of the submission. Such certification shall constitute full or partial dismissal of the appeal, as applicable, and final agency action.

§ 584.11 Will the hearing be transcribed?

Yes. Hearings under this part that involve oral presentations shall be recorded verbatim and transcripts thereof shall be provided to parties upon request. Each party shall pay its own fees for transcripts.

§ 584.12 What happens after the hearing?

(a) Within 30 days after the record closes, the presiding official shall issue his or her recommended decision.

(b) The recommended decision shall be in writing, based on the whole record, and include:

(1) Recommended findings of fact and conclusions of law upon each material issue of fact or law; and

(2) A recommended grant or denial of relief.

(c) The presiding official's recommended decision is reviewed by the Commission. The Commission issues the final decision.

§ 584.13 May I file an objection to the recommended decision?

Yes. Within 10 days after service of the presiding official's recommended decision, any party may file with the Commission objections to any aspect of the decision, and the reasons therefore.

§ 584.14 When will the Commission issue its decision?

(a) The Commission shall issue its decision within 90 days after the date of the recommended decision, unless the recommended decision is to dissolve or make permanent a temporary closure order issued under § 573.6 of this chapter, in which case the Commission shall issue its decision within 30 days.

(b) The Commission shall serve the final decision upon the parties.

PART 585—APPEALS TO THE COMMISSION ON WRITTEN SUBMISSIONS OF NOTICES OF VIOLATION, PROPOSED CIVIL FINE ASSESSMENTS, ORDERS OF TEMPORARY CLOSURE, THE CHAIR'S DECISION TO VOID OR MODIFY A MANAGEMENT CONTRACTS, THE COMMISSION'S PROPOSAL TO REMOVE A CERTIFICATE OF SELF REGULATION, AND NOTICES OF LATE FEES AND LATE FEE ASSESSMENTS

Sec.

585.1 What does this part cover?

585.2 Who may appeal?

585.3 How do I appeal a notice of violation, proposed civil fine assessment, order of temporary closure, the Chair's decision to void or modify a management contract, the Commission's proposal to remove a certificate of self regulation, and notices of late fees and late fee assessments?

585.4 Are motions permitted?

585.5 How do I file a motion to intervene?

585.6 When will I receive a copy of the record on which the Chair relied?

585.7 When will the Commission issue its decision?

Authority: 25 U.S.C. 2706, 2710, 2711, 2712, 2713, 2715, 2717.

§ 585.1 What does this part cover?

(a) This part applies to appeals of the following where the appellant does not elect a hearing before a presiding official and instead elects to have the matter decided by the Commission solely on the basis of written submissions:

(1) A violation alleged in a notice of violation under § 573.3;

(2) Proposed civil fine assessments under part 575 of this chapter;

(3) Orders of temporary closure under § 573.6;

(4) The Chair's decision to void or modify a management contract under part 535 of this chapter subsequent to initial approval;

(5) The Commission's proposal to remove a certificate of self-regulation under part 585 of this chapter; and

(6) Late fee notifications and assessments under part 514 of this chapter.

(b) Appeals from these actions involving a hearing before a presiding official are brought under part 584 of this chapter.

§ 585.2 Who may appeal?

(a) Appeals of notices of violation, proposed civil fine assessments, orders of temporary closure, proposals to remove certificates of self-regulation, and late fee notifications and assessments may only be brought by the tribe or the recipient that is the subject of the action.

(b) Appeals of the Chair's decision to void or modify a management contract after approval may only be brought by a party to the management contract.

§ 585.3 How do I appeal a notice of violation, proposed civil fine assessment, order of temporary closure, the Chair's decision to void or modify a management contract, the Commission's proposal to remove a certificate of self regulation, and notices of late fees and late fee assessments?

(a) Within 30 days after the Chair serves his or her action or decision, or the Commission serves notice of its intent to remove a certificate of self-regulation, appellant must file a notice of appeal with the Commission. The notice of appeal must reference the action or decision from which the appeal is taken and shall include a written waiver of the right to an oral hearing before and an election to have the matter determined by the Commission solely on the basis of written submissions. Unless the Commission has extended the time for filing an appeal brief pursuant to § 580.4(g), the appeal brief must be filed within 15 days of service of the record pursuant to § 585.7. The appeal brief shall state succinctly the relief desired and the supporting grounds thereof and may include supporting documentation.

(b) Hearings before a presiding official are governed by part 584.

§ 585.4 Are motions permitted?

(a) Motions for extension of time, motions to supplement the record under § 581.6, motions to intervene under § 585.5, and motions for reconsideration under § 581.7 are permitted. All other motions may be considered at the discretion of the Commission.

(b) The Chair shall not, either individually or through counsel, file or respond to motions.

§ 585.5 How do I file a motion to intervene?

(a) An entity not permitted to appeal may be permitted to participate as a party to a pending appeal if the Commission finds that:

(1) The final decision could directly and adversely affect it or the class it represents;

(2) It may contribute materially to the disposition of the proceedings;

(3) Its interest is not adequately represented by existing parties; and

(4) Intervention would not unfairly prejudice existing parties or delay resolution of the proceeding.

(b) A tribe with jurisdiction over the lands on which there is a gaming operation that is the subject of a proceeding under this part may intervene as a matter of right if the tribe is not already a party.

(c) A motion to intervene shall be submitted to the Commission within ten days of the notice of appeal. The motion shall be filed with the Commission and served on each person who has been made a party at the time of filing. The motion shall state succinctly:

(1) The moving party's interest in the proceeding;

(2) How his or her participation as a party will contribute materially to the disposition of the proceeding;

(3) Who will appear for the moving party;

(4) The issues on which the moving party wishes to participate; and

(5) Whether the moving party wishes to present witnesses.

(d) Objections to the motion must be filed by any party within ten days after service of the motion.

(e) A reply brief to the brief in opposition may be filed within 5 days of service of the brief in opposition.

(f) When motions to intervene are made by individuals or groups with common interests, the Commission may request all such movants to designate a single representative, or the Commission may recognize one or more movants.

(g) The Commission shall give each movant and party written notice of the decision on the motion. For each motion granted, the Commission shall provide a

brief statement of the basis for the decision. If the motion is denied, the Commission shall briefly state the grounds for denial. The Commission may allow the movant to participate as *amicus curiae*, if appropriate.

§ 585.6 When will I receive a copy of the record on which the Chair relied?

Within 10 days of the filing of an appeal brief, or as soon thereafter as practicable, the record on which the Chair relied will be transmitted to the appellant.

§ 585.7 When will the Commission issue its decision?

(a) The Commission shall issue its decision within 90 days after it receives the appeal brief, or its ruling on a request for intervention, if applicable, unless the subject of the appeal is whether to dissolve or make permanent a temporary closure order issued under § 573.6 chapter, in which case the Commission shall issue its decision within 60 days.

(b) The Commission shall serve the final decision upon the appellants, and any limited participant.

Dated: January 23, 2012, Washington, DC.

Tracie L. Stevens,
Chairwoman.

Steffani A. Cochran,
Vice-Chairwoman.

Daniel J. Little,
Commissioner.

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DEPARTMENT OF THE INTERIOR

National Indian Gaming Commission

25 CFR Part 559

RIN 3141-AA48

Review and Submittal of a Tribe's Facility License Information

AGENCY: National Indian Gaming Commission, Interior.

ACTION: Notice of proposed rulemaking.

SUMMARY: The National Indian Gaming Commission is proposing revisions to its regulations that would provide for an expedited review of a tribe's facility license information and streamline the submittal of information relating to a proposed facility license. The proposed rule also provides for tribes to submit a certification attesting that the gaming operation is being conducted in a manner that adequately protects the environment and the public health and safety. Further, the proposed rule requires a facility license to be

submitted before the opening of any new place, facility, or location on Indian lands where class II or III gaming will occur. Likewise, a tribe must notify the Chair if a facility license is terminated, expires, or if a gaming place, facility, or location closes or reopens, unless the closure is seasonal or temporary.

DATES: The agency must receive comments on or before April 2, 2012.

ADDRESSES: You may submit comments by any one of the following methods, however, please note that comments sent by electronic mail are strongly encouraged.

- *Email comments to:* reg.review@nigc.gov.

- *Mail comments to:* Armando J. Acosta, National Indian Gaming Commission, 1441 L Street NW., Suite 9100, Washington, DC 20005.

- *Hand deliver comments to:* 1441 L Street NW., Suite 9100, Washington, DC 20005.

- *Fax comments to:* Armando J. Acosta, National Indian Gaming Commission at (202) 632-0045.

FOR FURTHER INFORMATION CONTACT: Armando J. Acosta, National Indian Gaming Commission, 1441 L Street NW., Suite 9100, Washington, DC 20005. Telephone: (202) 632-7009; email: reg.review@nigc.gov

SUPPLEMENTARY INFORMATION:

I. Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposed rules.

II. Background

The Indian Gaming Regulatory Act (IGRA or Act), Public Law 100-497, 25 U.S.C. 2701 *et seq.*, was signed into law on October 17, 1988. The Act establishes the National Indian Gaming Commission ("Commission") and sets out a comprehensive framework for the regulation of gaming on Indian lands. The purposes of IGRA include: providing a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments; ensuring that the Indian tribe is the primary beneficiary of the gaming operation; and declaring that the establishment of independent federal regulatory authority for gaming on Indian lands, the establishment of federal standards for gaming on Indian lands, and the

establishment of a National Indian Gaming Commission, are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue. 25 U.S.C. 2702.

The Act provides for tribal gaming on Indian lands within such tribe's jurisdiction. 25 U.S.C. 2710. The Act further provides the Chair and the Commission with civil regulatory authority for any violation of any provision of IGRA, Commission regulations, or approved tribal gaming ordinances. 25 U.S.C. 2713. The Act requires "a separate license issued by the Indian tribe shall be required for each place, facility, or location on Indian lands at which class II (and class III) gaming is conducted." 25 U.S.C. 2710(b)(1) and (d)(1)(A)(iii). Further, IGRA requires that tribal ordinances provide that "the construction and maintenance of the gaming facilities, and the operation of that gaming is conducted in a manner which adequately protects the environment and public health and safety." 25 U.S.C. 2710(b)(2)(E).

Part 559 serves three purposes. The first is to receive information from tribes about the Indian lands status of each gaming facility. The second is to obtain information from tribal governments certifying that the construction, maintenance, and operation of the gaming facilities are conducted in a manner that adequately protects the environment and the public health and safety, as required by the IGRA. Finally, Part 559 serves to inform the Commission of those places, facilities, or locations at which Indian gaming is presently being conducted.

On November 18, 2010, the Commission issued a Notice of Inquiry and Notice of Consultation (NOI) advising the public that the Commission was conducting a comprehensive review of its regulations and requesting public comment on which of its regulations were most in need of revision, in what order the Commission should review its regulations, and the process the Commission should utilize to make revisions. 75 FR 70680 (Nov. 18, 2010). Part 559 was included in the first group of regulations reviewed in consultation.

II. Development of the Proposed Rule

The Commission conducted multiple tribal consultations as part of its review of part 559. Tribal consultations were held in every region of the country and were attended by numerous tribal leaders or their representatives. In addition to tribal consultations, on June 11, 2011, the Commission requested