



Miami Tribe of Oklahoma

3410 P St. NW, Miami, OK 74354 • P.O. Box 1326, Miami, OK 74355

Ph: (918) 541-1300 • Fax: (918) 542-7260

www.miamination.com



March 30, 2018

Mr. Jonodev Chaudhuri, Chairman
National Indian Gaming Commission
1849 C Street NW
Mailstop #1621
Washington, DC 20240

Re: Comments on 2018 Consultation Topics

Dear Chairman Chaudhuri:

On behalf of the Miami Tribe of Oklahoma, we are writing to you to request the NIGC defer publication of any proposed rules and issue a second set of *Discussion Drafts* of the proposed regulatory changes to 25 C.F.R. Part 531 and 571.12 based on the feedback it received during the first round of consultations. We would further seek a discussion draft of any contemplated regulatory changes concerning the proposed definition for the term "Management" and regulations pertaining to "Sole Proprietary Interest." Release of a second set of Discussion Drafts should immediately be followed by a 45-day NIGC listening session tour to receive feedback on the proposed new regulations.

The NIGC's efforts to reach out and gather tribal input on these important topics we believe was rushed at the beginning of the New Year and Tribes have not had adequate engagement with the NIGC on these issues. Text of the proposed changes were released on January 18, 2018, less than one week before the first scheduled consultation session on January 23, 2018. This allowed less than one week of analysis by Tribal Governments and Tribal Gaming Regulatory bodies.

Over the course of the NIGC's one (1) month consultation schedule, tribal governments simply did not have enough time to ensure that the consultations had adequate attendance to result in constructive engagement.

Therefore, at a minimum, we urge the NIGC to release a set of Discussion Drafts of the proposed regulatory changes. A listening and comment period must naturally follow before any proposed rule(s) are published in the Federal Register.

Additionally, to the extent possible, any additional consultation/listening sessions should be scheduled around Indian gaming related events, such as the upcoming Indian Gaming Tradeshow & Convention in Las Vegas, Nevada, April 17-20, and NCAI's Mid-Year Conference on June 4th in Kansas City.

Please find below the Miami Tribe's comments on the proposed regulatory changes. We hope the NIGC incorporates these recommendations into a Discussion Draft version of the proposed regulations.

I. Proposed Changes to Management Contract Process

We appreciate the NIGC's intent to bring greater efficiency to the management contract process, particularly as this has been a longstanding area of concern. However, we have some concerns with the proposal to treat any extension of a management contract term beyond the permitted five or seven years as a brand new submission rather than an amendment. We are particularly concerned with the lack of assurance that any such review will be expedited or somehow move through the process faster than a new management contract whose terms have never been reviewed by the NIGC. In our view, this proposal is unnecessary and, without amendment, could have the unintended consequence of disrupting the management relationship to the detriment of the tribe, especially if NIGC approval is not secured in time before the contract is terminated.

Based on the December 22, 2017 Letter, we understand that part of the underlying concern here is that by treating term extensions as amendments, management companies have tried to circumvent the background investigation and suitability requirements in 25 C.F.R. Part 537. The NIGC has also indicated that the proposed change is needed to maintain compliance IGRA's mandate with respect to term limits.

But nothing in IGRA explicitly requires the NIGC to repeat the entire management contract review process when the only change is to the duration of the contract term. All IGRA requires is that the term – whether it be the initial term or any extension thereafter – be approved by the NIGC. Unless there are significant revisions to a previously approved management contract, a lengthy review of the entirety of the management contract not only seems unnecessary, but duplicative of the existing review requirements for new submissions and subsequent amendments. We are not clear as to the

benefit of treating what is simply a renewal of a previously approved management contract as an original submission.

We are particularly concerned about the proposal to disallow renewals of management contracts and the requirement that management contracts be offered for review as new submissions. If the NIGC's goal is to maintain updated suitability determinations, we believe there is a more efficient and cost-effective means of achieving the same desired outcome. Instead of requiring term extensions to undergo the same review and approval process as new management contract submissions, one alternative would be to instead impose a renewal process focused on the background investigation requirements in 25 C.F.R. Part 537, bearing in mind that tribal gaming regulatory agencies typically require license renewals on an annual or bi-annual basis.

To streamline the renewal process, the emphasis should be on updating any background information and verifying the tribal licensure status of management contractors. This would be a more practical and reasonable approach to ensuring that all background investigations and suitability determinations are current and up to date. Again, all primary management officials are licensed by tribal gaming regulatory agencies and licenses are renewed periodically, thus there are periodic background checks on management officials over the course of the term of a management contract. The same process has been in place for nearly 30 years. It is not clear why such a change is necessary.

With respect to the proposed changes to background investigation fees in proposed 25 C.F.R. § 537.3, we generally support the NIGC's efforts to bill fees on a costs basis, but have some concerns with the lack of data concerning the estimated costs of background investigations. Our concern is that the proposed revisions leave the fees open-ended, making it difficult for applicants to determine in advance the estimated costs of their background investigations. We suggest that the NIGC consider performing a cost-benefit analysis in relation to this proposal. If such analysis supports the revision, the NIGC should consider developing and periodically publishing a fee schedule of estimated costs based on the level of background review required.

II. Audit Submissions

Conceptually, we support the NIGC's efforts to reduce the compliance burden on small gaming operations by exempting them from the annual financial statement submission requirement. If adopted, the proposal will likely have a beneficial, cost saving impact on small gaming operations, particularly those located in rural locations that depend on gaming as a significant source of tribal revenue. In developing the regulatory text for this proposal, however, we encourage the NIGC to include language providing tribal gaming regulators with maximum flexibility to determine whether unaudited or CPA-compiled financial statements would be appropriate under tribal

governmental standards. Tribal government have long been recognized as having primary regulatory authority over tribal gaming activities. We believe that the NIGC should defer to tribal governmental agencies to the maximum extent under the law on these types of matters.

III. Proposed Definition of “Management”

The NIGC is seeking feedback on its proposed definition of “management, which is intended to bring greater clarity to its management contract regulations. In general, we agree that the management contract regulations would benefit from greater clarity in terms of scope and applicability. However, we are concerned that the proposed definition of the term “management” is too broad and has the potential to be more harmful than beneficial. When read together with the current definition of “management contract,” the proposed definition operates to include a number of activities that do not necessarily constitute management functions.

For instance, planning, organizing, or coordinating accounting systems, marketing functions, or training programs, standing alone, do not necessarily implicate management of gaming activities or the gaming operation. It is common practice, for example, for tribal governments to hire marketing companies to plan advertising campaigns and coordinate promotional activities, or to hire subject matter experts to provide training, leadership development, analytics, and a plethora of other services that benefit tribal gaming operations and do not run afoul of IGRA.

The breadth of the proposed definition, however, is readily subject to an interpretation that a contract for any of these services would constitute a management contract requiring NIGC review and approval in order to be effective. As proposed, the definition overly complicates the analysis of whether a particular arrangement is or is not a management contract. We urge the NIGC to exercise extreme caution and ensure that its definition is not subject to such construction or other unintended consequence that could impede the ability of tribal enterprises to timely obtain routine services.

The difficulty with defining a term like “management” is that management encompasses a broad range of activities, but not all such activities necessarily constitute the management of all or part of a gaming operation as intended by the Congress when it enacted IGRA. This is perhaps why historically, the NIGC has approached the question of whether a particular arrangement constitutes a management contract as a fact-intensive inquiry, focusing on the unique facts and circumstances of each case as they relate to a contractor’s job responsibilities, authority, and compensation. Furthermore, management contract is a term of art pertaining to a specific type of contract. To parse out a word or phrase from a defined term subjects that defined term to an entirely new or different interpretation.

Given the open-ended nature of the term “management,” we question whether a new regulatory definition is necessary or would even be beneficial to the regulation. As noted above, the NIGC for decades has made this determination on a case-by-case basis. If the NIGC remains convinced, however, that a regulatory definition of the term “management” is needed, we urge the NIGC to delay any further consideration of the definition until a new discussion draft has been developed in consultation with tribes. Any subsequent draft of the proposed regulation should be focused on the degree of management control, the term of the contract and the nature of compensation under the contract, all of which are key components of a management relationship under IGRA.

IV. Sole Proprietary Interest

While we note favorably the NIGC’s desire to bring clarity to the sole proprietary interest mandate in IGRA, we have similar concerns with the broad scope and impact of the proposed regulatory language as we do with the proposed definition of “management.” The proposed regulation attempts to stretch the meaning of the phrase “sole proprietary interest and responsibility” to more than “ownership” of the gaming activity. However, we believe the proper interpretation of the phrase is a narrow one, limited solely to the concept of ownership within the simplest, most straightforward meaning of the term.

We wish to point out that the legislative history of IGRA supports the reading of the phrase “sole proprietary interest and responsibility” as simply meaning “owner.” The relevant legislative history makes clear that the Senate Indian Affairs Committee considered the phrase to be synonymous with “owner” when it stated that the “tribe must be the sole owner of the gaming enterprise”¹ in its highlights describing § 11 of the statute (§ 2710 of IGRA). The issue was not addressed on the floor of either House of Congress. The brevity of the reference and the plain meaning of the term is sufficient evidence that Congress saw no need to elaborate on it further.

In spite of the foregoing, the proposed regulation assumes a more expansionist meaning of the phrase by extending it to include factors that go beyond ownership, such as the “right of control” exercised by a third party, which we note are more indicative of a management relationship. As drafted, the proposed regulation conflates the separate and distinct concepts of “management” and “sole proprietary interest” in a manner inconsistent with congressional intent.

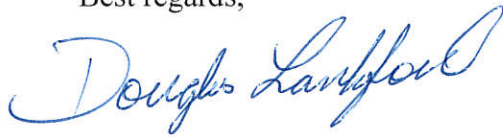
However, the legislative history is clear that “sole proprietary interest” means ownership plain and simple. In other words, the tribe must be the sole owner of the gaming enterprise. As such, any regulation addressing the sole proprietary interest standard in IGRA should be narrowly tailored to focus on whether a third party has effectively obtained an ownership interest in a tribe’s gaming operation, which is the specific harm that Congress intended to prevent here.

¹ S. Rep. 100-446 at 8 (Aug. 3, 1988).

V. Conclusion

In closing, we would like to reiterate our request for the NIGC to release a set of Discussion Drafts of any regulatory changes on the topics under consideration by the NIGC. The release of the Discussion Drafts must be followed with at least a 45-day listening and discussion period with Indian Country. We look forward to working with the NIGC as these proposals are developed further. Please do not hesitate to contact us if we can provide any additional information.

Best regards,



Douglas G. Lankford, Chief
Miami Tribe of Oklahoma