



May 21, 2018

Jonodev Chaudhuri, Chairman
National Indian Gaming Commission
1849 C Street Northwest
Washington, DC 20240

Via Electronic & U.S. Mail

ATTN: Comments@nigc.gov

Re: Proposed Changes to Management Contracts Review Process

Dear Chairman Chaudhuri:

The Oklahoma Indian Gaming Association ("OIGA") offer the following comments in response to the National Indian Gaming Commission ("NIGC") call for comments concerning the Management Contract review process. Because that process involves background investigations of the tribally-selected contractor and certain of those associated with the contractor, OIGA is including comments on the background investigations.

A. Tribal Sovereignty Inherent in Management Contract.

We view the process through the eyes of tribal sovereignty. When a sovereign Indian Nation or tribe executes an agreement that constitutes a management contract under the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 et seq. ("IGRA"), the Nation or tribe is engaged in a sovereign act relative to its tribal governmental gaming operation. The tribe has made its own decision as to what it believes is in its best interest. By doing so, the tribe has determined with whom it wants to contract and on what terms.

While IGRA requires management contract approval by the NIGC Chairman,¹ nothing in IGRA suggests that the Chairman, and his subordinates, should perform the approval process in a way that diminishes respect for tribal governmental decision-making or impose the general will of the NIGC as to whether the tribe should have a management contractor, who it should be, or whether terms beyond those required by statute should be included. Because of the government to government relationship between tribes and the NIGC's consistently announce support by the NIGC of tribal self-determination, the NIGC approval process should be designed to facilitate, consistent with IGRA, a tribally-made contract rather than impede it.

B. The Approval Process for Management Contract Terms.

¹ 25 U.S.C. § 2710(d)(8)(D) and § 2711 (a)(1).

The process to further that tribal sovereignty should begin with the presumption that the tribe's selection of a management contractor and the terms of the tribe's relationship with the contractor are appropriate exercises of tribal self-government. IGRA mandates what a management contract must contain.² If the management contract meets those statutory requirements, and does not violate a provision of IGRA, the terms should be approved. No other terms should be imposed by the NIGC as a condition of statutory approval.³

The OIGA is concerned about the time allowed by statute for the NIGC Chairman to approve management contracts. 270 appears to be excessive. Management contracts remain an important option for successful tribal governmental gaming. The failure to promptly approve a management contract can result in a tribe gaming for years without needed management expertise and support, to the detriment of tribal programs dependent of gaming revenue. Accordingly, the approval process should be streamlined to address the statutory requirements for the management contract. While not statutorily required, ninety days should be ample time to review and approve contractual terms. A shorter period helps to prevent unnecessary delay used to further prejudice bias, prejudice and arbitrary and capricious action.

C. Background Checks on Certain Management Contract Participants.

Those involved in certain capacities with a management contract will no doubt be required to be licensed by the tribal gaming regulator. The NIGC should start with the presumption of their suitability. Such a presumption is a further, and appropriate, endorsement of tribal sovereignty. That presumption should be reflected in a streamlined background investigation that should be concluded within 60 days.

NIGC investigator and staff bias, prejudice, arbitrary and capricious behavior and individual views as to whether a management contract is best for a tribe have no place in the background investigation process. Unfortunately, nothing in the current NIGC regulations prevent such inappropriate regulatory behavior or provide a mechanism for those being investigated to challenge such behavior or obtain review of it.

Specifically, nothing prevents the use of an investigating process to drive management contractors out of contracts. NIGC regulation 25 CFR 537.1 b(3) authorizes the Chairman to ask any question those subject to investigation without limitation as to scope, relevancy, burdensomeness or number of questions. That absence of limitation provides ample opportunity for abuse of the investigation to achieve improper purposes.⁴ Equally significant, if an applicant refuses to answer an abuse question posed for an improper purpose, the NIGC's own regulation 25 C.F.R. § 533.6 (b)(1)(iv) requires the Chairman disapproval of the management contract.

² 25 U.S.C. § 2711 (b).

³ The current additional, non-statutory requirements of 25 C.F.R. 531.1(b) could be listed as recommended in a guidance bullet containing explanation for each recommendation.

⁴ The statutory authorization for Chairman questions at least limits those questions to "those the Chairman may propound in accordance with his responsibilities under this section" [25 U.S.C. § 2711 (a)(1)(c)(2)], rather than the unlimited scope of the regulation.

Accordingly, OIGA recommends that NIGC adopt scope, relevancy, burdensomeness and numerical limitations on questions from the NIGC during a background investigation. Likewise, requests for documents beyond those identified in the current regulation should be subject to similar limitations. Because the applicant must pay the investigation's costs, the chance to spend an applicant out of process through incessant, expensive document requests and written questions is real and inappropriate. In particular, a NIGC background investigation should not devalue into a surrogate IRS audit or a GAAP audit of financial statements, neither of which are in the NIGC's statutory remit or subject matter expertise. Further, the NIGC should provide by rule a process for applicants to object to document request and questions and for impartial review of such objections if denied.

Background investigations conducted in good faith and without an improper purpose should proceed expeditiously. OIGA suggests a 60-day period for completion of such investigations for those already licensed by tribal gaming regulators and a 90-day period for others. That time period avoids investigations from taking on lives of their own, recognizes that a tribe has already approved the management contract and helps prevent the opportunity for regulatory abuse. A properly staffed, trained, and supervised NIGC employed work force should be able to meet such time frames, as do many tribes in conducting licensing investigation.

These proposed limitations recognize and advance tribal sovereignty, promote the presumption that tribes have properly selected and vetted their management contractor business partners, help stymie federal paternalism, and go a long way to preventing federal investigatory abuse concerning the operational decisions for tribes with deep operational experience.