



TFA

Monthly Newsletter

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IN THE NEWS

Ch-Ch-Ch-Changes: Time to Make a Change and Drop the Requirement for NIGC Declination Letters

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Author note: Recommend reading this newsletter while listening to David Bowie's "Changes".

As it stands today, most everyone involved in Indian Country gaming is familiar with the term "declination letter." The NIGC's opinion effectively provides lenders and others entering into financial agreements with tribes a security blanket against having those agreements being voided for being de facto unapproved management agreements. The origin of declination letters stems from a poorly drafted bond indenture that was in fact voided on this basis and led to a lengthy and costly negotiation to affect a settlement because of the lack of applicability of bankruptcy code in tribal contexts (Wow! That's a mouthful!). This event occurred in May 2009 and came on the heels of the 2008 financial crisis and subsequent Great Recession. It freaked out lenders who feared their tribal loan agreements could be invalidated by court order and effectively shut down tribes' access to the debt capital markets for several months.

The question today, well over a decade after this one-time event, is this: should we still



consider declination letters necessary to closing and funding deals? Are they necessary at all?

I strongly suggest the answer to both questions is "No".

The NIGC has Told Us Declination Letters are Unnecessary. Could one argue that it is naïve and oversimplistic to suggest declination letters are not necessary today? Perhaps, how-

California: Timbisha Shoshone Tribe moving ahead with Inyokern site for casino

7/7/2024 – cdcgaming.net

New York sports betting revenue surges again

7/8/2024 – cdcgaming.net

Pascua Yaqui Tribe Breaks Ground on Elder Housing Project in Tucson

7/12/2024 – nativenewsonline.net

Navajo President Buu Nygren Invests \$7 Million in Small Businesses with loans to Grow, Diversify Navajo Navajo's Entrepreneurs, Economy

7/12/2024 – nativenewsonline.net

A casino project sparks conflict over tribal sovereignty and control of sacred lands [Northern California]

7/23/2024 – latimes.com

Brandon Montour brings Stanley Cup home to Six Nations

7/25/2024 – ictnews.org

Federal agency greenlights tribal gaming hall in Alaska

7/31/2024 – ictnews.org

(continued from Page 1)

ever, the NIGC has publicly issued statements that state declination letters are unnecessary for general agreements and financing related agreements. In October 2021, the NIGC directly addressed the need for declination letters in bulletins 2021-3 and 2021-4 stating declination letters are not required under IGRA. Those bulletins were issued nearly three years ago. Yet, to this day, most lenders and other interested parties require declination letters to finalize agreements, even in some instances where the agreements are largely similar to those that have already received declination letters in the past.

From the NIGC bulletin 2021-3 and 2021-4 issued October 5, 2021:

"In the nearly 30 years since Bulletin No.1993-3 was passed, however, the tribal gaming industry has grown exponentially in both size and experience. In addition, the NIGC published guidance on what activities constitute management, and has reviewed thousands of agreements for management, resulting in a vast body of guidance though declination letters and enforcement actions . . . the Indian Gaming and finance industries have by and large adapted their agreements to avoid management."

Why Does it Matter? Opportunity Cost. So, what is the big deal with getting assurance from the NIGC that an agreement, finance related or otherwise, does not have provisions related to a management agreement? Opportunity cost to tribes. In a review of the timing for the NIGC to provide a declination letter, TFA has determined the time range to be from 33 days (one month) to 289 days (about 10 months) over the past two years.

10 Latest Dec Letters Provided on NIGC Website

Type	Submitted	Received	Time at NIGC
Loan Amendment	2/12/2024	4/2/2024	50 Days
Financing Agreement	9/1/2023	3/29/2024	210 Days
Mobile Sportsbook	5/22/2023	3/6/2024	289 Days
Financing Agreement	11/17/2023	1/19/2024	63 Days
Mobile Sportsbook	1/6/2023	10/19/2023	286 Days
Loan Documents	9/15/2023	10/18/2023	33 Days
Loan Documents	6/28/2023	10/16/2023	110 Days
Financing Agreement	6/1/2023	7/24/2023	53 Days
Sportsbook	9/22/2022	11/14/2022	53 Days
Loan Documents	7/22/2022	9/26/2022	66 Days

The NIGC currently offers guidance of four to six weeks for a declination letter to be provided. This delay to closing can translate into significant economic impact to a tribe in the form of several factors:

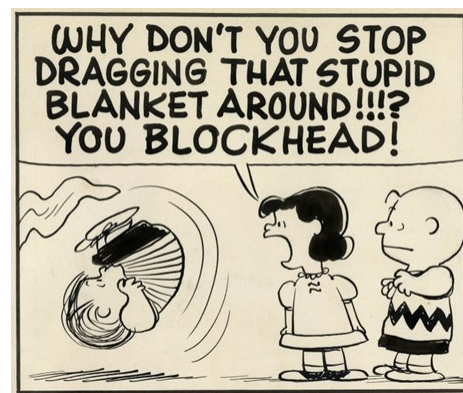
- **Lost revenue:** delay to a project opening can result in millions of dollars of lost revenue to a tribe.
- **Lost interest rate savings:** millions of dollars in lost interest savings can result from delay in closing.
- **Increased transaction costs:** at its most basic, obtaining a declination letter can result in tens of thousands to hundreds of thousands of dollars of increased transaction costs, including increased legal and professional expenses.
- **Increased project costs:** the impact to project costs is immeasurable given material costs and labor can increase as a tribe waits for a declination letter to close a financing.
- **Deal risk:** adding any amount of time to close inherently increases risk to a financing or transaction closing.

Unfair and Unnecessary Tax on Tribes. Ultimately, those transacting in Indian Country must acknowledge the unfair and unnecessary burden declination letters put on tribes. This results in capital being diverted from tribes to increased transaction costs. If we want to be better business partners to

tribes, we need to recognize there is no longer a need for declination letters. Let's focus on helping tribes obtain financial sovereignty and not placing an unnecessary tax on them to conduct business.

Walk the Walk. As the NIGC has stated, those working in Indian Country have enough of a body of knowledge to draft agreements to avoid any provisions that may be interpreted as management. We know better. Our legal technology has evolved. Let's have our thinking evolve as well and move forward without the delay and cost of this patently unnecessary step in conducting business in Indian Country. Like David Bowie's "Changes", it's time for us to look in the mirror and "turn and face the strange", embrace our experience and knowledge, and drop this unnecessary "requirement" to enabling progress and wealth generation in Indian Country.

As always, TFA stands at the ready to help tribes with their financing needs and economic diversification efforts. We offer unimpeachable transaction experience that cannot be matched by any other financial advisor in Indian Country. We look forward to visiting you at your tribal reservation, at conferences, or are happy to host in Southern California.



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