



March 20, 2018

VIA EMAIL (Vannice Doulou@nigc.gov)

The Honorable Jonodev O. Chaudhuri, Chairman
The Honorable Kathryn Isom-Clause, Vice Chair
The Honorable E. Sequoyah Simermeyer, Associate Commissioner
National Indian Gaming Commission
1849 C Street NW, Mail Stop #1621
Washington, DC 20240

RE: Comments of Station Casinos LLC in Response to the NIGC's 2018 Consultation on
"Management and Sole Proprietary Interest" and "Management Contract Amendment
Regulations – Discussion Draft"

Dear Chairman Chaudhuri, Vice Chair Isom-Clause and Associate Commissioner Simermeyer:

I write on behalf of Station Casinos LLC in response to the National Indian Gaming Commission's ("NIGC" or "Commission") December 22, 2017 "Notice of Consultation Sessions for 2018" letter ("Consultation Letter") soliciting comments on three topics. Our comments are limited to two topics: "Management and Sole Proprietary Interest" and "Management Contract Amendment Regulations – Discussion Draft." We very much appreciate the NIGC's efforts in engaging in this meaningful consultation and the opportunity to participate and comment.

I. "Management and Sole Proprietary Interest"

As noted in the Consultation Letter, the Indian Gaming Regulatory Act, 25 U.S.C. §§2701 *et seq.* ("IGRA") requires that all management contracts be submitted to the NIGC for the Chairman's review and approval. Although the term "management contract" is defined in existing NIGC regulations, the term "management" is not. Similarly, although IGRA also requires that a Tribe maintain the "sole proprietary interest" in its gaming establishment, neither IGRA nor NIGC regulations define this term. Accordingly, the Commission seeks consultation and input on developing regulations that would set forth clear standards for what constitutes "management" and "sole proprietary interest."

A. "Management – Discussion Draft"

The Commission has included on its website, and has provided at consultation sessions, a discussion draft of a definition of "Management" that would be added to the regulations at 25 C.F.R. Part 502 (Definitions). The discussion draft includes two parts: first, a broad definition of what constitutes management, and second, a non-exhaustive list of examples of management.

Draft Section 502.25(1) would define management broadly as “planning, organizing, directing, coordinating, controlling or the performance of any one of these with respect to all or part of a gaming operation.” We believe that should the NIGC decide to promulgate a regulation defining management, the definition should clearly provide that management only pertains to a gaming operation that actually exists and is operating. We are concerned that this proposed definition is overly broad and could inadvertently encompass activities related to developing a gaming facility that take place prior to the commencement of actual gaming operations and that may indirectly involve planning and organizing of what will ultimately become the gaming operation. For example, it is not uncommon for development agreements, which are not intended to provide for management, to include provisions such as location of gaming equipment in general, types of games, and number of games, that could be construed as planning or organizing a gaming operation under the draft definition. We do not believe this is the intent of the draft definition. Moreover, clarifying that management only applies to on-going existing gaming operations would be consistent with the present definition of “gaming operation” which provides, in part, that “Gaming Operation” means each economic entity that . . . *operates* the games, *receives* the revenues, *issues* the prizes, and *pays* the expenses.” 25 C.F.R. Part 502.10 (emphasis added).

We believe this concern could be addressed by excluding from the definition of management the stated actions (planning, organizing, directing, coordinating, controlling) as they pertain to the development of a gaming facility that will ultimately house a gaming operation.

Relatedly, as you are aware, the Office of General Counsel of the NIGC has issued numerous “declination letters,” including those letters that opine that certain development agreements do not provide for management and therefore, are not management contracts requiring the Chairman’s approval. We encourage the Commission to consider including a grandfather provision that would allow developers that have received such letters to continue to rely upon them. We understand that the Commission’s intent in possibly promulgating a definition of management is not to introduce new requirements or interpretations of the term, but rather, to codify its prior analyses and standards. As such, we believe a grandfather provision for existing declination letters opining that a contract does not contain management would be appropriate.

Proposed Section 502.25(2) sets forth a non-exhaustive list of examples of what constitutes management. The need to clarify that these examples should only apply to on-going operations is evident by examining a few in the context of developing a gaming facility.

Draft Section 502.25(2)(k) provides that “Management includes, but is not limited to, planning, organizing, directing, coordinating, or controlling . . . the supervision of construction.” A typical development agreement obligates the developer to engage in just this activity. Also, it is very common for construction loans to give some degree of control to the lender with respect to construction controls and draw-downs.

Draft Section 502.25(2)(h) provides that “Management includes, but is not limited to, planning, organizing . . . the purchase, lease . . . of any gaming equipment.” It is not uncommon

for developers to assist a tribe in setting forth the advantages and disadvantages of purchasing or leasing gaming equipment. Often, this decision is made months before the operational stage.

We encourage the Commission to consider revising the introductory language in Section 502.25(2) to read as follows: "Management includes, but is not limited to, planning, organizing, directing, coordinating, or controlling, with respect to an on-going or existing gaming operation:" or similar language to that effect.

B. "Sole Proprietary Interest – Draft Regulation"

The Commission has posted on its website, and has provided at consultation sessions, a discussion draft regulation pertaining to sole proprietary interest that if adopted, would be added to the compliance regulations at 25 C.F.R. Part 573.

At the onset, we note that the Commission is not proposing a definition of sole proprietary interest. Rather, the Commission proposes a non-exhaustive illustrative list of factors, the existence of one or more that may cause the Chair to determine that a violation of the sole proprietary interest mandate has occurred. Like most non-tribal entities involved in Indian gaming, we fully support and respect IGRA's sole proprietary mandate and desire to continue to comply with it. Accordingly, and in light of the potentially severe consequences of a violation of the mandate, we believe that if the Commission decides to promulgate regulations on this subject, the Commission should endeavor to first set forth a clear and concise definition of sole proprietary interest. We also believe that such definition should derive directly from, and be limited by, the commonly understood definition of proprietary.

We are also concerned that the Chair can take other factors that are not set forth in the list – and are therefore unknown – into consideration in determining that a violation has occurred. As such, and in the absence of any definition, let alone a clear and concise definition, we believe the draft proposal is vague and does not provide sufficient or clear guidance as to the meaning of the sole proprietary mandate.

Also, we note that the list of factors does not include factors that may weigh in favor of the Chair concluding that a violation of the sole proprietary interest requirement *has not occurred*. For example, the discussion draft states that the Chair may take into consideration merely one factor, such as "the amount of revenue paid or given to the third party or kept by it" in determining that the mandate has been violated. In the past, when examining compensation paid or to be paid to third parties, the NIGC has examined the relationship between the parties as a whole and in particular, the investment risks undertaken by the third party and on several occasions has opined that the particular compensation did not violate the sole proprietary requirement because it was justified given the risks. The draft regulation casts uncertainty on whether the Chair may continue to take this factor into consideration. We believe this is not the Commission's intent as the Commission has made clear in consultation sessions that the draft regulations are intended to codify prior NIGC analyses and decisions and not alter them.

In keeping with the Commission's stated intent to promulgate standards that reflect its current practices and decisions, we believe any regulation pertaining to the sole proprietary interest requirement should clarify that declination letters previously issued on the subject remain in effect and unaltered by the new regulation. In the absence of such a grandfather provision, and the uncertainty created by the lack thereof, we believe that numerous tribes and third parties will incur unnecessary costs in seeking new declination letters.

We also suggest that any regulation on the subject should include a clear statement that the terms of an approved management contract do not violate the sole proprietary interest mandate and a manager operating pursuant to, and in accordance with such terms (and not exceeding such terms), does not violate the mandate. We believe such clarification is necessary because a number of the factors listed in the discussion draft that can form the basis for a violation, including the amount of revenue paid to a third party, aspects of control as it relates to management, term of the contract and the right to access gaming operation records, are typical provisions set forth in approved management contracts.

Finally, we are particularly concerned that factor #7 concerning the assignment of "Tribal rights to the third party" is overly broad and could have a chilling effect on tribal gaming financing, both at the pre-development and construction stages. The discussion draft provides that the Chair, in determining whether the sole proprietary interest mandate has been violated, may take into consideration "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 operation or part thereof; . . . and c. the grant of a security interest in the gaming operation."

It is very common for third party developers to advance to tribes in the form of a loan, certain pre-development expenses prior to the tribe obtaining permanent financing. As part of the pre-development and permanent financing, the developer and senior lender are granted certain rights that virtually always include the right to access financial records and the grant of a security interest in certain collateral associated with the gaming operation such as future gaming revenues and various accounts into which such revenues are deposited. The discussion draft language suggests that inclusion of these common and standard provisions in the financing agreements may violate IGRA's sole proprietary interest requirement.

Based on prior NIGC guidance and declination letters posted on the NIGC website, we believe the draft security interest language may be related to the NIGC's position that a secured party, in the exercise of its rights in the event of a default, may not manage or operate the gaming enterprise. If this is the case, we suggest that the Commission include language, consistent with its prior pronouncements, upon which lenders have relied, that a secured party will not be in violation of the sole proprietary interest mandate if it is granted a security interest in collateral related to a gaming operation or (1) enforces compliance with any term in any loan agreement that does not require the gaming operation to be subject to any third-party decision-making as to any management activities; (2) requires that all or any portion of the revenues securing the loan to be

applied to satisfy valid terms of the loan agreement; or (3) otherwise forecloses on all or any portion of the property securing the loan.¹

II. “Management Contract Amendment Regulations – Discussion Draft”

The Consultation Letter indicates that the NIGC is considering certain changes to its management contract review process and has posted and circulated a document entitled “Management Contract Amendment Regulations – Discussion Draft” (“Discussion Draft”) that would amend 25 C.F.R. Part 502. We appreciate the opportunity to provide the following comments on the Discussion Draft.

We are concerned that the Discussion Draft’s proposed modification to the definition of “Collateral agreement” (§502.5) would result in an inadvertently overly broad definition. The proposed modification language expands the definition of collateral agreement to include any contract between “a tribe . . . and any other third-party, that is related . . . to any rights, duties or obligations created between a tribe . . . and a management contractor.” As you know, existing NIGC regulations require that a management contract enumerate and assign responsibility to either the manager or the tribe (25 C.F.R. Part 531.1(b)) for certain specific functions, including “maintaining and improving the gaming facility,” “preparing the gaming operation’s financial statements and reports,” “providing fire protection services,” and “placing advertising.” In ensuring that these services are provided, regardless of which party assumes the responsibility, it is very common for the tribal enterprise (or the Tribe directly) to contract with a third party for the services. These contracts are related to the duties and obligations between the tribe and a manager. As such, under the proposed language, the following contracts with third parties would become collateral agreements: typical facility maintenance and repair contracts, including plumbing, electric, HVAC, roofing, window, etc., construction contracts for improvements, contracts with third parties related to preparing financial statements, contracts with local communities or municipalities that provide for fire protection services and contracts with advertising agencies that place advertisements for the gaming operation.

The Discussion Draft also considers revising the regulations to provide that an amendment to the term of an existing management contract that would result in the contract extending beyond the IGRA’s stated term limitations would be processed and reviewed as a new management contract. (§535.1). Although we do not comment on this specific proposal, we are concerned that proposed language designed to implement this change inadvertently conflicts with existing NIGC practice and regulations. Specifically, proposed Part 535.3(c)(5) provides that if applicable, a tribe shall include in any request for approval of an amendment “consistent with the provisions of §531.1(h) of the chapter, for a term limit in excess of five (5) years, but not exceeding seven (7) years inclusive of the time passed since contract approval.” Although this proposed language references Part 531.1(h) and is limited to amendments, we are concerned that the additional

¹ See January 23, 2009 letter from Acting General Counsel, Penny J. Coleman to Kent E. Richey.
<https://www.nigc.gov/images/uploads/ManagementReviewLetters/20090123MuscogeeCreekNationreGrossRevenues.pdf> (Accessed February 26, 2018)

language conflicts with Part 531.1(h) and may cause uncertainty as to how management contract terms will be calculated in general. The proposed language suggests that the term commences upon approval of the contract; however, this directly conflicts with Part 531.1(h), which clearly states that “[t]he time period shall begin running no later than the date when the gaming activities authorized by an approved management contract begin.” 25 C.F.R. Part 531.1(h).

The Discussion Draft also proposes a number of revisions to certain aspects of the NIGC’s background investigation process.

Proposed Part 537.1(a)(3) would require the NIGC to conduct a background investigation on any “person” who has 10 percent or more direct or indirect financial interest in a management contract, as opposed to the existing regulation that requires background investigations on the ten persons who have the greatest financial interest in the management contract. We support this proposal as it focuses the investigative process on those individuals who have significant or meaningful financial interests in the contract. Under the existing regulations, it is not uncommon for several of the ten individuals with the greatest financial interest to have relatively small or insignificant interests.

Proposed revisions to Part 537.1 would also clarify that the Chair may exercise discretion to reduce the scope of the background investigation of certain identified entities. We support this provision and would encourage the Commission to include a publicly traded company that holds a license by one or more gaming jurisdictions within the United States. Although we appreciate the independent regulatory authority of the Commission, we believe that licensure in other gaming jurisdictions is evidence of suitability and, at a minimum, should result in a more streamlined backgrounding process.

The Discussion Draft also considers revisions to Part 537.3 pertaining to fees for background investigations, including eliminating the requirement for a manager to post deposits to cover the costs of background investigations and providing that an unpaid bill “may result in an approved contract being voided or cause a pending contract to be disapproved.” (§537.3(c)). While we support elimination of the deposit agreement, we strongly disagree with the proposal that an unpaid bill may result in voiding an approved contract because it raises serious due process issues, conflicts with Part 513, and does not take into consideration the requirements of Part 573.

Existing Part 513 sets forth detailed and comprehensive procedures pursuant to which the NIGC may pursue collection of “debts” (defined broadly to include “fees”). These provisions include due process rights, including notice, an opportunity to review and inspect agency records and an opportunity to be heard. The concept of voiding an approved contract is contrary to both a tribe’s and a manager’s due process rights and conflicts directly with Part 513.7 which provides that the Chair may revoke a debtor’s ability to manage a tribal gaming operation only “if the debtor inexcusably or willfully fails to pay a debt.” 25 C.F.R. Part 513.7. Moreover, “[t]he revocation of ability to engage in gaming may last only as long as the debtor’s indebtedness.” *Id.* Finally, the proposed language stating an unpaid bill may result in an approved contract being

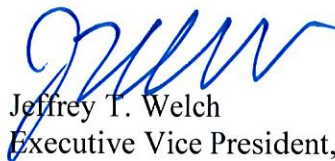
National Indian Gaming Commission
March 20, 2018
Page 7

voided does not take into consideration a tribe's and a manager's due process rights under Part 573, nor does it appear to take into consideration the Commission's goal of voluntary compliance.

Conclusion

We appreciate the Commission's efforts in engaging in consultation on these important topics and our opportunity to comment. We look forward to working with the Commission. Should you have any questions, please contact me or Kevin Wadzinski at (202) 872-6774.

Sincerely,



Jeffrey T. Welch
Executive Vice President,
Chief Legal Officer