

Updated on January 30, 2018

## *NIGC Consultation Topic 1*

### *Management Contract Regulations*

#### **Proposed Action**

Following the National Indian Gaming Commission's 2017 consultation sessions, the Commission carefully reviewed the Indian Gaming Regulatory Act, NIGC regulations, and the Agency's internal procedures for management contracts. As a result of that review and based on comments received during the consultations, the Commission believes that changes to our management contract regulations will improve the efficiency of the contract review process and take necessary action to ensure consistency with IGRA's requirements regarding term limits.

#### **Background**

IGRA mandates that the Chair of the National Indian Gaming Commission may only approve a management contract if it does not exceed a term of five years, or in rare circumstances, seven years.<sup>1</sup> NIGC regulations reflect that limitation as well as the other requirements of IGRA.<sup>2</sup> Management contracts are not approved unless they comply with IGRA's requirements, including term limits.<sup>3</sup>

After management contracts have been approved, tribes and their management contractors may amend their contracts by following the streamlined procedures for review and approval of contract amendments found in 25 C.F.R. Part 535. Part 535 provides an expedited process; background investigations are only required if the third party individuals and/or entities responsible for the management contract have changed, and no new business plan or updated financial information is required. The expedited process is designed to allow the parties to sustain their relationship in a dynamic business environment while maintaining the integrity of the Chair's initial management contract review and approval by relying primarily on the Chair's initial contract approval.

The safeguards found in NIGC's management contract review process serve to assure that IGRA's primary policy goals of protecting Indian gaming from organized crime and other corrupting influences and ensuring a tribe is the primary beneficiary of its gaming operation are met. A thorough review of past practice demonstrates that parties, using Part 535's expedited process, have submitted amendments to the initially approved contracts that materially altered terms mandated by IGRA. Specifically, parties have extended the term of their approved contract by an additional one to five years resulting in a contract that, in essence, extends beyond the explicit term limits of IGRA.<sup>4</sup>

The proposed amendments clarify the regulations by explicitly noting that amendments that extend the approved management agreement beyond the term limits permitted by IGRA (five or seven years) will be reviewed under the requirements of Part 531. So, for example, if an approved contract with a five-year term is nearing the end of its term, and the parties are happy with the relationship and simply wish to extend it for an

<sup>1</sup> See 25 U.S.C. § 2711(b)(5).

<sup>2</sup> See 25 C.F.R. Parts 531 and 533.

<sup>3</sup> See 25 U.S.C. § 2711(a)-(c).

<sup>4</sup> 25 U.S.C. § 2711.

additional five years, they may do so, but it may not be reviewed as an amendment under Part 535. Because IGRA limits contract terms to five or seven years, the Chairman will review the agreement under Part 531, and the entire requisite information that 531 requires must be submitted.

For another example, though, if a management contract had a one year term, and the parties wanted to amend the agreement to extend it for an additional year, for a total term of two years, the Chair would review the amendment under part 535 because the term limit would still be within the statutory limit of five or seven years.

The Commission understands this change may affect the timing and expense of updating background investigations for making suitability determination of management contractors. Independent of the changes discussed above, the Commission received comments during the last round of consultation that the background investigation process was time-consuming and expensive. As a result, the Commission has done a thorough review of its background investigation process and is proposing changes to our internal procedures to make the process more efficient, thereby reducing the cost of investigations.

Under the new process, NIGC staff will review the background investigation applications and divide them into different investigative groups based on the level of risk. This process will allow the agency staff to focus their investigative resources on the most vital individuals and entities. This replaces a one-size-fits-all model that scrutinizes all applicants the same. For example, under the current process, the top direct financial interest goes through the same background investigation as the smallest indirect financial interest. But under the new process entities and individuals with a direct financial interest holding the highest level of risk to the tribe will have a more in-depth background investigation completed versus those entities or individuals who have an indirect financial interest.

In addition, the Commission has proposed changing the individuals and entities that are required to submit background applications under the regulations to those that have 10% or greater financial interest. This proposed change should significantly reduce the costs to the management contractors in submitting full applications on smaller investors. This proposed change will also better align the agency's requirements with other regulatory agencies. This change should not increase the risk to tribal gaming as the Commission will retain discretionary authority to conduct background investigations on the owners with even the smallest interest, who may pose a threat to the industry.

Further, the Commission is proposing a regulatory change to clarify the "reduced scope of investigation" provision. The proposed clarification should assist those that qualify with additional options to reduce the regulatory background investigation onus.

To further reduce the time and cost of background investigations, the agency will no longer use the office of Personnel Management (OPM) to conduct background checks going forward. Instead, we will process fingerprint check through the Federal Bureau of Investigation (FBI) and perform credit check through other more efficient alternatives.

Lastly, to reduce the up-front financial burden and timing concerns, the proposed amendments to the regulation removes the requirement of a deposit before the background investigations begin. Instead, the agency will bill the management contractors regularly as the investigation proceeds.

## **Tribal Input Requested**

The Commission seeks feedback on its proposed amendments to the management contracts regulations.

## *NIGC Consultation Topic 2*

### *Audit Regulations*

#### **Proposed Action:**

The Commission is considering additional amendments to 25 C.F.R. § 571.12 regarding audit submission regulations as a means of reducing the cost burden of these requirements for small or charitable gaming operations. The Commission would like to consult on developing regulatory language for proposed changes in support of tribal economic development, self-sufficiency and strong tribal governments per IGRA's mandate. The Commission is seeking feedback on any recommended changes to the annual audit regulations. See C.F.R. § 571.12.

#### **Background:**

NIGC regulation at 25 C.F.R. § 571.12 requires each gaming operation to submit audited financial statements to the NIGC on an annual basis. Submission of the annual audit report is critical to the NIGC's mission to protect the integrity of Indian gaming and provides a certain level of assurance as to the safekeeping of tribal gaming revenues. The audit report prepared and submitted on a timely basis is evidence of, among other things, the integrity of the gaming operation and, more specifically, of the adequacy of the books and records, the functioning of the internal financial controls, and the disclosure of information having a bearing on the financial statements.

In 2009, the regulation was revised to allow gaming operations with annual gross gaming revenue less than \$2 million to submit reviewed financial statements if they had otherwise complied with the requirement to submit timely audit reports for the previous three years. The intent of the 2009 revision was to relieve smaller gaming operations of the cost of an annual CPA audit. However, for small gaming operations, even the cost of a CPA review can be perceived as prohibitive and in some cases, so costly, it significantly lowers the net revenue of the operation and may deter tribes from pursuing these gaming opportunities.

In fiscal year 2016, only 80 operations earned less than \$2 million in gross gaming revenue. Of those 80, only six submitted the lesser financial statement review. Small or charitable gaming operations often produce less than \$100,000 in gross gaming revenue annually, some less than \$10,000. Contracting a CPA firm to perform an annual audit can prove cost prohibitive, and as a result, may deter tribes from pursuing these gaming opportunities.

NIGC reviewed statutes and regulations from a number of jurisdictions and agencies concerned with financial entities, including the State of Nevada, the Federal Deposit Insurance Corporation and the Department of Interior. We found no consistency in the audit requirements. For example, Nevada gaming regulations require audits of financial statements for operations grossing more than \$5 million but maintain the right to require audits, compiled statements or reviews of financial statements of those operations whose gross revenue is less than \$5 million. Interior exempts non-federal entities from their audit requirement if the entity expends less than \$750,000 per year. As NIGC considers altering its own regulations, it recognizes that there are currently 95 Tribal operations that produce less than \$3 million in gross gaming revenue. Further, the Commission is aware that tribal operations comply with the most regulations, from their own governments, as well as state and federal entities.

## Tribal Input Requested:

With this in mind, the Commission is seeking feedback and recommendations on how to amend this regulation while still ensuring we are supporting financial stability and maintaining a high level of protection of tribal gaming operations. Specifically, we want input on the following questions:

- Do you have any suggestions as to how the NIGC can improve its regulation regarding annual audits for small or charitable gaming operations?
- Do you think the \$2 million threshold (see C.F.R. § 571.12) still adequately captures the universe of small gaming operations?
- Do you find that your operation is adequately prepared for the annual audit each year? Do you think that you would benefit from training on how to prepare for a financial audit so that the audit can be performed more efficiently, saving the tribe money?

## NIGC Consultation Topic 3

### Management & Sole Proprietary Interest Regulations

#### Proposed Action

The Commission is considering developing regulations clearly setting out its standard for what constitutes “management” as well as its criteria for evaluating when a “sole proprietary interest” violation has occurred.

#### Background: Management

IGRA provides that a tribal gaming operation owned by the tribe may either be managed by the tribe or by a management contractor subject to a management contract approved by the NIGC Chair.<sup>5</sup> Management contracts not approved by the Chair are void.<sup>6</sup> This applies to any arrangement in which a contractor manages all or part of an Indian gaming operation.<sup>7</sup> To assist tribes in determining whether an activity constitutes “management,” NIGC Bulletin No. 94-5 explains that the term encompasses activities such as planning, organizing, directing, coordinating, and controlling all or part of a gaming operation.<sup>8</sup> In addition, language cited in an NIGC Office of General Counsel opinion letter expands on these terms by providing examples of management activities.<sup>9</sup>

To date, the Commission has not issued a regulation formally defining “management.” The Commission believes, however, that, in consultation with tribes, developing a regulatory definition consistent with past interpretations would help provide greater certainty to the tribal gaming industry regarding what constitutes management. The Commission notes that the Seventh Circuit has also recommended that the Commission

<sup>5</sup> See 25 U.S.C. §§ 2711(a)(1), 2710(d)(9); 25 C.F.R. § 533.1.

<sup>6</sup> 25 C.F.R. § 533.7.

<sup>7</sup> 25 C.F.R. § 502.15.

<sup>8</sup> NIGC Bulletin No. 94-5: “Approved Management Contracts v. Consulting Agreements (Unapproved Management Contracts are Void).”

<sup>9</sup> NIGC Acting General Counsel Coleman, Re: Opinion regarding pledge of gross revenue from gaming operations (January 23, 2009).

provide more certain guidance.<sup>10</sup> To that end, the enclosed Management – Discussion Draft incorporates the Commission’s past descriptions of management for consideration as an addition to the Commission’s regulatory definitions.

## Background: Sole Proprietary Interest

A stated purpose of IGRA is “to ensure that the Indian tribe is the primary beneficiary of the gaming operation.”<sup>11</sup> One way IGRA seeks to serve this purpose is to require that tribal gaming ordinances provide that tribes have the sole proprietary interest and responsibility for the conduct of any gaming activity unless the gaming activity is individually owned.<sup>12</sup> To determine whether a third party has received a proprietary interest in a tribal gaming operation in violation of the SPI mandate, the NIGC considers “1) the term of the relationship; 2) the amount of revenue paid to the third party; and 3) the right of control over the gaming activity provided to the third party.”<sup>13</sup>

The Commission has previously consulted on developing guidance or regulations concerning SPI in 2008<sup>14</sup> and 2010.<sup>15</sup> The Commission also notes that several courts have had the opportunity to consider and discuss SPI in the intervening years, noting and upholding NIGC’s formulation of the criteria to evaluate for SPI violations.<sup>16</sup> In addition, the Department of Justice has articulated the position of the United States in litigation.<sup>17</sup> The Commission believes that an SPI regulation consistent with past NIGC enforcement actions and litigation would provide greater certainty to the tribal gaming industry regarding what constitutes a violation of the SPI mandate. To that end, the enclosed Sole Proprietary Interest – Discussion Draft incorporates these interpretations for consideration as an addition to the Commission’s compliance regulations.

## Tribal Input Requested

The Commission seeks feedback on the enclosed Discussion Drafts for “sole proprietary interest” and “management.”

<sup>10</sup> *Wells Fargo Bank, Nat. Ass'n v. Lake of the Torches Econ. Dev. Corp.*, 658 F.3d 684, 697 n. 13 (7th Cir. 2011).

<sup>11</sup> 25 U.S.C. § 2702(2).

<sup>12</sup> 25 U.S.C. § 2710(b)(2)(A). An individually owned gaming operation must provide 60% of its net revenue to the tribe. 25 U.S.C. § 2710(b)(4)(B)(i)(III).

<sup>13</sup> *See, e.g.*, NOV-11-02.

<sup>14</sup> NIGC Chairman Hogen, Dear Tribal Leader (June 13, 2008).

<sup>15</sup> Notice of Inquiry and Request for Information; Notice of Consultation, 75 FR 70680 (November 18, 2010).

<sup>16</sup> *See, e.g.*, *City of Duluth v. Fond du Lac Band of Lake Superior Chippewa*, 830 F.Supp.2d 712 (D. Minn. 2011); *City of Duluth v. Fond du Lac Band of Lake Superior Chippewa*, 785 F.3d 1207 (8th Cir. 2015); *Bettor Racing, Inc. v. National Indian Gaming Com'n*, 47 F.Supp.3d 912 (D. S.D. 2014).

<sup>17</sup> *See* BETTOR RACING, INC. and J. Randy Gallo, Plaintiffs-Appellants, v. NATIONAL INDIAN GAMING COMMISSION, Defendant-Appellee, Flandreau Santee Sioux Tribe, Intervenor-Defendant., 2015 WL 1956293 (C.A.8).