



Rincon Band of Luiseño Indians

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VIA E-MAIL ONLY
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February 28, 2018

COMMENTS OF THE RINCON BAND OF LUISEÑO INDIANS NIGC NOTICE OF CONSULTATION

Dear Chairman Chaudhuri:

This letter is submitted on behalf of the Rincon Band of Luiseno Indians (Tribe), a federally-recognized and sovereign tribal government. The Tribe was asked to submit comments responsive to the NIGC notice of consultation, dated December 22, 2017, on the topics of proposed changes to management contracts regulations, audit submissions and sole proprietary interest regulations. The comments below address how the first topic harms the Tribe's interests as a sovereign government seeking to protect our gaming resources for present and future uses.

Topic 1 - Management Contract Regulations

Beginning with the NIGC Strategic Plan 2018-2022, which presumably informs the work NIGC undertakes, and the correspondence circulated to tribal leaders from 2016 to present, the NIGC presents a series of vague and unrelated concerns about the expedited approval process under Part 535 to extend the term of a management agreement before it asserts that the decades-long practice violates the IGRA. With very little information, we fail to see any connection between this proposal and the consultation record or the NIGC Strategic Plan. Specifically, how is the goal of operational excellence, to deliver solutions and services in an efficient and effective manner to benefit tribal stakeholders, promoted by changing a routine process in advance of establishing a transparent and credible basis to support the need for this change?

Moving onto the consultation record, in its November 2016 Notice of Consultation for 2017, NIGC identified management contract regulations and procedures as a topic for consultation to improve the NIGC's efficiency in processing management agreements, including changes to the regulations. At this time, NIGC did not identify the IGRA term provision or its past practices of permitting Part 535 expedited approval process as a concern. In December 2016, NIGC began to elaborate on the need for improved efficiency in processing management agreements indicating that "there has been a significant increase in management agreement submissions" in requesting feedback on any recommended changes to the management contract and background investigation regulations. In December 2017, NIGC finally announced that the Chair may only approve a management contract if it does not exceed a term of 5 years, or in rare instances, 7 years – and warned that the Chair's past willingness to approve extensions of the term has allowed

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COMMENTS ON NIGC NOTICE OF CONSULTATION

FEBRUARY 28, 2018

Page 2 of 4

management companies to claim that the background investigations and suitability requirements are not applicable. This is the first and only time to our knowledge that the NIGC interpreted a problem that needed to be solved. This interpretation was quickly followed by NIGC's conclusion, January 30, 2018, that

“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 the IGRA.”

This record substantiating the basis for these changes is devoid of any information that NIGC has engaged in any informal or formal analysis of the efficacy and implications of this proposal to tribes with management contracts. There is no evidence of empirical or anecdotal data to support the need for this change. Thus far, the NIGC's record of comments and transcripts show that Tribal Leader feedback on this proposal has been limited to concerns over: (1) NIGC's lack of transparency and unpredictability in timing of management contract approval; (2) NIGC's delay in completing background investigations without firm timelines; and (3) outright objection to NIGC's arbitrary changes to existing business practices. There has been no meaningful dialogue between the NIGC and tribal governments with management agreements who will be most affected by this change. The consultation record substantiating the need for this change is scant at best. Nevertheless, on January 30, 2018, the NIGC published its conclusion that consecutive amendments to management agreements, using the Part 535 process, violate the term provision of the IGRA.

The Tribe views this proposal as an abrupt, arbitrary and incorrect interpretation of the IGRA that will surely injure the Tribe's interests without helpful information from the NIGC regarding the underlying need to overhaul the management agreement amendment process under Part 535. There is no clear relationship between this proposal and the NIGC Strategic Plan, or evidence of meaningful consultation with the Tribe that makes this proposal the logical solution in the best interests of the Tribe. Given the consultation record, we do not understand how the elimination of a decades-long, routine business practice of the NIGC to permit extensions of management agreement terms under Part 535 is in the best interest of the Tribe, and the trust responsibility.

In our opinion, this proposal is not legally required by the IGRA and may be a misguided paternalistic approach that, if adopted, will certainly expose the Tribe to greater economic burdens, uncertainty and risk in its business dealings with its management company and the NIGC. Congress established term limits out of concern that some management contracts in existence before the IGRA was enacted were clearly unconscionable. Sen. Rep. 100-466, p.15. The IGRA and its legislative history lack any suggestion that Congress intended to prohibit a mutually-beneficial managerial relationships from continuing beyond a five-year term. More importantly, Congress assured tribes that IGRA would “not be construed, either inside or outside the field of

COMMENTS ON NIGC NOTICE OF CONSULTATION

FEBRUARY 28, 2018

Page 3 of 4

gaming, as a derogation of the tribes' right to govern themselves and to attain economic self-sufficiency" and that the statute would always be construed in the tribes' best interests. S. Rep. No 100-446, at 36 (statement of Sen. Evans); *Rincon Band of Luiseño Mission Indians of Rincon Reservation v. Schwarzenegger*, 602 F.3d 1019, 1027 (9th Cir. 2010).

Until now, the NIGC has recognized and deferred to the independent judgment of the Tribe to determine their business partners, the conditions and duration of their relationship. The IGRA gives sovereign tribal governments the right to determine whether to continue a managerial relationship or change direction, if it so chooses, provided that the Tribe is not bound to a manager beyond a five-year period without special circumstances -- and in that case, no more than seven.

This change would impose greater costs on the Tribe, and increase risk and uncertainty in its business dealings with third parties. If approved, what was previously a low-cost two-page amendment to extend the term and maintain a five-year relationship under Part 535 will now become a voluminous new contract. There will undoubtedly be unintended consequences for the Tribe if it exercises its option to maintain a mutually beneficial relationship beyond a five-year term. First, eliminating amendments to extend the term under Part 535 will mean that all previously negotiated and approved provisions may be subject to renegotiation and approval even if the only changed provision of the new contract is the term. The NIGC may approve certain provisions at one point in time but is under no obligation to subsequently re-approve an unchanged provision at a later date. This same uncertainty and risk will exist in the Tribe's dealings with its business partner. Previously negotiated provisions may be subject to renegotiation – everything is on the table, again. Second, if this proposal is approved, it will be very difficult for the Tribe to protect its interests in the uninterrupted continuity of its gaming operations when it seeks NIGC approval of a new contract under Part 531, specifically, the segue and timing of NIGC approval of a new contract at the end of the existing term of the agreement. The consultation record and proposed change do not discuss or answer these concerns.

The only part of this proposal that the Tribe agrees with is streamlining of background investigations and suitability determinations. The NIGC has not established a practical or legal basis for its assertion that the Tribe has submitted amendments to its initially approved contract that materially altered terms mandated by IGRA, resulting in a contract that extends beyond the explicit term limits of the IGRA. The Tribe strongly disagrees with this statement. At no time, ever, has the Tribe's management agreement violated the term limits of the IGRA. If the NIGC's past willingness to approve extensions of the term allows management companies to claim that background investigations and suitability requirements are not applicable, then propose a solution to that but also adhere to the trust responsibility and the statutory duty to protect the Tribe's rights to maintain a mutually-beneficial management relationship without the added uncertainty and risk we have noted. Our response to the NIGC's concern over a significant uptick in management agreement submissions is to request that the NIGC propose solutions that deliver efficient and effective services that benefit tribal stakeholders by improving routine processes and increasing

COMMENTS ON NIGC NOTICE OF CONSULTATION

FEBRUARY 28, 2018

Page 4 of 4

transparency and accountability – consistent with its Strategic Plan. The elimination of a decades-long routine past practice under Part 535 is not in the best interest of the Tribe and will definitely injure our interests in Rincon gaming resources for this and future generations.

Executive Order 13175 mandates meaningful consultation of proposed regulations “that have substantial direct effects on one or more tribes, on the relationship between the United States and Indian tribes, or on the distribution of power and responsibilities between the United States and Indian tribes.” Implementation of this proposal without further consultation implicates all three concerns of the Executive Order. The NIGC’s interpretation with regard to the expedited approval process under Part 535 negatively impacts tribal sovereignty by changing a practice that has existed for years and ignores the congressional assurance that the IGRA would always be construed in the best interest of tribes. Finally, without an opportunity for further consultation, this proposal could be viewed as a unilateral decision that redistributes the balance of power between tribes and the United States through the diminishment of federal protections previously afforded to our tribal gaming resources.

Given the extreme and negative implications that this proposal would have on the Tribe, we request that the NIGC postpone any decision on this proposal until such time as the Tribe, and all other similarly situated who would be affected by this change, have a formal government-to-government consultation on this specific topic. Asking the Tribe to provide written comments to the NIGC’s ever-changing rationale supportive of this proposal cannot replace meaningful consultation. We look forward to hearing from the NIGC to schedule our consultation.

Respectfully submitted,

RINCON BAND OF LUISEÑO INDIANS



Bo Mazzetti
Tribal Chairman