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Tribal Council

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**RE: Comments on 2018 Consultation Topics**

I write on behalf of the Yocha Dehe Wintun Nation, a federally recognized Indian tribal government in Northern California ("Tribe" or "Yocha Dehe"), which appreciates the opportunity to comment on the proposed regulatory changes to the management contract review process and the definitions of "management" and "sole proprietary interest" under the Indian Gaming Regulatory Act ("IGRA"). Yocha Dehe applauds the National Indian Gaming Commission's effort and attention to address these important matters.

Yocha Dehe has significant experience in gaming, having operated a bingo hall well before IGRA's enactment, and thereafter having established a successful Class III operation, known today as the Cache Creek Casino Resort. While the Tribe manages its own casino, it did have the assistance of outside contractors when operating its bingo hall and expanding that operation into a casino. Accordingly, the Tribe has a keen interest in the NIGC's involvement in contractual oversight, and the Tribe also supports any effort to clarify and streamline the regulatory process. As explained below, however, Yocha Dehe believes the proposed regulations go too far when it comes to NIGC involvement, impeding tribal efforts to maintain ongoing relationships with existing contractors without outside interference. At the same time, the Tribe supports the regulatory effort to bring meaning to protective standards governing Indian gaming contracts. However, the Tribe respectfully submits that one of the two definitional changes — changes that are offered to bring clarity — does not go far enough.

**I. The Management Contract Review Process**

Under current NIGC regulations, after the agency has approved a management agreement, the tribe may amend it by following the streamlined procedures for approval found in 25 C.F.R. Part 535. Under this provision, background investigations relative to the amendment are required only if the third-party individuals or entities responsible for the management contract have changed, and no new business plan or updated financial information is required.

Yocha Dehe Wintun Nation

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The NIGC now seeks to change that streamlined process. Specifically, the proposed revisions would restrict the applicability of Part 535 and require that *all* extensions of an approved management agreement beyond the term limits permitted by the IGRA (five or seven years) instead be reviewed under Part 531. This regulatory provision requires extensive background investigations on all parties to a management contract and a reassessment of the agreement's financial terms. In effect, the proposed regulatory modification would eliminate amendments to management contracts and instead treat such amendments as new contracts.

The Tribe is concerned that the new regulations would result in the unnecessary review of management agreements that had long benefitted both the tribe and the management contractor. Such a change would mean that, despite a successful history of working together, the contractor would be subject to NIGC review as if it was a new party to the agreement.

In addition, the proposed provision requires that such parties undergo a lengthy and expensive background investigation, even if they were previously backgrounded. The present proposal ignores the unique contractual circumstances that exist throughout Indian gaming and discounts the importance of ongoing business relationships in favor of increased federal oversight and interference in tribal self-governance.

Yocha Dehe understands that in the initial days of Indian gaming, the NIGC's top priorities were ensuring that predatory companies did not take advantage of tribal governments and that tribes retained the primary benefits from their gaming operations. Such an approach, however, does not match the current circumstances most gaming tribes face, and certainly not where a management agreement already exists and the tribe is simply contemplating extending it. Tribes have more experience now, and are in the best position to determine whether a management agreement is fair and reasonable, and in their best interest. They are also in the best position to know whether the longstanding business relationship should continue. On the other hand, increasing interference with a tribe's longstanding business relationships runs the risk of undermining valued relationships. We see no benefit to tribes from increased federal involvement in our businesses.

## **II. Management Contract Regulations**

The IGRA provides that a tribal gaming operation may be managed by a management contractor subject to an agreement approved by the NIGC's Chairman. To assist tribes in determining whether an activity constitutes "management," the agency issued NIGC Bulletin No. 94-5 in 1994. That guidance explains that the term "management" is broad, encompassing activities such as planning, organizing, directing, coordinating, and controlling "all or part" of a gaming operation. In addition, language cited in an NIGC Office of General Counsel opinion expands upon these terms by providing examples of management activities.

To date, however, the NIGC has never issued a regulation formally defining "management." The Commission is now proposing to adopt a regulatory definition of management that tracks past NIGC interpretations. This change is to be accomplished by amending the NIGC definition regulations to incorporate previous standards applied by the NIGC when determining whether a particular activity constitutes "management."

The Tribe agrees that gaming tribes will benefit from the adoption of regulations that incorporate the NIGC's previous determinations as to what constitutes management under the IGRA. We believe such a change will reduce the uncertainty federal courts have long noted when considering this issue and provide much needed clarity to tribes in constructing protective agreements relating to the development, management and/or financing of their gaming operations.

### **III. Sole Proprietary Interest**

A principal purpose of the IGRA is to ensure an Indian tribe is the primary beneficiary of its gaming operation. To that end, the IGRA requires that tribal gaming ordinances provide that tribes have the sole proprietary interest and responsibility for the conduct of any gaming activity. In determining whether a third party holds an unlawful proprietary interest, the NIGC has considered multiple factors, including: the term of the relationship; the amount of revenue paid to the third party; and the right of control over the gaming activity provided to the third party.

The NIGC now proposes adopting a regulation identifying the factors the Chairman may consider in determining whether a contractual arrangement gives a particular contractor a proprietary interest in the gaming operation. The Tribe certainly appreciates the need to clarify the legal standards defining proprietary interest. We believe, however, that the agency's proposed regulatory approach will fail to provide the needed clarity. The NIGC here adopts the same approach that resulted in the present confusion about the meaning of this term. The proposed regulation merely identifies certain factors the NIGC Chairman may consider in determining if a contract grants a proprietary interest to the contractor. The parties, however, are left on their own to speculate as to how the Chairman might apply these factors in a particular instance, or even if the Chairman will apply them at all.

What is needed is an explicit statement of the standards to define "proprietary interest" under the IGRA. Such standards will provide needed guidance to tribes, contractors and courts facing this issue. Under the proposed amendment, proprietary interest remains malleable, construed to mean whatever a particular NIGC Chairman says it is. This precludes the development of viable legal precedents because each decision is made using subjective criteria relating to the particular circumstances of an individual matter. Respectfully, this is the wrong approach. The NIGC needs to do what it has done in connection with the definition of "management," and adopt clear and consistent standard upon which tribes can rely.

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Anthony Roberts  
Tribal Chairman