

SENECA - CAYUGA NATION

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National Indian Gaming Commission
Attn: Vannice Doulou
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Re: Comments on Proposed Changes to Management Contract Process and Draft
Regulations on Management and Sole Proprietary Interest Definitions

Dear Commissioners:

Please find attached the Seneca-Cayuga Nation's comments regarding the above matter. I would like to thank the Commission for their consideration and outreach regarding these important matters. I respectfully urge that the Commission also provide additional time to affected parties in order to more thoroughly address the issues discussed in the Commission's draft regulations.

Thank you,



William Fisher, Chief
Seneca-Cayuga Nation

**COMMENTS OF THE SENECA-CAYUGA NATION
NIGC CONSULTATION TOPICS CONTAINED IN THE
DECEMBER 22, 2017 DEAR TRIBAL LEADER LETTER**

The Seneca-Cayuga Nation (hereinafter "Nation") welcomes the opportunity to provide its 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. This Commission's work in outreach and consultation with tribal governments is appreciated.

Tribal engagement is critical to ensuring that consultation is meaningful and consistent with the special government-to-government relationship between tribal and federal governments. Meaningful consultation must necessarily include adequate time for tribal governments to understand and consider the implications of a proposed federal action. We are concerned that the timeframe for consultation proposed here is insufficient to allow thoughtful well considered tribal input into proposed regulations that will have significant impact for tribal gaming. The Nation requests that the Commission schedule additional consultation sessions during major Indian gaming related events, such as the National Indian Gaming Association's upcoming tradeshow, to maximize attendance and opportunities for tribal representatives to provide feedback. Additionally, we respectfully request the NIGC to extend the timeframe for consultation and corresponding comment period and, to the extent possible, schedule additional consultations. This is especially important given the scope of the draft regulations and the far-reaching impacts they could have on virtually all aspects of gaming operations.

I. Proposed Changes to Management Contract Process

The Nation appreciates the Commission's attention on the important topic of management contracting. In its 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. Ostensibly such an amendment will fulfill a dual purpose: first, to ensure compliance with mandatory term limits for management contracts under IGRA, and second, to prevent management contractors from foregoing the background investigation and suitability requirements of 25 C.F.R. Part 537.

While we understand the Commission's compliance concerns with respect to the term restrictions under IGRA, we note that IGRA does not explicitly require a full review of the entire management contract for renewals. Though IGRA requires approval of term provisions, it is silent on the issue of whether renewals exceeding the permitted five or seven-year term should be treated as new contract submissions or amendments. Given that no substantive revisions would be contemplated in a merely extended agreement, we believe it would be reasonable to

interpret IGRA's mandate as permitting the review of term extensions as a simple amendment rather than an entirely new contract submission.

II. Audit Submissions

The Nation appreciates the Commission's continued support of tribal economic development and the Commission's consideration of regulatory amendments that will reduce the cost of regulatory compliance for small tribal gaming operations. We are appreciative of any proposal that would reduce the auditing requirements and, ultimately, the regulatory burden and costs associate therewith. The Commission's actions will ensure the viability and continued success of smaller gaming venues which serve as an important source of revenue for smaller tribes and their surrounding communities. While the Nation largely approves of the Commission's efforts in this matter, we would urge that the threshold be raised from \$2 million to \$4 million, allowing a greater number of tribal gaming operations to take advantage of the reduced auditing requirements.

III. Management and Sole Proprietary Interest Regulations

a. Management

Ensuring that that a tribe has not entered into an unapproved management relationship is one of the many important monitoring and enforcement roles of the Commission, and the Nation believes this area of the IGRA is important to the overall integrity of Indian government gaming. The proposed regulation changes, however, are problematic in two ways. First, the proposed regulations fail to recognize the fact intensive analysis necessary to determine whether an unapproved management relationship exists. Second, the proposed regulations expand the Commission's authority relating to tribal government gaming into the peripheral non-gaming areas sometimes associated with gaming operations.

Determining whether an unapproved management relationship exists between a tribe and a third-party is generally requires a fact intensive analysis. The Commission has conceded this point during the consultation process. Notably, however, an unapproved management relationship may, in some instances, be so obvious that the inquiry is brief. Given the foregoing, it is incumbent upon the Commission to recognize that the Commission, nor any court, could not come up with an exhaustive list of what constitutes management of all or part of a gaming operation. Further, the proposed regulations provide that the Commission could potentially rely on only *one* listed factor when making a determination under this provision. This is problematic and fails to acknowledge the fact intensive analysis that will drive a Commission investigation into such matters.

Similarly, the Commission definition of management unreasonably expands the definition of a Gaming Operation. Gaming Operation is defined by 25 CFR §502.10 (*in part*) as "*each economic entity that is licensed by a tribe, operates the games, receives the revenues, issues the prizes, and pays the expenses.*" Unless the management activity takes place with regard to all or any part of the "Gaming Operation," there has been no violation of IGRA. Key to that inquiry is what activity constitutes a Gaming Operation. While some of the items listed in

proposed 25 CFR §502.25(2) are typically associated solely with a gaming operation, some of them are not. The Nation believes that the better approach is to rely on published guidance as opposed to the hard and fast list of factors in the proposed regulations, and the Commission has failed to demonstrate that the proposed regulations are necessary to enforce against or act on unapproved management relationships.

Moreover, the Commission has indicated that promulgating clear standards for what is and is not management will provide clarity and potentially reduce the number of "declination letter requests" received by the Commission. Because of the concerns that the Nation has regarding the proposed regulations, the Nation believes that the Commission will continue to receive declination letter requests. In fact, as discussed below, the inadvertent effect of expanding the definition of a Gaming Operation will likely cause unnecessary ambiguity for current operators and vendors resulting in an influx of said letters.

In our view the Commission has the necessary tools and definitions in place to act on unapproved management relationships without the necessity of regulations that may have grave consequences to smaller operations. Smaller tribes, which are likely in greater need of third party assistance or advice in some aspects of their gaming operations will be disadvantaged by the proposed regulation. 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. The Commission has done an effective job in approaching questions of management in the past, and we believe that addressing contracts on a case by case basis under existing regulations may be the most appropriate way to address the issue in the future. We urge the NIGC to delay any further consideration of the definition until a new discussion draft has been developed in consultation with tribes.

b. Sole Proprietary Interest

Like 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. Like the management definition discussed above, the Commission's proposal would deviate from the existing protocol of conducting a fact-intensive inquiry to identify violations of the sole proprietary interest requirement.

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 and encompass management functions. We believe the proper interpretation of the standard is a narrow one, limited solely to the issue of ownership. We believe that the phrase "sole proprietary interest and responsibility" is intended to reflect its ordinary meaning, simply ownership of the gaming operation. The definition proposed by the Commission seems to entail activities that would fall within management. The Commission should clearly delineate and distinguish the factors relating to management and proprietary interest to avoid a duplicative regulatory scheme.

CONCLUSION

In conclusion, we again extend our appreciation to the Commission for its efforts toward meaningful consultation on regulations that are of vital importance to Indian gaming. The Nation also re-iterates our request that the Commission grant additional time for tribes to provide further written feedback on the Commission's proposals, and that the Commission consider scheduling further consultations at upcoming tribal gaming related events. Please do not hesitate to contact us if we can provide any additional information.