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VIA ELECTRONIC MAIL

National Indian Gaming Commission
Attn: Vannice Doulou
1849 C Street, NW
Mailstop #1621
Washington, DC 20240
Vannice_Doulou@nigc.gov

Re: Proposed Regulations 25 C.F.R. Parts 502, 573

Dear Ms. Doulou:

I am a partner at Sheppard Mullin Richter & Hampton LLP ("Sheppard Mullin") and co-chair of its Tribal Industry Group. I write today on behalf of Sheppard Mullin's finance practitioners to comment on the Sole Proprietary Interest Regulation Discussion Draft dated January 18, 2018 (the "SPI Discussion Draft") and the Management Definitions Regulation Discussion Draft dated January 19, 2018 (the "Management Definitions Discussion Draft," and with the SPI Discussion Draft, the "Discussion Drafts"), which were the subject of the recent Tribal Consultations held by the National Indian Gaming Commission ("NIGC").

Sheppard Mullin is a full service law firm and our finance practitioners represent Tribes, subordinate Tribal entities, state and federally regulated banks, investment banks and private equity funds active in extending financing to Tribes and their gaming operations. We are familiar with and have represented clients participating in the NIGC General Counsel's "declination letter" process, which became widely used by commercial financial institutions after the decision in *Wells Fargo, N.A., v. Lake of the Torches Economic Development Corporation,* 677 F. Supp.2d 1056 (W.D. Wis. 2010) *aff'd in part* 658 F.3d 684 (7th Cir. 2011) (the "Lake of the Torches case").

We have reviewed the Discussion Drafts and understand the NIGC's goal is to provide greater certainty to the Tribal gaming industry by defining the term "management" and enumerating factors that the agency will use to determine whether regulated parties have violated the sole proprietary interest mandate of the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 et seq. ("IGRA"). While we agree with this underlying goal of creating greater certainty, we are concerned that if adopted as proposed the regulations could have unintended, material negative consequences on the availability of conventional bank and bond financing for Tribes.

Management Definitions Discussion Draft

The proposed definitions of management and examples of the activities that would constitute management of a gaming operation follow, in large part, the "IGRA limitations language" initially set forth by then-NIGC General Counsel Penny J. Coleman in a letter dated January 23, 2009, posted on the NIGC website (the "January 2009 Letter") and further developed after the Lake of the Torches case.[1] The Management Definitions Discussion Draft departs from the IGRA limitations language, however, in at least two significant ways relevant to the Tribal gaming finance industry.

First, Section 2 of the proposed regulation identifies planning, organizing, directing, coordinating, or controlling "(k) the supervision of construction or improvements" as an example of management. This factor is not in the IGRA limitations language and if adopted as proposed could be interpreted to prohibit Tribal financings from including construction controls that are standard in any construction financing structure. Commercial construction financing arrangements, whether in the form of credit agreements or bond financings, usually include customary construction controls that address the disbursement of loan or note proceeds used for the construction of a project. These controls vary in detail but may include provisions such as: (1) review of all construction documents and budgets by a third-party construction consultant for technical specifications and sufficiency; (2) submittal of construction-related invoices to a third-party construction consultant to verify requested construction costs before loan or note proceeds are disbursed to pay such invoices; (3) inspections of a construction project by a construction consultant or inspector; or (4) submittal of certifications by a borrower or issuer to ensure that a project is on budget and that the borrower or issuer has sufficient funds to complete the project. These types of construction controls are designed to protect creditors and investors from continuing to advance financing toward a project that is not actually being constructed or that will not be able to be successfully completed. Such construction controls do not include any controls on the operation of a project or facility.[2] We are concerned that if the Management Definitions Discussion Draft is implemented as currently drafted, construction financing options and terms for new and expanded Tribal gaming projects could be negatively impacted.

Second, the proposed Section 2 does not include the following IGRA limitations language disclaimer set forth in the January 2009 Letter, which has been replicated by the NIGC in declination letters and relied upon by financial institutions following the Lake of the Torches case:

> provided, however, that upon the occurrence of a default or an event of default, a secured party will not be in violation of the foregoing restrictions solely because it: (i) enforces compliance with any term in any loan document that does not require the gaming operations to be subject to any third-party decision-making as to any Management Activities; (ii) requires that all or any portion of the revenues

[1] See Letter from Penny J. Coleman dated as of February 22, 2010 (the "2010 Declination Letter"), posted on the NIGC website.

[2] Construction controls have been included in credit documents reviewed by the Office of the General Counsel for which declination opinion letters have issued.

securing the loans be applied to satisfy valid terms of the loan documents; or (iii) otherwise forecloses on all or any portion of the collateral securing the obligations.[3]

The omission of the disclaimer language is likely to create further uncertainty in the Tribal gaming finance industry. As set forth in the January 2009 Letter, the intent of the disclaimer language was to allow creditors to have a security interest in the personal property of gaming operations, including gaming revenues, so long as such creditors agreed that in exercising remedies the creditors would not engage in prohibited management activities. If the concepts in the disclaimer language are not incorporated somehow into the definition of the term "management," Sheppard Mullin is concerned that financing options available to Tribes could be further limited.

Additionally, we note that the Management Definitions Discussion Draft includes two additional categories of management activities not included in the above-referenced IGRA limitations language: Section 2 (a), "the daily operations," and (b), "the maintenance of a facility or facilities." As drafted, such provisions are vague and overly broad, could be construed to include other customary financing terms and also could negatively impact the ability of Tribes to effectively contract for routine services in connection with the operation of their gaming facilities.

SPI Discussion Draft

As currently proposed, the SPI Discussion Draft language could negatively impact at least two customary provisions in Tribal financing documents. First, Section a) subparagraph 7 states that the Chair may consider the provision or assignment of Tribal rights to a third party, including but not limited to: "**a. the third party's right to access to records or financial information regarding the gaming operation or part thereof**;" and "**c. the grant of a security interest in the gaming operation**" (emphasis added) as factors to determine whether a regulated party has violated IGRA's sole proprietary interest mandate.

In Tribal gaming finance, Tribal borrowers customarily agree to provide specific financial statements and audits of the gaming operation to lenders or noteholders on a specified schedule and agree to allow creditors the ability to review or inspect other financial records and information upon the creditors' request (often subject to Tribal gaming laws and/or supervision by a Tribe's gaming commission). Receiving copies of or having inspection rights with respect to certain financial information is important to the ability of creditors to lend money to any borrower. Additionally, financial institutions are required under federal law and regulations to obtain certain financial information from their borrowers and ensure that borrowers in the gaming industry are compliant with anti-money laundering laws and regulations.

In addition, creditors customarily request and obtain a security interest in personal property collateral of a gaming operation, including security interests in deposit accounts into which gaming revenues are deposited. The broad language and construct of the SPI Discussion Draft could be interpreted as prohibiting or severely limiting the inclusion of these provisions in Tribal gaming finance agreements. Some of these concerns could be addressed with certain

[3] See the 2010 Declination Letter and other declination letters posted on the NIGC website.

modifications to the provisions. For example, Section a), subparagraph 7a. could be revised to read "the third party's exclusive control of records . . . . ." rather than "third party's right to access records." Further, Section a), subparagraph 7c. could be qualified with a proviso stating that the granting of a security interest in a gaming operation would be prohibited if such security interest would permit a party other than the relevant Tribe the ability to actually operate the gaming operation.

Finally, the language in Section a) states that the Chair can consider "a single factor" in determining whether the sole proprietary interest mandate has been violated, and Section b) states that the Chair can take into consideration "other factors not listed in a)" in making the determination. While presumably intended to provide flexibility and discretion to the Chair, these provisions have the effect of creating further uncertainty for Tribes and creditors and, in our view, would not result in fewer declination letter requests but in more.

We understand that these Discussion Drafts are intended to reflect legal developments, the NIGC's current practices and its past enforcement actions. When viewed from a Tribal gaming finance perspective, however, the language as drafted has unintended consequences that could be detrimental to Tribal borrowers and Tribal economic development. Sheppard Mullin believes, however, that language limiting the scope and reach of these provisions or excepting specified types of transactions could easily be added to achieve the agency's goal of clarity and certainty. We would be happy to further submit our suggested edits to the Discussion Drafts if helpful to the NIGC. We also suggest that NIGC consider additional consultations or listening sessions with Tribes and the finance community during upcoming spring conferences and events in the Tribal gaming industry.

We appreciate the opportunity to comment on the Discussion Drafts. If more information is needed, please feel free to contact me at 212-634-3051 or any one of the firm's other attorneys with whom you may be currently working with in the context of a declination letter request or otherwise.

Sincerely,

Christine L. Swanick
for SHEPPARD, MULLIN, RICHTER & HAMPTON LLP