



OFFICE OF THE GOVERNOR

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BILL ANOATUBBY
GOVERNOR

February 27, 2018

Mr. Jonodev Chaudhuri, Chairman
National Indian Gaming Commission
1849 C. Street NW
Mail Stop# 1621
Washington, DC 20240

Dear Chairman Chaudhuri:

Included with this letter are the Chickasaw Nation's comments in response to the National Indian Gaming Commission's December 22, 2017 letter to tribal leaders announcing scheduled 2018 consultation sessions and topics for comment.

Thank you for your consideration of our comments. If you have any questions, please contact Mr. Bill Lance, secretary for the department of commerce at (580) 421-9500.

Sincerely,

Bill Anoatubby
Bill Anoatubby, Governor
The Chickasaw Nation

BJA: rlh

**COMMENTS OF THE CHICKASAW NATION
REGARDING NIGC CONSULTATION TOPICS LISTED IN THE
DEAR TRIBAL LEADER LETTER DATED DECEMBER 22, 2017**

The Chickasaw Nation (hereinafter “Nation”) is pleased to provide comments on the regulatory proposals set forth in the National Indian Gaming Commission’s (the “Commission”) December 22, 2017 Dear Tribal Leader Letter and corresponding discussion drafts. The Nation appreciates the Commission’s open approach to developing regulatory proposals and applauds the Commissioners for engaging with tribal governments early in the planning process. Early tribal engagement is critical to ensuring that consultation is meaningful and consistent with the special government-to-government relationship between tribal governments and federal government agencies.

We note, however, that to be effective and meaningful, the consultation process must allow adequate time for tribal governments to understand and consider the implications of a proposed federal action. We are concerned the timeframe for consultation is not sufficient for tribal governments to review and provide meaningful input on the discussion drafts, which were released less than a week before the first scheduled consultation session in South Dakota. Moreover, it is unclear why the Commission elected not to schedule consultation sessions during major Indian gaming related events, such as the National Indian Gaming Association’s upcoming tradeshow. We respectfully request the Commission extend the timeframe for consultation and corresponding comment period. We further request the Commission schedule additional consultations around upcoming tribal gaming gatherings, to the extent possible.

I. Proposed Changes to Management Contract Process

In the December 22, 2017 Dear Tribal Leader Letter, the Commission seeks comments on its proposal to treat any extension of a management contract beyond the permitted five or seven years as a brand-new submission instead of an amendment pursuant to 25 C.F.R. Part 535. According to the Dear Tribal Leader Letter, the purpose of the proposed revision is two-fold: first, to ensure compliance with mandatory term limits for management contracts under IGRA, and second, to prevent management contractors from evading the background investigation and suitability requirements under 25 C.F.R. Part 537.

As an initial matter, we understand the Commission’s compliance concerns with respect to the term restrictions under IGRA. However, we note IGRA does not explicitly require a full review of the entire management contract for renewals. IGRA requires approval of term provisions but does not specify whether renewals exceeding the permitted five or seven-year term should be treated as new contract submissions or amendments. Given that there are no other significant

revisions being made, we believe it would be reasonable to interpret IGRA's mandate as permitting the review of term extensions as a simple amendment rather than a new contract submission.

We also understand the Commission's interest in maintaining updated suitability determinations; however, we are concerned the proposal, as drafted, imposes an undue burden and could potentially disrupt the contractual obligations of the management contractor to the detriment of the tribe if approval is not secured before the contract expires. As noted above, since the only change is to the duration of the contract term, we do not believe a simple renewal of the contract should be treated as an original contract submission or subject to the same time-consuming review and approval process as new contracts whose terms have never been reviewed. Unless there are significant revisions, it seems unnecessarily duplicative to require a full review of contract terms that have already been vetted and approved by the Commission.

If the intent is to ensure background investigations and suitability determinations remain current and up to date, then we propose an alternative approach that we believe will be a more reasonable and less onerous means of achieving the same outcome. Instead of requiring term extensions of a previously approved contract to undergo the same review and approval process as new submissions, one alternative would be to impose a renewal process focused on the background investigation requirements in 25 C.F.R. Part 537. The emphasis of the renewal process should be on reviewing any additional background information that has not yet been provided to the Commission. Indeed, this would be consistent with the renewal procedures of most tribal gaming regulatory agencies, who already require periodic background checks on management officials as part of the licensing process.

On a related note, we wish to comment on the proposed language in the discussion draft concerning the reduced scope of background investigations for certain low-risk entities, including wholly owned tribal entities. Over time, a number of tribal governments have developed a high level of expertise in managing and operating gaming operations, and are beginning to assume the role of management contractor at other tribal gaming locations. The discussion drafts include a provision for limiting the scope of the background information required from management contractors that are tribes or wholly owned entities of tribes. We strongly support this initiative but note the proposed regulatory language lacks any guidance on what the limited scope will entail. We urge the Commission to provide additional detail or guidance on how it intends to implement this proposal.

II. Audit Submissions

The Commission's proposal to reduce the cost of regulatory compliance for small tribal gaming operations reflects the Commission's commitment to supporting tribal economic development opportunities. The Nation operates a number of gaming operations in rural gaming locations, and welcomes any proposal that would reduce the auditing requirements and, ultimately, the compliance costs of operating a smaller gaming operation. In turn, this will ensure the viability and continued success of these smaller gaming venues which serve as an important source of revenue for the Nation and the surrounding communities.

III. Management and Sole Proprietary Interest Regulations

a. Management

We generally support the Commission's efforts to bring greater clarity to the scope and applicability of its management contract regulations. However, we have serious concerns with the proposed regulatory language, specifically, the proposed definition of "management," which has the potential to be more harmful than beneficial. We are concerned the definition is too broad and may inadvertently be interpreted to encompass activities that do not constitute management, much less gaming activities.

For instance, the proposed definition defines management as including planning or coordinating accounting systems and marketing functions, both of which can be performed without necessarily implicating management. In fact, it is not uncommon for tribal gaming operations to hire third party companies to plan marketing campaigns and coordinate promotional activities, or subject matter experts to provide technical support on gaming and gaming-related functions. If all of the foregoing services are considered management functions under the proposed definition, then a contract for any of these services would constitute a management contract requiring Commission review and approval in order to be effective.

We are also concerned the proposed definition could be interpreted to extend beyond the gaming operation to cover non-gaming related goods and services, such as construction services for a hotel or other ancillary facilities. Under 25 C.F.R. § 502.15, the term "management contract" is defined as any contract that "provides for the management of all or part of a gaming operation." The regulations further define "gaming operation" as "each economic entity that is licensed by the tribe, operates the games, receives the revenues, issues the prizes, and pays the expenses."

For some tribes, the "gaming operation" consists of a tribal corporation or enterprise established for the purpose of operating both gaming *and* non-gaming activities such as the hotel, golf course, and/or events center. In other words, the scope of a "gaming operation" is not always limited to gaming or gaming-related activities. In such instances, the proposed definition could be construed to mean that an unapproved contract providing for any of the enumerated services in a non-gaming context is void as an unlawful management contract. We do not believe this to be the intended result and are concerned that, if adopted, the proposed definition will only add to the confusion as to which contracts are subject to Commission approval.

As proposed, the definition overly complicates the analysis of whether a particular arrangement is or is not a management contract. If the intent is to clarify the scope of contracts requiring review, then we urge the Commission to exercise caution in drafting a definition that could impede the ability of tribes to obtain routine services. Otherwise, the lack of clarity and ambiguities created by the proposed definition could have the unintended consequence of increasing the number of declination letter requests received by the Commission.

To date, the Commission and federal courts have relied on the ordinary meaning of “management,” as further defined in relevant case law and NIGC bulletins, and have avoided adopting a precise definition of the term. It may well be the case that a definition of management is unnecessary and will prove unhelpful to the regulation, especially when considering that questions of management have historically been approached on a case-by-case basis. If so, we urge the Commission to delay any further consideration of the definition until a new discussion draft has been developed in consultation with tribes.

b. Sole Proprietary Interest

Similar to the Nation’s comments relating to the proposed definition of management, we have serious concerns with the broad scope of the proposed sole proprietary interest regulations. As drafted, the proposed regulation enumerates factors that are not directly related to the relevant standard, and thus creates ambiguities that could potentially infringe on the ability of tribal governments to engage in arm’s length transactions relating to their gaming operations.

In clarifying the factors relevant to the sole proprietary interest standard, the proposed regulation includes factors that extend beyond the intended meaning of the standard. As supported by the legislative history of IGRA, we believe the proper interpretation of the standard is a narrow one, limited solely to the issue of ownership. Based on relevant legislative history, the phrase “sole proprietary interest and responsibility” is intended to simply mean “owner.” In fact, the only statement made in relation to the phrase reads as follows: “[the] tribe must be the sole owner of the gaming enterprise”¹

We believe that any regulation addressing the sole proprietary interest standard should be narrowly tailored to focus on the specific harm the Commission is seeking to prevent here – that is, the possibility of a third party receiving an ownership interest in the gaming operation. Moreover, the regulation should be clear in distinguishing between issues concerning unlawful management and those regarding the tribe’s ownership/equity interest in its gaming operation.

Conclusion

In closing, we appreciate the opportunity to provide input on these important matters affecting tribal gaming. We seek your favorable consideration of our comments and look forward to working closely with the Commission as these proposals are developed further. Please do not hesitate to contact us if we can provide any additional information.

¹ S. Rep. 100-446 at 8 (Aug. 3, 1988).