Kootenai Tribe of Idaho

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Mr. Jonodev Chaudhuri, Chairman
National Indian Gaming Commission
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Sent via email: Vannice_Doulou@nigc.gov

RE: Comments on 2018 Consultation Topics

The Kootenai Tribe of Idaho ("Kootenai Tribe) appreciates this opportunity to provide comments to the proposed changes to the management contract approval process, background investigations and the definition of "management".

The Kootenai Tribe has operated the Kootenai River Inn in Ktunaxa Territory on the Kootenai Indian Reservation since 1986. Our management team consists of a General Manager employed by the Tribe and the Hagadone Hospitality Company, a company with deep roots in northern Idaho and northwestern Montana. The Tribe added gaming in 1993 and later added a spa. The Kootenai River Inn Casino & Spa ("KRICS") is a successful business providing needed revenue for our government operations. Through the guidance of our past and current Tribal Councils and the hard work of our management team, the KRICS is debt-free.

The gaming portion of the enterprise consists primarily of Class III games regulated by the Tribe and the State under the Kootenai-Idaho Class III Gaming Compact. The Tribe also offers Class II bingo once a month. While bingo often brings in less than $200 per session after payouts and labor, community elders enjoy the game so we continue to offer it. By doing so, however, the Tribe subjects itself to additional National Indian Gaming Commission ("NIGC") regulation under the Indian Gaming Regulatory Act ("IGRA").

The Kootenai Tribe manages its gaming, hotel and spa operations by hiring a management team with the expertise and infrastructure to do so. The Tribal Council provides oversight and guidance so that the operation provides revenue and benefits to the Tribe and its community in a cost-effective and efficient manner and reflecting Kootenai culture and ways of life.

The Kootenai Tribe has serious concerns regarding the proposed regulatory modifications to the management contract approval process and the definition of management. The modifications apply a one size fits all requirement that ignores the unique situations that exist throughout Indian Country. Further, the requirement ignores self-determination and dismisses a tribe's ongoing business relationship in favor of increased federal oversight and interference in tribal self-governance.

Management Contract Approval Process (proposed changes to Parts 531, 533 and 535)

The National Indian Gaming Commission ("NIGC") has not clearly identified the reasons it believes treating management contract amendments as new contracts are necessary.

The NIGC's Notice of Consultation Topics for 2018 recognizes that past NIGC Chairpersons "ha[ve] approved amendments to agreements that extend the agreement's term beyond five or seven years." Amendments to agreements do not require additional background investigations or suitability determinations. *See*, 25 C.F.R. Part 535. And for good reason. Established operations like the Kootenai Tribe's KRICS do not need additional oversight to protect the Tribal government.

Why is it now necessary to modify the regulations so that management contractors are investigated by the NIGC every five to seven years? Given that many tribes, and certainly the Kootenai Tribe, have moved further toward self-governance, what new events led the NIGC to believe it must do more to protect tribes?

NIGC statements during the Portland and Oklahoma consultation sessions referenced gamesmanship and overreach by management contractors and the need to protect tribes from such. It is unclear where this gamesmanship and overreach is occurring. The Kootenai Tribe is unquestionably not being gamed or taken advantage of by its management contractor after thirty-plus years of working together.

Our tribal governments heard the arguments that tribes are incapable of regulating their gaming and in danger of being overrun by organized crime when the Indian Gaming Regulatory Act ("IGRA") was being negotiated in Congress. Congressional leaders acknowledged repeatedly "that in 15 years of gaming activity on Indian reservations there has never been one clearly proven case of organized criminal activity." Senate Report 100-446, Additional Views of The Hon. John McCain.

In the words of another Congressional leader:

> Where is the problem? There have been grand claims that this is good for the Indians because it 'protects them' from unscrupulous managers and organized crime. But there is no data on that at all.... And they do not need one more commission or another bureaucracy, and still more outside intervention from those people who say they know it all but know too little.

134 Cong. Rec. 25379 (September 26, 1988) (statement of the Hon. Mr. Sikorski of Minnesota).

Those statements were true then and remain true today.

The passage of the IGRA included a role for the NIGC to approve management contracts, while also respecting the right of tribes to self-government and run their own business affairs. We understand, then, that NIGC has a role to play. But that role must be balanced with the right of tribes to self-govern and self-regulate. The proposed regulations do not reach that balance. Instead, they increase federal interference in our self-government for reasons unknown.

Congressman Lujan noted that "[t]he Indian tribe, as a party to the management contract and as the owner of the [gaming] operation, is in the best position to evaluate the reasonableness of the contract term and management fee." 134 Cong. Rec. 25379 (September 26, 1988) (The sponsor of the legislation, the Hon. Congressman Udall, agreed).

The Kootenai Tribe takes seriously its responsibility to its citizens and is invested in seeing its economic enterprises succeed. The Kootenai Tribal Council is actively involved in the operations of the KRICS and provides daily oversight and guidance to its management team. The Kootenai Tribal Gaming Commission investigates the KRICS management team and employees with thorough criminal and financial background checks as required by the Idaho-Kootenai Class III Gaming Compact and in coordination with the National Indian Gaming Commission and the State of Idaho.

The Kootenai Tribe, therefore, is in the best position to determine whether the management agreement is fair and reasonable, whether its management team is suitable, and whether the longstanding business relationship should continue. And since the Tribe regulates the majority of its gaming through the Kootenai-Idaho Class III Gaming Compact, including background investigations of its management team, it is unclear what more is offered by also requiring the NIGC to conduct background investigations every five or seven years.

The Kootenai Tribe suggests the NIGC modify the proposed regulations in Parts 531, 533 and 535 to explicitly state that amendments that extend the terms of an agreement shall be treated as amendments that do not require additional background investigations, provided the tribal regulator has performed a background investigation on the management contractor and its key employees and principals in accordance with an approved tribal gaming law or a tribal-state compact.

Proposed Definition of "Collateral Agreement" (Proposed change to §502.5)

The proposed regulatory definition of "collateral agreement" goes far afield of what the IGRA envisioned. The IGRA provided that "any reference to the management contract described in paragraph (1) shall be considered to include all collateral agreements *to such contract that relate to the gaming activity*." 25 U.S.C. §2711(a)(3). The proposed regulation defines "collateral agreement" so broadly, however, that it is unclear what would *not* constitute an agreement requiring NIGC approval.

For example, the proposed regulation would include any agreement between a tribal member and a third-party as part of a management agreement requiring NIGC approval. How does the NIGC expect a tribe to comply with this regulation *when it is not even a party to that agreement and has no say over its terms*? If a third party and a tribal member owned business refuse to turn over their contractual documents, will the NIGC then refuse to approve a management agreement despite the fact the tribe and its management contractor *are not parties to those agreements and have no say over their terms*?

The Kootenai Tribe believes the current "collateral agreement" definition is sufficient and consistent with the IGRA. We recommend the NIGC discard its proposed definition change.

Streamlining the NIGC Investigative Process

The proposal states that the NIGC intends to streamline the NIGC's investigative process. The proposed regulations, however, do not reflect that intention. Requiring NIGC investigations every five years certainly does not streamline the process. And eliminating the deposit requirement, while a welcome change, also does not streamline the process.

The NIGC should adopt new regulations or transparent internal policies that streamline the investigative process, respect tribal regulators role, and provide greater accountability to tribes and management contractors that fund the investigation. The following principles should be included in the new regulations or policies:

- **Only new entities, key employees or principals to management contracts shall be subject to background investigation and suitability determination by the NIGC when a management contract amendment is submitted for approval. The NIGC shall accept information obtained through tribal background investigations and suitability determinations as part of the agency's investigation and shall not require additional information unless the NIGC has reason to believe that a new key employee or principal poses some risk to the tribal gaming operation. The NIGC must consult with the tribal regulator and describe the reasons leading to the belief of increased risk.**
- **NIGC shall not require a deposit from management contractors for purposes of defraying costs to the agency for background investigations and suitability determinations. The agency shall provide detailed, monthly invoices to both the tribe and the management contractor showing the costs incurred by the NIGC. The detailed invoice shall include any expenses, hours worked by investigators and other information that shows the reasonableness of the costs and time associated with the background investigation and suitability determination.**

Definition of Management (Proposed new §502.25)

Lastly, the definition of "management" in the new 25 C.F.R. §502.25 is expansive enough to include any agreement tribal gaming operations may enter into. For example, the Kootenai Tribe's KRICS enters into agreements to resurface the parking lot every few years. Is that agreement between the Tribe and the pavement company a management contract or collateral agreement that necessitates NIGC approval? What about agreements with newspapers and other advertising platforms? The proposed regulation appears to make those agreements either management contracts or collateral agreements requiring NIGC approval.

The Kootenai Tribe recommends deleting the definition of management and consulting with tribes to determine what actually constitutes management of a gaming operation.

We look forward to working the NIGC on a path back to decolonization of our tribal governments and business operations and reconciliation between our governments.

Sincerely,

Gary Aitken, Jr.
Chairman