



TFA

Monthly Newsletter

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IN THE NEWS

Gaming executive says Seminole takeover of Mirage a “game changer,” but urges caution on tribal entry into Las Vegas

3/5/23 – cdcgaming.com

Read The Fine Print: A Proposed Federal Rule Could Change Everything For Indian Gaming

3/6/23 – sportshandle.com

Tribal Casinos 3.0: Tribes Embrace Integrated Resorts

3/24/23 – tribalgovernmentgaming.com

IGA Tradeshow: Tribal casinos look to diversify as competition increases

3/29/23 – cdcgaming.com

IGA Tradeshow: California tribes won't bring back sports betting initiative until 2026, if then

3/30/23 – cdcgaming.com



The TFA team with Kiss front man Gene Simmons at the Rock & Brews IGA reception co-hosted by TFA.

Declination Letters: Still relevant?

By William Newby

Declination letters (“Dec Letters”) have been around since the early 1990’s and have been an integral part of doing business in Indian Country ever since. They have been used in support of a variety of contracts and agreements between tribal casinos and third parties including development, loan and security agreements; promissory notes; bond indentures and employment, independent contractor and depository account agreements and more.

Because of the widespread use of Declination Letters for a wide variety of transactions over several decades, the “library” of Dec Letters is substantial. The details of each underlying contract may not be universally shared per se, however the collective experience of the litany of requesters and their expert Indian Law counsel supports a common awareness of what will or what won’t be found acceptable under IGRA.

While perhaps a “good to have”, is getting a Dec Letter from the NIGC therefore a “must have”? For new, novel and, possibly,

“cutting edge” transactions with few if any comparable transactions from which to draw inference from, Dec Letters are certainly advisable.

But for most “typical” transactions, TFA contends they are not necessary and, moreover, can be an impediment to getting a “regular way” deal done in a timely and efficient manner.

What is a Declination Letter?

The Indian Gaming Regulatory Act **requires** that contracts for the management and operation of tribal casinos be reviewed and approved by the NIGC Chair. Failure to have management contracts reviewed and approved means that those contracts are legally void. Additionally, the IGRA requires that contracts do not violate the statutory requirement that Tribes have the sole proprietary interest in their casino. Put another way, only Tribes may own tribal casinos.

To assist potential non-tribal business partners understand whether their financial contracts have provisions that implicate

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direct or indirect management control over the tribe's casino operations, the NIGC's general counsel office offers a non-statutory advisory process whereby it will review substantially completed **draft** agreements for potential inclusion of management-like elements. These elements could result in the contract unexpectedly being deemed a management contract and thus potentially void. NIGC will similarly review financial contracts to advise the parties whether any of the contractual provisions convey a proprietary interest in casino operations to a non-tribal party.

The product of that review is the Declination Letter wherein the NIGC will offer an *advisory opinion* as to "whether or not a contract or an agreement implicates management of a tribe's gaming operation or violates the sole proprietary interest requirement."

The Effect of a Declination Letter

As noted, a Dec Letter is an **OPINION**. It is offered as a courtesy and is not a Final Agency Action—and while it represents the views of the NIGC's general counsel, it is nonetheless not binding on a court. This fact is important and as Robert Gips, a highly respected business and Indian Law counsel at Drummond Woodsum points out, "...the final determinant on the validity of a contract is not the Declination Letter, but rather a court of law... and even then, probably the Judge in that court...". So, while the Dec Letter provides some good guidance, it is only a "comfort letter" and is not legally binding. As Mr. Gips notes "Courts are required to give substantial deference to Final Agency Actions, but not as much deference to Declination Letters, which are non-statutory advisory opinions."

The Declination Letter in Practical Use

In 1993, the NIGC issued Bulletin No. 1993-3 following the submission of a number of gaming related documents for review, largely consulting and development agreements, which contained elements reserved for approved management agreements. The Bulletin was an effort to make clear the rules and thereby ensure that submitted agreements were limited in scope and therefore did not cross over either the management or sole proprietary interest lines.

Though the 1990's and 2000's the preponderance of Dec Letters were of this sort. In fact, back in 1995 when principals of TFA, at the time part of the gaming team at BofA, arranged the first ever syndicated bank line of credit for a Tribe's gaming operation—Foxwoods Resort Casino—no Dec Letter was sought. Although the banks were generally novices to Indian Country, expert Indian Law representation (Mr. Gips for the Mashantucket Pequot Tribal Nation and Dorsey and Whitney for the banks) ensured that NIGC rules were adhered to in the loan documents. Banks and bond investors relied on knowledgeable Indian law counsel to construct legal documents that did not include any management controls to the lenders for many years with no issues.

But in 2010 that all changed with *Lake of Torches*.

In *Wells Fargo Bank vs Lake of Torches EDC*, Federal Courts ruled that the underlying loan documentation contained elements of management control, was unapproved by the NIGC and was therefore considered void.

An over-aggressive investment bank and the use of inexperienced (in Indian Law) counsel were largely to blame for the

documentation, but regardless of the reason, the case sent shockwaves through the capital markets. The result was that nearly all subsequent financing transactions—bank, bond, lease—sought clarity from the NIGC through Dec Letters. Note, the case was ultimately settled after years of litigation and the lender was made whole. ([NafoaOrg](#))

The wave of requests was so great, that of the approximately 300 Dec Letters listed on the NIGC website to date, ([nigc.gov](#) 1), some 237 or so are for financing transactions—a whopping ~79%.

Then, following the 2018 repeal of the Professional and Amateur Sports Betting Protection Act of 1992 (or "PASPA": the legislation that enacted a blanket ban on sports wagering that applied to most all states in America), a new, albeit smaller, wave of requests emanated from companies looking to engage in sports betting activities with Tribes.

As one source close to the NIGC put it, "the advent of widespread sports betting meant a new category of agreements to review. This in turn begat an effort to ensure that aspects of these new, largely untested agreements would avoid many of the pitfalls of the early development, consulting and even finance agreements." The source went on to say that one of the primary issues was that many sports betting companies were from overseas and didn't appreciate that within IGRA there exists limits on management and on fees, especially revenue-based forms of variable compensation—limits that don't exist on sports betting companies overseas per se (see: [nigc.gov](#) 2).

Where Are We Now?

It's important to remember that Tribes are not the ones requesting Dec Letters, rather it is the party on the other side of

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the prospective business deal that does since the counter party runs the primary risk of the contract being deemed to be void.

That being the case, prospective partners should ask themselves “what benefit does the Dec Letter bring to me as the requesting party?” As discussed, for new, novel and “cutting edge” transactions, they serve as an important first step in affirmation that proposed terms and conditions do not violate IGRA.

But for a large majority of transactions, especially in the finance and, recently, sports betting areas, the long history of Dec Letters back to Lake of Torches and the repeal of PASPA, have provided strong guidance as to appropriate deal structure for experienced Indian law attorneys. This “data base” of precedential transactions informs new deals in a way that provides a sure road map for staying “on side”. One could therefore conclude that for most financial and many sport betting deals, Dec Letters are “nice to have” but by no means necessary.

In fact, no less than the NIGC has said as much. In its October 5, 2021 Bulletin on submission of loan and financing documents for review (nigc.gov 3) the NIGC says “...an agency review may not always be necessary. Rather, it is the Agency’s intent that tribes and the financing entities with whom they are working look to this bulletin, as well as the materials referenced above, to determine whether a particular financing implicates manage-

ment.”

On the same day, NIGC published a similar guide intended for sports betting (nigc.gov 4).

Clearly, the NIGC is asking experienced financing and sports betting providers (and their counsel) to do the work themselves, compare to published guidelines and proceed with confidence that their informed decision is correct.

Despite that, however, our source tells us that the number of Dec Letter requests of the NIGC remains “high” despite all of the above.

Implications of the High Volume of Dec Letter requests

The practical problem with the continued flood of Dec Letters is that it inundates the NIGC’s legal staff. In addition to reviewing financing documents, development, and independent contractor agreements, etc., for purposes of preparing Dec Letters, the staff lawyers at NIGC have “day jobs” that demand the same careful review and response that do Dec Letters.

The consequence of this continuing high volume of requests is that, although the NIGC website suggests a 4–6-week turnaround for Dec Letters, anecdotal evidence suggests that timeline is aggressive.

The Takeaway...If You Will

When asked if there might be an overreliance on Dec Letters, Mr. Gips replied “it depends”. His somewhat Delphic re-

sponse suggests that there will always be a role for Dec Letters when the transaction is new, novel and/or without significant factual precedent and that for those transactions, every circumstance is unique and needs to be considered as such. But for transactions that do have substantial factual precedent, making a request of the NIGC for a Dec Letter and then waiting (and waiting and waiting) is likely not necessary. Moreover, the time taken waiting on a Declination Letter could have an adverse impact on the very business that’s contemplated.

As business people, we’re trained to assess risks and compare those risks to anticipated rewards. Knowing that, at best, Dec Letters are a form of non-binding “comfort letters” for which possibly waiting weeks and even months for receipt could impact a business transaction, the risk/reward dynamic should be carefully considered. What is the impact of a delay on the other side of the transaction (the Tribe)? What about deal deadlines? The competition--are they requesting a Dec Letter?

TFA has seen a slight increase in the number of deals done *without* Dec Letters. Despite that trend, Dec Letter requests remain high, and one must wonder why. Precedent transactions (many with Dec Letters in file), competent Indian Law advice, prior business experience and savvy Tribal partners all should contribute to a growing confidence in the business community that for many, perhaps most cases, Dec Letters remain a “nice to have” but are no longer a “need to have”.

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