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Via Electronic Mail

National Indian Gaming Commission
Attn: Vannice Doulou
1849 C St. NW
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Washington, DC 20240

Re: Comments on Proposed Changes to the Management Contract Process and Draft Regulations Defining Management and Sole Proprietary Interest

Dear Commissioners:

On behalf of the Lytton Rancheria of California (Tribe), we submit these comments regarding the National Indian Gaming Commission's (NIGC) proposed changes to the management contract process and draft regulations defining the statutory terms "management" and "sole proprietary interest." While the Tribe appreciates the NIGC's commitment to protecting tribes from "gamesmanship," we are concerned that the current draft regulations, if adopted in anything like their current form, will bring greater uncertainty to contracting parties, slow the contract-review process, and may call into question existing contracts.

As discussed below, the Tribe urges the NIGC to make major clarifications to the draft regulations regarding the management contract review process and the definition of management. It also recommends that the agency refrain from codifying a definition of sole proprietary interest in its regulations.

I. Proposed Changes to Management Contract Review Process

A. Collateral Agreements

The NIGC proposes to amend the definition of a collateral agreement at 25 C.F.R. § 502.5. Currently, that section provides that a collateral agreement is "any contract … that is related … to a management contract."[1] The draft regulation would specify that a collateral agreement is "between a tribe (or any of its members, entities, or organizations) and a management contractor or subcontractor (or any person or entity related to a management contractor or subcontractor) or between a tribe (or any of its members,

[1] 25 C.F.R. § 502.5

entities, or organizations) and any other third party." While there may be value in the NIGC clarifying that collateral agreements are agreements to which a tribe is a party, we are concerned that this proposed language is vague and not properly limited in scope.

Specifically, the proposed language could be construed to include agreements to which a tribal member, but not the tribe itself, is a party. As proposed, the draft regulatory language does not limit the definition of collateral agreements to those agreements over which a tribe has control. If the Commission decides to go forward with a regulatory revision, we recommend that the proposed language be amended to remove the phrase "or any of its members" in order to limit the definition of collateral agreement to agreements to which the tribe is a party.

We also are concerned that the proposed language does not define "entities" or "organizations." We recommend that the NIGC define these terms in any new regulation, but limit their scope to entities and organizations that are wholly owned and controlled by a tribe.

B. Amendments

The draft regulations are intended to provide that an amendment can no longer be used to extend a management contract beyond the five-to-seven year time limit in IGRA. Consistent with IGRA, § 531.1(h) currently requires that management contracts have a five-year time limit, except that the Chair may authorize a contract term of up to seven years if the Chair is satisfied that the capital investment required and income projections for the particular gaming operation require additional time. The draft regulations would change the effect of this provision to provide that the calculation of these time limits "shall include any future amendments that affect the term of the relationship." Current § 535.1(c)(5) requires that a request for an amendment approval provide a justification for a term limit between five and seven years, and the draft regulation would add language to § 535.1(a) providing that "[a]n amendment that causes the previously approved management contract to exceed IGRA's mandated limitations … will be processed as a new contract in accordance with 25 C.F.R. Part 533."

We are concerned that although the NIGC appears to be proposing these regulatory changes for a narrow purpose, the proposed language could be applied more broadly. For example, we understand that an amendment extending a management contract beyond IGRA's time limits will be processed as a new contract, but the language in the draft regulation could be interpreted to require special justification for any amendment extending an existing management contract beyond five years. Further, based on this new regulatory language the current prohibition on a contract term over seven years could be construed to prohibit any management contract from being renewed for a period beyond seven years. We recommend the NIGC reconsider the language of the proposed regulatory changes governing amendments in order to limit any unintended consequences to tribes' ability to extend and renew contracts.

C. Background Investigations

The NIGC has proposed a series of changes to the Part 537 regulations governing background investigations for "persons" or "entities" with an interest in a management contract. The draft regulations would amend existing regulations to provide that only persons or entities with at least 10% interest in a management contract would be required to have a background investigation, although the NIGC would retain the discretion to investigate any other person or entity with an interest in the contract. The Tribe supports these changes, which will ensure that the NIGC is only requiring background investigations of persons and entities with a significant interest in a management contract.

The draft regulations also extend the Chair's ability to reduce the amount of information required for background investigations. Current regulations provide that the Chair may reduce the scope of information for the following entities: tribes, wholly owned tribal entities, national banks, or institutional investors meeting certain requirements. The draft regulation adds that the Chair may also reduce the scope of information required for these entities or for "individuals associated with" these entities. It is not immediately clear, however, whether the Chair also has the authority to reduce the scope of information for "persons" associated with the listed entities if those entities do not have a 10% or more financial interest in a management contract. For instance, it is not clear whether the Chair could reduce the scope of background requirements for persons with 10% or more financial interest in a management contract if the individual person is associated with a tribe, wholly owned tribal entity, national bank, or certain institutional investor. The NIGC should clarify the application of this provision.

The draft regulations also eliminate the requirement that the management contractor post a deposit to cover the costs of background investigations and provide that any unpaid bills will be processed in accordance with debt collection regulations at Part 513. We support this simplification of the process. However, we are concerned with the NIGC's draft language that states that unpaid background investigation bills "may result in an approved contract being voided or cause a pending contract to be disapproved." We do not agree that the NIGC has authority to void an existing contract (to which it is not a party) based on the management contractor's failure to pay a background investigation bill. To provide clarity or certainty, the NIGC should not threaten the status of already approved contracts. Rather, contracts should be approved or disapproved on their merits, and debts should simply be collected in accordance with the Part 513 regulations.

II. Proposed Definitions of Management and Sole Proprietary Interest

A. Defining Management

Subsection (1) of the NIGC's proposed definition of management would codify NIGC Bulletin No. 94-5 by adding the following at 25 C.F.R. § 502.25(1): "*Management* means planning, organizing, directing, coordinating, controlling, or the performance of

any one of these with respect to all or part of a gaming operation."[2] We note that codifying this definition of management does not provide further clarity to contracting parties, who already rely on Bulletin No. 94-5. We do not think there is any need to make the proposed regulatory change. If adopted, the new regulation may cause confusion rather than bring clarity.

However, if the NIGC moves forward with codifying this definition, we recommend that it amend the definition to clarify that a management contract does not include a contract that is between a tribe and an entity wholly owned by the tribe. The NIGC has long recognized that section 2711 of IGRA "does not apply to instrumentalities owned and operated completely by [a] tribe."[3] Thus, the NIGC has stated that "[t]he tribal government is free to create a separate arm, branch, or wholly-owned corporation to manage its business ventures. IGRA permits a tribal instrumentality to run the gaming operation, provided that the central tribal government authorizes such and still requires the tribe to handle all regulatory functions."[4] The NIGC should revise any new regulation defining "management contract" to include this clarification.

Subsection (2) of the proposed definition of management would provide a nonexclusive list of activities as examples. The list is largely based on language the NIGC quoted with approval in a 2010 declination letter ("2010 Letter").[5] Proposed § 502.25(2) provides:

> Management includes, but is not limited to, planning, organizing, directing, coordinating, or controlling:
>
> (a) the daily operations;
> (b) the maintenance of a facility or facilities;
> (c) the training, supervision, direction, hiring, firing, retention, compensation (including benefits) of any employee (whether or not a management employee) or contractor;

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[2] Bulletin 94-5 currently provides: "Management encompasses many activities (e.g., planning, organizing, directing, coordinating, and controlling). The performance of any one of such activities with respect to all or part of a gaming operation constitutes management for the purpose of determining whether any contract or agreement for the performance of such activities is a management contract that requires approval."

[3] Letter from Penny J. Coleman, Acting General Counsel, National Indian Gaming Commission, to George Blanchard, Chairman, Absentee Shawnee Tribe of Oklahoma at 2 (Sep. 1, 2009).

[4] *Id.*; *see also* Letter from Lawrence S. Roberts, General Counsel, National Indian Gaming Commission, to Raymond Etcitty, General Counsel, Navajo Nation Gaming Enterprise at 1 (Dec. 15, 2010) ("[B]ecause Navajo Nation Gaming Enterprise is a wholly owned tribal enterprise, the agreements are not management contracts within the meaning of IGRA and do not require the approval of the NIGC ....").

[5] Letter from Penny J. Coleman, Acting General Counsel, National Indian Gaming Commission to Kent E. Richey, Faegre & Benson LLP (Feb. 23, 2010) (determining a loan document successfully precluded the lender from exercising management control by prohibiting the lender from engaging in a nonexclusive list of management activities) [hereinafter "2010 Letter"].

(d) any employment or working policies, procedures, or practices;
(e) the hours or days of operation;
(f) any accounting systems or procedures;
(g) any advertising, promotions or other marketing activities;
(h) the purchase, lease, or substitution of any gaming device or related equipment or software, including player tracking equipment;
(i) the vendor, type, theme, percentage of pay-out, display or placement of any gaming device or equipment;
(j) the budgeting, allocation, or conditioning of payments of the gaming operation's operating expenses; or
(k) the supervision of construction or improvements.

The proposed list of example management activities includes all of the prohibited management activities listed in the 2010 Letter as well as new activities at paragraphs (a), (b), and (k). We are concerned that the language of paragraphs (a), (b), and (k) is vague and overly broad, provides the NIGC with too much discretion, and does not provide contracting parties with greater clarity. If it determines to go forward with this new regulation, we urge the NIGC to reconsider the inclusion of these paragraphs in their current form.

Paragraph (a) provides that management includes activities related to "the daily operations." We recognize that the Seventh Circuit has noted the need for a tribe to maintain control over the "daily operations" of a gaming facility.[6] However, we are concerned that this language is vague. It does not provide any additional clarity regarding the types of activities the agency will consider to be operating the daily operations of a gaming facility, and therefore this language provides uncertainty to contracting parties.

Paragraphs (b) and (k) address facility maintenance and the supervision of construction or improvements. Again, we are concerned with the lack of detail provided, resulting in regulatory language that is both vague and overly broad. As written, the draft regulation could require tribes to obtain NIGC approval of contracts with third parties to provide routine, non-gaming-related maintenance such as grounds keeping, janitorial, and physical plant services. In its current form, the definition could also apply when a tribe hires a contractor to construct a facility or expansions and renovations. The definition could be interpreted to require that tribes have such construction agreements approved by the NIGC as management contracts. The NIGC has previously contrasted the role of developers with those of management, and it has not found management functions to exist when a contractor is in charge of constructing and developing a casino when not in

[6] *Wells Fargo Bank, N.A. v. Lake of the Torches Econ. Dev. Corp.*, 658 F.3d 684, 697 (7th Cir. 2011).

charge of the casino's operations after opening.[7] No such distinction is included in the proposed language regarding supervision of construction and improvements. Further, the new definition could call into question the validity of existing contracts governing maintenance, construction, and development.

More broadly, we are also concerned that the proposed definition of management focuses only on management activities and does not include any assessment of payment structure, contract terms, the ability to assign or subcontract responsibilities, or other indicators of management that are listed in Bulletin No. 94-5 or other NIGC guidance.[8] This raises concern that the NIGC could in the future find that a contract provides for management of a gaming operation if any one of the above-listed activities is contracted out to a third party regardless of the overall structure of the contract and its other provisions. If the NIGC determines to go forward with this regulation, we recommend that it be revised to reflect that the agency's determination of whether a contract is a management contract includes an assessment of the entire contract, not merely a focus on potential management activities.

B. Defining Sole Proprietary Interest

Even if it decides to go forward with the comprehensive new regulations it has proposed, we recommend that the NIGC refrain from codifying a definition of sole proprietary interest and instead continue to rely on existing guidance and address the issue through the declination letter process. IGRA provides the NIGC with express authority to review and approve management contracts.[9] In contrast, the statute requires that tribal gaming ordinances include a provision that mandates that "the Indian tribe will have the sole proprietary interest and responsibility for the conduct of any gaming activity."[10] We note that courts have ruled that NIGC rulemaking authority is limited to those areas over which IGRA has authorized the agency to regulate. *See Colorado River Indian Tribes v. Nat'l Indian Gaming Comm'n*, 466 F.3d 134 (D.C. Cir. 2006).

If the NIGC decides to proceed with codifying a definition of sole proprietary interest, we have significant concerns about the draft regulation. The proposal would add to the compliance regulations at Part 573 a new provision codifying a non-exclusive list of factors that the Chair would consider in determining whether IGRA's sole proprietary interest mandate has been violated. The draft language provides that the existence of any of the factors listed, "including only a single factor," may be considered. We are concerned that the proposed definition is vague and that it would provide the agency complete discretion in determining whether a contract violates the sole proprietary

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[7] *See* Letter from Penny J. Coleman, Acting General Counsel, National Indian Gaming Commission to Lester J. Marsten, Law Offices of Rapport and Marsten 4–5 (Feb. 26, 2009).

[8] *See* Bulletin 94-5 at 2–3.

[9] 25 U.S.C. § 2711.

[10] 25 U.S.C. § 2710(b)(2)(A).

interest mandate. Further, allowing the NIGC to determine whether a contract violates the mandate based on a single factor is a significant departure from current practice, in which the agency evaluates factors "in the aggregate." [11]

The proposed definition of sole proprietary interest mirrors the three factors the NIGC currently examines: (1) the financial benefit to the third party; (2) the right of control provided the third party; and (3) the term of the relationship.[12] We discuss these categories below.

1. The Financial Benefit to the Third Party

The draft regulation lists several factors related to assessing whether the financial benefit to the third party violates the sole proprietary interest mandate.

1. whether the Tribe received the primary benefit of its gaming revenue;
2. the amount of revenue paid or given to the third party or kept by it;
3. whether the third party received or was entitled to the gaming revenue for no return service, or asset provided to the gaming operation; [and]
4. whether the amount of revenue given to an approved or unapproved management contractor or kept by it exceeds the statutory cap set forth in IGRA for management contractors[.]

All of these factors are focused on whether a third party has too great of an interest in a gaming operation and whether the tribe is receiving a reasonable benefit from its bargain.

Factors 1 and 2 raise concern because they are vague. Factor 1 addresses whether a tribe receives the "primary benefit" of its gaming revenue, but it is not clear how primary benefit would be measured. One of the purposes of IGRA is to ensure that a tribe is the "primary beneficiary of the gaming operation."[13] Restating this primary beneficiary language here, without any further detail, does not increase clarity regarding assessment of the sole proprietary interest mandate or provide information about how the NIGC will assess whether the tribe is the primary beneficiary. Similarly, factor 2 says the NIGC may consider "the amount of revenue" the third party receives, but provides no guideposts for what will be considered reasonable or what other circumstances might be considered in this analysis, such as the amount of revenue in comparison to risk, capital

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[11] *City of Duluth v. Fond du Lac Band of Lake Superior Chippewa*, 830 F.Supp.2d 712, 723 (D. Minn. 2011), *aff'd in part, rev'd in part*, 702 F.3d 1147 (8th Cir. 2013).

[12] *See Bettor Racing, Inc. v. Nat'l Indian Gaming Comm'n*, 47 F.Supp.3d 912, 925 (S.D. 2014), *aff'd* 812 F.3d 648 (8th Cir. 2016) (citing NIGC audit report); *City of Duluth v. Nat'l Indian Gaming Comm'n*, 89 F.Supp.3d 56, 65 n.8 (D.D.C. 2015) (citing NIGC audit reports); *City of Duluth v. Fond du Lac Band of Lake Superior Chippewa*, 830 F.Supp.2d at 723 (citing NIGC notice of violation).

[13] 25 U.S.C. § 2702(2).

investment, or other factors. Without any greater specificity, these portions of the draft regulation give too much discretion to the NIGC. They are likely to create more uncertainty rather than clarifying the standards the NIGC will use in assessing compliance with the sole proprietary interest mandate.

Factors 3 and 4 appear designed to codify existing standards. Factor 3 considers whether a third party is profiting from gaming revenue without providing anything in return to a tribe. The NIGC has previously expressed concern that the sole proprietary interest mandate is violated when fees are not reasonably tied to service rendered.[14] The NIGC has stated, for example, that "[d]evelopment fees that are tied to the operation's profits and fail to reasonably relate to the service provided, or the risk undertaken, can look more like a stake in the business rather than mere payment for services rendered."[15] However, factor 4 requires compliance with IGRA-imposed statutory caps on revenue to a management contractor. IGRA provides that generally a management contract providing for a fee based on a percentage of net revenues may not exceed 30%, although upon the request of the tribe the Chair can approve a contract with up to a 40% fee if the capital investment required and income projections justify the higher percentage.[16] We are concerned that applying the cap applicable to management contracts to other types of contracts is arbitrary because higher fees may be reasonable for other types of services.

2. The Right of Control Provided the Third Party

Factor 5 focuses on the right of control provided a third party and contains several sub-factors to consider. The draft regulations provides that the NIGC may consider:

5. the right of control provided to the third party or exercised by it, including, but not limited to:
    a. whether the Tribe was excluded from the premises of the gaming operation or part thereof;
    b. whether the third party operated the gaming operation or part thereof as the proprietor;
    c. whether the third party possesses the right to seek a judicial appointment of a receiver over the gaming operation;
    d. whether the Tribe and third party created a joint venture; and

[14] *See, e.g.*, Letter from Penny Coleman, Acting General Counsel, National Indian Gaming Commission, to Dan Jones, Chairman, Ponca Tribe of Oklahoma at 3–4 (Sep. 23, 2008) ("[W]e are concerned that [the third party's] fees for its services may violate IGRA's sole proprietary interest mandate because they do not appear to be reasonably related to the service provided.").

[15] *Id.* at 4.

[16] 25 U.S.C. § 2711(c)(1)–(2).

e. whether a third party, third parties, or individuals possess stock ownership in a gaming operation[.]

The list provided in factor 5 seeks to codify existing guidance, but it is not clear that this codification brings any additional clarity to contracting parties. Factor 5(a) and 5(b) are addressed in the text of IGRA. Factor 5(a) echoes IGRA's requirement that management contracts provide for access to daily operations by appropriate tribal officials, but the draft regulation would assess this issue in the context of sole proprietary interest rather than management contracts.[17] Factor 5(b) simply restates IGRA's sole proprietary interest mandate.[18] Factors (c),[19] (d),[20] and (e)[21] are already clearly addressed by existing NIGC guidance.

The draft regulation also addresses the assignment of tribal rights, which can also be considered part of the analysis of how much control a third party is given over the gaming operation. The draft regulation provides:

7. the provision or assignment of Tribal rights to the 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;
    b. the right to place gambling devices that are controlled by a third party in the gaming operation or part thereof; and
    c. the grant of a security interest in the gaming operation.

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[17] 25 U.S.C. § 2711(b)(2).

[18] 25 U.S.C. § 2710(b)(2)(A).

[19] NIGC declination letters have repeatedly cited *Wells Fargo Bank, N.A. v. Lake of the Torches Econ. Dev. Corp.*, 677 F.Supp.2d 1056 (W.D. Wis. 2010), *aff'd* 658 F.3d 684 (7th Cir. 2011) (holding a contract was a management contract because a lender could seek receivership). *See, e.g.*, 2010 Letter, *supra* at 5–7.

[20] Letter from Penny J. Coleman, Acting General Counsel, National Indian Gaming Commission to Wallace Coffey, Chairman, Comanche Tribe of Oklahoma, et al. at 4 (Sep. 20, 2005) (quoting 46 Am.Jur.2d *Contracts* § 57 that "a proprietary interest or control may be evidence of a joint venture" and stating that "if a joint venture is found to exist it would be further evidence that [a tribe] did not hold the sole proprietary interest in the gaming operation.")

[21] 58 Fed.Reg. 5802, 5804 (Jan. 22, 1993) ("[B]ecause IGRA specifies that a tribe (not its members) must have the sole proprietary interest, stock ownership in a tribal gaming operation by individual tribal members would also be inconsistent with the IGRA.").

Factor 7(a) has been addressed by courts in the context of management contracts, rather than sole proprietary interest.[22] Factor 7(b) and 7(c) have been clearly addressed by the NIGC in the preamble to existing regulations.[23]

Factors 5 and 7, addressing third-party right of control in a gaming operation, largely codify existing standards but do not necessarily bring additional clarity. In fact, the regulations introduce greater uncertainty by providing that any one of these factors in isolation, regardless of other provisions of a contract, would be sufficient basis for finding a violation of the sole proprietary interest mandate. This is a significant departure from the NIGC's current approach, and we recommend that the NIGC instead continue to rely on its existing guidance.

3. The Term of the Relationship

The NIGC's proposed list of factors includes consideration of the term of the relationship. The draft regulation provides:

> 6. the term of the relationship between the Tribe and the third party, including but not limited to, the cost or difficulty in terminating the relationship[.]

Consideration of the term of a contract is consistent with the NIGC's current approach to reviewing contracts to determine whether they violate the sole proprietary interest mandate. However, we are concerned that, as written, factor 6 is vague. Nothing in the draft regulation provides guidance to contracting parties regarding how the term of a contract will be assessed in order to determine whether the sole proprietary interest mandate has been violated. We are also concerned the provision is arbitrary. As the draft regulation is written, the NIGC could find that a contract violated the sole proprietary interest mandate based solely on the length of the contract. Without guideposts in the regulation, the agency would have total discretion in evaluating the impact of the term of the relationship. This would be a significant departure from current NIGC practice, which assesses the length of the contract in combination with other factors.

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[22] *Lake of the Torches Econ. Dev. Corp.*, 658 F.3d at 697–98 (finding that a tribe maintaining control over financial and accounting records weighs against determining an agreement was a management contract).

[23] 58 Fed.Reg. at 5804 provides: "An agreement whereby consideration is paid or payable to the gaming operation for the right to place gambling devices that are controlled by the vendor in such gaming operation is inconsistent with the requirement that a tribe have the sole proprietary interest. Regarding collateral for loans, a tribe may not grant a security interest in a gaming operation if such an interest would give a party other than the tribe the right to control gaming in the event of default by a tribe."

Conclusion

Although the Tribe supports the NIGC's desire to bring greater clarity to the contract-review process, the language of the draft regulations is troubling in many respects. If the Commission goes forward with comprehensive new regulations, we are concerned that many provisions are vague, overly broad, and/or arbitrary. We believe that, as currently drafted, the provisions, if promulgated, would introduce greater uncertainty, stall the contract-review process by increasing requests for declination letters, and may call into question existing contracts. Even if the NIGC decides to go forward with comprehensive new regulations, we strongly recommend that the agency preserve the existing guidance and framework for addressing sole proprietary interest concerns and refrain from codifying a definition of sole proprietary interest.

Sincerely,

HOBBS, STRAUS, DEAN & WALKER, LLP

By: Joseph H. Webster

cc: Larry Stidham, Esq.
Kathy Ogas, Esq.