



TFA

Monthly Newsletter

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IN THE NEWS

NIGC Proposed Changes That Could Impair Tribes' Access To Debt Capital Markets

by Jeffrey S. Heimann

In late December, the NIGC announced it was seeking tribal input on, among other topics, proposed action on regulations related to the definitions of "Management" and "Sole Proprietary Interest". Specifically, some of the changes proposed could have a materially negative impact on the ability of tribal governments to access debt capital to finance gaming operations.

Definition of "Management"

The proposed action in the January 19, 2018 Discussion Draft would add a definition of "Management" to 25 C.F.R. Part 502 (definitions related to the implementation of IGRA). Currently, "management" is not a defined term. The proposed change would formalize a definition for purposes of determining if financing documents are Management Contracts. Recall that most lenders will not provide financing without receipt of a "Declination Letter" from the NIGC that confirms the financing documents

do not constitute a Management Contract.

Two major areas of concern exist with this proposed definition:

First, Section 2(k) of the proposed definition states, "Management includes, but is not limited to, planning, organizing, directing, coordinating, or controlling...the supervision of construction or improvements." This language would be problematic for any lender providing a tribe any type of construction financing as these financing documents typically contain provisions related to "construction controls" and "construction draws". This language protects lenders from continuing to fund a project that is either a) not actually being constructed or b) unable to be completed successfully. These provisions are required in most Native American and commercial financings, and tribes would unlikely be able to access construction financing if these provisions were to be considered management activities.

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2/1/18 – BusinessWire.com

Indian Gaming Tradeshow & Convention Announces 2018 Conference Lineup

2/6/18 – IndianGamingTradeshow.com

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2/8/18 – Indianz.com

Court Opinion Could Free Maine Tribes to Open Casinos Without State Approval

2/19/18 – BangorDailyNews.com

Native American Tribe Not Entitled to Sovereign Immunity: PTAB

2/26/18 – LifeSciencesIPreview.com

Supreme Court Sides with Indian Country in Long-Running Homelands Case

2/27/18 – Indianz.com

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Second, the proposed definition does not include disclaimer language related to the ability of the lender to enforce their rights under the agreements. The intent of this language is to provide lenders comfort that they have a valid security interest in the gaming operation, so long as they do not engage in any other prohibited management activities. For example, language in the financing documents requiring the borrower to pay the interest on their debt or comply with financial covenants should not constitute management activities. To avoid potential disruption of tribe's access to capital, the NIGC should specifically carve out lenders' ability to enforce their rights, to the extent those rights are not otherwise management activities, from the proposed definition of "Management".

"Sole Proprietary Interest"

The NIGC's proposed language related to the determination of violation of the "Sole Proprietary Interest" mandate contains three significant areas of concern.

First, while the proposed regulation sets forth 7 factors for the NIGC to consider in its determination, it allows the Chair to take only a single factor into account. (Also of concern is the regulation reserves the Chair's right to find a violation based on a factor not identified in the proposed list.)

Second, the NIGC could find a violation of Sole Proprietary Interest if the

Tribe assigns a right to a third party allowing them "access to records or financial information regarding the gaming operation." Lenders require borrowers to regularly submit financial information for review. If the NIGC was able to claim a violation of Sole Proprietary Interest because a tribe is required to submit financial statements to its lender, access to traditional financing would be nearly impossible. Most financial institutions are obligated by federal law to collect certain financial information and ensure they are compliant with anti-money laundering laws and regulations.

Lastly, a "grant of a security interest in the gaming operation" could also be deemed a violation of the Sole Proprietary Interest mandate. Without the ability to grant this security interest, tribal

borrowers would have a very difficult time finding financing from traditional sources. While some tribes in certain instances may be able to borrow on an unsecured basis, unsecured debt is far more costly than secured debt. Security interests in the Tribe's gaming operations should be permitted if those provisions don't allow the creditor to actually operate the gaming operation.

Let Your Voice Be Heard

While February 28, 2018 was the official "deadline" for comments to these Discussion Drafts, the NIGC will always accept more comments and feedback. We urge interested parties to reach out to the NIGC directly or reach out to us and we can coordinate a response.



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