

February 27, 2018

Sent via E-mail: Vannice_Doulou@nigc.gov

Mr. Jonodev Chaudhuri, Chairman
National Indian Gaming Commission
1840 C Street NW
Mailstop #1621
Washington, DC 20240

Re: Comments on 2018 NIGC Consultation Topics #1-3

Dear Chairman Chaudhuri:

On behalf of the Seneca-Cayuga Office of the Gaming Commissioner (“SCOGC”), I am pleased to provide the following comments in response to your Dear Tribal Leader Letter of December 22, 2017 and corresponding discussion drafts containing proposed changes to the following consultation topics:

1. Proposed Changes to Management Contract Process;
2. Audit Submissions; and
3. Management & Sole Proprietary Interest.

The SCOGC appreciates the opportunity to provide comments during this early stage of the decision-making process. As the primary regulators of tribal gaming activities, tribal gaming regulators, such as the SCOGC, are particularly well-positioned to identify potential issues early on and offer alternative solutions for achieving regulatory objectives.

As demonstrated below, we have some concerns with the proposed changes reflected in the discussion drafts, especially in relation to the management contract requirements, which have the potential to cause more harm than benefit to tribal gaming operators. We hope the NIGC will engage with tribal governments and seek additional tribal input prior to initiating a formal rulemaking process to ensure that subsequent proposals are well-reasoned, fair, and consistent with the policies of the Indian Gaming Regulatory Act (“IGRA”).

1. Proposed Changes to the Management Contract Process.

While we generally support the NIGC’s initiative to improve the effectiveness of the management contract review process, we have concerns with the proposal it has put forward with

respect to term extensions. More specifically, we are concerned with the proposal to treat an extension of an existing, approved management contract as a brand new submission under 25 C.F.R. Part 531. Nothing in the discussion draft suggests that this type of review will receive expedited processing or a reduced scope of review, even though all other contract terms have already been reviewed and approved by the NIGC. It seems unreasonable to subject previously approved contracts to the same level of review as a contract whose terms have never been reviewed. This duplicative review process has the potential to cause unnecessary delays and disruptions in the gaming operation if approval is not obtained before the expiration of an existing contract.

We understand the NIGC's efforts to comply with the mandatory term limits for management contracts under the IGRA; however, the proposal to treat what is merely a renewal as an original submission exceeds what IGRA requires and is contrary to years of established practice. IGRA requires approval of term provisions but does not explicitly require the NIGC to repeat the entire management contract review process for renewals or extensions to the initial contract term. We believe it is reasonable to interpret IGRA as allowing the NIGC to review term extensions under the amendment process.

If the NIGC is concerned with maintaining updated suitability determinations, a more appropriate and cost-effective solution would be to impose a renewal process focused on updating background information and suitability determinations. Indeed, this would be consistent with the renewal procedures of most tribal gaming regulatory agencies, including the SCOGC, who already require periodic background checks on licensed employees and vendors as part of the licensing process.

Although this is not one of the issues addressed in the Dear Tribal Leader Letter, we note that the discussion drafts contain edits to the language providing for a reduced scope of background investigations for certain management contractors, including wholly owned tribal entities. We strongly support this initiative to ease the compliance burden for certain applicants, but believe that the regulation would benefit from additional guidance on how this provision will be applied. As tribal governments continue to develop expertise in gaming operation and management, we expect to see many more tribal entities assuming the role of management contractor for newer gaming operations. While we understand that suitability determinations are made on a case-by-case basis, it would be helpful to understand how the NIGC plans to implement this provision.

2. Audit Submissions.

We agree with the NIGC's proposal to lessen the burden of financial statement submissions for small and rural gaming operations. Adoption of this proposal would help to ensure the continued success of smaller tribal gaming operations by reducing compliance costs and freeing up resources to address more critical needs of the operation. Small gaming operations provide important sources of revenue for tribes and surrounding communities. We appreciate the

NIGC's commitment to ensuring the viability of these operations and its support of tribal economic development opportunities.

3. Management & Sole Proprietary Interest Regulations.

a. Management

We are encouraged by the NIGC's continued efforts to improve the efficiency and transparency of the management contract review process. As we stated in our comments during the NIGC's 2017 Consultation Series, management contract review is an area that has been particularly fraught with uncertainties and unpredictability for tribes. We appreciate the opportunity to revive consultations on this topic, as we believe there is need for clarity as to the scope and application of management contract regulations. Unfortunately, the proposed definition of "management" is far too broad to provide this needed clarity and may, in fact, give rise to more confusion and uncertainty.

We understand that, with its proposed definition, the NIGC is attempting to capture the full scope of management contract services. However, the current draft definition would operate to include a number of activities that tribes commonly contract out to expert professionals on a time-limited or fee-for-service basis without running afoul of IGRA's requirement for management contract approval. For instance, tribal gaming operators hire marketing companies to plan, organize, and coordinate "advertising, promotions, or other marketing activities." Under the proposed definition, contracts for these and related services would be deemed management contracts requiring NIGC approval, regardless of whether the contract terms provide for actual management of the gaming operation. We do not believe this is what was intended with the proposed definition.

In practice, the term "management" encompasses a broad range of activities. For this reason, introducing a new regulatory definition of "management" may not be appropriate or beneficial. The NIGC may instead want to consider issuing an updated Bulletin or other guidance document that outlines the specific considerations involved in determining whether a contract provides for management and, therefore, requires NIGC approval to be valid.

b. Sole Proprietary Interest

Our concerns with the NIGC's proposed proprietary interest regulations are similar to the concerns raised above with regard to the proposed definition of management. The broad scope of the proposed regulations goes beyond the meaning of "ownership" and begins to conflate "sole proprietary interest" with "management." This creates ambiguities in distinguishing factors related to unlawful management from those related to a tribe's ownership interest in its gaming operation.

The legislative history of IGRA is clear that “sole proprietary interest” is synonymous with “ownership.” When the Senate Committee on Indian Affairs considered the statutory phrase, “sole proprietary interest and responsibility,” it stated, the “tribe must be the sole owner of the gaming enterprise...”¹ Given this narrow interpretation, the NIGC should tailor any regulations concerning the sole proprietary interest requirement to focus on the specific harm Congress intended to prevent: a third-party obtaining ownership of a tribal gaming operation.

4. Conclusion.

In closing, we would like to again express our appreciation for the opportunity to provide comments on these important consultation topics. We hope you will give favorable consideration to our comments as you proceed with your deliberations.

Sincerely,



Danielle Brashear, Gaming Commissioner
Seneca-Cayuga Office of the Gaming Commissioner

¹ S. Rep. 100-446 at 8 (Aug. 3, 1988)