



May 5, 2017

Chairman David Burnett
The Confederated Tribes of the Chehalis Reservation
420 Howanut Road
Oakville, WA 98568

Re: Review of Consulting Agreement for the Confederated Tribes of the Chehalis Reservation

Dear Mr. Castello:

This letter responds to the March 22, 2017, request on behalf of the Confederated Tribes of the Chehalis Reservation (Tribe) for the Office of the General Counsel, National Indian Gaming Commission, to review a proposed agreement between the Tribe and The Hartmann Gaming Group Washington LLC (Hartmann). The request asks for my opinion as to whether the proposed agreement is a management contract requiring the NIGC Chairman's approval pursuant to the Indian Gaming Regulatory Act. The request also asks for my opinion as to whether the proposed agreement violates IGRA's requirement that a tribe have the sole proprietary interest in its gaming operation.

In my review, I considered the Consulting Agreement marked "NIGC Submission Draft (3-22-17)." It is my understanding that the Consulting Agreement is represented to be in substantially final form, and any further changes will not be material to OGC's analysis. This opinion shall not apply if the Consulting Agreement changes in any material way prior to execution or is inconsistent with assumptions made herein. Further, this opinion is limited to the Consulting Agreement and does not include or extend to any other agreements.

It is my opinion that the Consulting Agreement is not a management contract and does not require the approval of the NIGC Chairman. It is also my opinion that the Consulting Agreement does not violate IGRA's sole proprietary interest requirement.

The NIGC has defined the term *management contract* as "any contract, subcontract, or collateral agreement between an Indian tribe and a contractor or between a contractor and a subcontractor if such contract or agreement provides for the management of all or part of a gaming operation."¹ Though NIGC regulations do not define *management*, the term has its ordinary meaning. Management encompasses activities such as planning, organizing, directing,

¹ 25 C.F.R. § 502.15.

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coordinating, and controlling.² If a contract requires the performance of any management activity with respect to all or part of a gaming operation, the contract is a management contract within the meaning of 25 U.S.C. § 27411 and requires the NIGC Chairman's approval. Management contracts not approved by the Chairman are void.³

Here, the Consulting Agreement provides for a consulting and advisory role for Hartmann regarding the operations of the Tribe's Lucky Eagle Casino. The Consulting Agreement does not contemplate a management role and expressly provides that Hartmann shall not engage in any management activities. Hartmann is provided with no decision making authority over or role in the regulatory functions of the Tribe or the gaming operation's daily activities. As such, the Consulting Agreement is not a management contract and does not require the Chairman's approval.

IGRA further requires that "the Indian tribe will have the sole proprietary interest and responsibility for the conduct of any gaming activity."⁴ When determining whether a proprietary interest in the gaming operation has vested with a third party, the NIGC typically examines three criteria: (1) the term of the relationship; (2) the amount of revenue paid to the third party; and (3) the right of control provided to the third party over the gaming activity.⁵

Here, the Consulting Agreement provides for an initial fixed term of two years that may be extended by mutual agreement for successive 12-month terms. Compensation owed Hartmann is fixed and directly tied to a schedule of tasks to be completed over the course of the term. In addition, the Consulting Agreement does not provide Hartmann with the right of control over any aspect of the gaming activity – the Tribe is not obligated to implement or adopt any of the recommendations, strategies, or plans developed pursuant to the Consulting Agreement. Thus, as the Consulting Agreement's term is not for a long length of time, the compensation scheme appears appropriately tied to the services provided, and the consultant does not have control over the Tribe's gaming operation, the Consulting Agreement does not violate IGRA's sole proprietary interest requirement.

Please note that it is my intent that this letter be released to the public through the NIGC's website. If you have any objection to this disclosure, please provide a written statement explaining the grounds for the objection and highlighting the information that you believe should be withheld.⁶ If you object on the grounds that the information qualifies as confidential commercial information subject to withholding under Exemption Four of the Freedom of

² *NIGC Bulletin No. 94-5*: "Approved Management Contracts v. Consulting Agreements (Unapproved Management Contracts are Void)."

³ 25 C.F.R. § 533.7; *Wells Fargo Bank, Nat. Ass'n v. Lake of the Torches Econ. Dev. Corp.*, 658 F.3d 684, 688 (7th Cir. 2011).

⁴ 25 U.S.C. § 2710(b)(2)(A); *see also* 25 C.F.R. § 522.4(b)(1).

⁵ *See* NOV-11-02; *see also*, *City of Duluth v. Fond du Lac Band of Lake Superior Chippewa*, 830 F. Supp. 2d 712, 723 (D. Minn. 2011), *aff'd in pertinent part*, 702 F.3d 1147 (8th Cir. 2013) (discussing NIGC adjudication of proprietary interest provision).

⁶ 25 C.F.R. § 517.7(c).

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Information Act (FOIA),⁷ please be advised that the information was voluntarily submitted and, as such, that any withholding should be analyzed in accordance with the standard set forth in *Critical Mass Energy Project v. NRC*.⁸ Any claim of confidentiality should also be supported with “a statement or certification by an officer or authorized representative of the submitter.”⁹ Please submit any written objection to FOIASubmitterReply@nigc.gov **within thirty (30) days of the date of this letter**. After this time elapses, the letter will be made public and objections will no longer be considered.¹⁰ If you need any additional guidance regarding potential grounds for withholding, please see the United States Department of Justice’s Guide to the Freedom of Information Act at <http://www.justice.gov/oip/doj-guide-freedom-information-act-0>.

If you have any questions, please contact Staff Attorney Austin Badger at (202) 632-7003.

Sincerely,



Michael Hoenig
General Counsel

cc: Aaron Harkins, Faegre Baker Daniels LLP
(via email: Aaron.Harkins@FaegreBD.com)

⁷ 5 U.S.C. § 552(b)(4).

⁸ 975 F.2d 871 (D.C. Cir. 1992).

⁹ 25 C.F.R. § 517.7(c).

¹⁰ *Id.*