



February 19, 2021

VIA EMAIL

Gina M. Jacobs, Esq.
Jones Walker LLP
190 E Capitol Street, Suite 800
Jackson, MS 39201

Re: Review of the 2020 Loan Documents for the Eastern Band of Cherokee Indians

Dear Ms. Jacobs:

This letter responds to your December 14, 2020 request, on behalf of the Eastern Band of Cherokee Indians, for the National Indian Gaming Commission, Office of the General Counsel, to review certain loan documents and to provide an opinion as to whether or not the submitted loan documents are management contracts requiring the NIGC Chairman's approval pursuant to the Indian Gaming Regulatory Act of 1988. You have also asked for my opinion as to whether or not the loan documents violate IGRA's requirement that a tribe have the sole proprietary interest in its gaming operation.

In my review, I considered the following unexecuted document (collectively, "the 2020 Loan Documents"):

- Sixth Amended and Restated Loan Agreement among Tribal Casino Gaming Enterprise, as the Borrower, the Lenders party hereto from time to time and Wells Fargo Bank, National Association, as Administrative Agent, L/C Issuer and Swing Line Lender; Wells Fargo Securities, LLC [____] and [____], as Joint Lead Arrangers and Joint Bookrunners [____], and [____], as Co-Syndication Agents marked in lower left-hand corner with 4149-5495-5560-8, together with the following Exhibits:
- Exhibit A – Notice of Loan Borrowing marked in upper right hand corner with Orrick Draft 12/14/2020 and in lower left-hand corner with 4129-9762-3336.2;
- Exhibit B – Notice of Conversion marked in upper right hand corner with Orrick Draft 12/14/2020 and in lower left-hand corner with 4149-5495-5560-8;
- Exhibit C – Notice of Interest Period Selection marked in upper right hand corner with Orrick Draft 12/14/2020 and in lower left-hand corner with 4149-5495-5560-8;
- Exhibit D – Reserved marked in upper right hand corner with Orrick Draft 12/14/2020 and in lower left-hand corner with 4149-5495-5560-8;

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- Exhibit E – Pricing Certificate marked in upper right hand corner with Orrick Draft 12/14/2020 and in lower left-hand corner with 4149-5495-5560-8;
- Exhibit F – Assignment of Construction Contract marked in upper right hand corner with Orrick Draft 12/14/2020 and in lower left-hand corner with 4164-5826-0264.2;
- Exhibit G – Notice of Swing Line Borrowing marked in upper right hand corner with Orrick Draft 12/14/2020 and in lower left-hand corner with 4149-5495-5560-8;
- Exhibit H – Revolving Loan Note marked in upper right hand corner with Orrick Draft 12/14/2020 and in lower left-hand corner with 4149-5495-5560-8;
- Exhibit I – DD Term Loan Note marked in upper right hand corner with Orrick Draft 12/14/2020 and in lower left-hand corner with 4149-5495-5560-8;
- Exhibit J – Swing Line Note marked in upper right hand corner with Orrick Draft 12/14/2020 and in lower left-hand corner with 4149-5495-5560-8;
- Exhibit K – Assignment Agreement marked in upper right hand corner with Orrick Draft 12/14/2020 and in lower left-hand corner with 4149-5495-5560-8;
- Exhibit L – Compliance Certificate marked in upper right hand corner with Orrick Draft 12/14/2020 and in lower left-hand corner with 4149-5495-5560-8;
- Exhibit M - Subordinated Promissory Note marked in upper right hand corner with Orrick Draft 12/14/2020 and in lower left-hand corner with 4135-3705-8600.2;
- Exhibit N – Request to Increase the Total Revolving Loan Commitment (Section 2.5(c)) marked in upper right hand corner with Orrick Draft 12/14/2020 and in lower left-hand corner with 4149-5495-5560-8;
- Exhibit O – Form of Distribution Certificate marked in upper right hand corner with Orrick Draft 12/14/2020 and in lower left-hand corner with 4149-5495-5560-8;
- Exhibit P-1 – Form of U.S. Tax Compliance Certificate (Owner) marked in upper right hand corner with Orrick Draft 12/14/2020 and in lower left-hand corner with 4149-5495-5560-8;
- Exhibit P-2 – Form of U.S. Tax Compliance Certificate (Participant) marked in upper right hand corner with Orrick Draft 12/14/2020 and in lower left-hand corner with 4149-5495-5560-8;
- Exhibit P-3 – Form of U.S. Tax Compliance Certificate (Participant) marked in upper right hand corner with Orrick Draft 12/14/2020 and in lower left-hand corner with 4149-5495-5560-8;
- Exhibit P-4 – Form of U.S. Tax Compliance Certificate (Owner) marked in upper right hand corner with Orrick Draft 12/14/2020 and in lower left-hand corner with 4149-5495-5560-8;
- Schedule 4.3, Insurance, Gaming Insurance Requirements, marked in lower left-hand corner with 4140-5327-4920.2;

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- Undated Fourth Amended Restated Demand Deposit Account Control Agreement by and among: Wells Fargo, TCGE and First-Citizens Bank & Trust Company marked in upper right hand corner with Orrick Draft 12/14/2020 and in lower left-hand corner with 4159-6516-7656.4;
- Undated Sixth Amended and Restated Tribal Agreement, between the Tribe and Wells Fargo, as agent marked in upper right hand corner with Orrick Draft 12/14/2020 and in lower left-hand corner with 4156-8257-6424.4;
- Undated Third Amended and Restated Tribal Subordination Agreement between the Eastern Band of Cherokee Indians and Wells Fargo Bank, marked in upper right hand corner with Orrick Draft 12/14/2020 and in lower left-hand corner with 4157-6161-2840.2];
- Undated Fourth Amended and Restated Security Agreement made by Tribal Casino Gaming, an enterprise and instrumentality of the Eastern Band of Cherokee Indians in favor of Wells Fargo Bank for itself and as the administrative agent, marked in upper right hand corner with Orrick Draft 12/14/2020 and in lower left-hand corner with 4165-6495-3128.3; and
- Undated Third Amended and Restated Unjust Enrichment and Sovereign Immunity Agreement made by the Eastern Band of Cherokee Indians and Tribal Casino Gaming Enterprise (the “Enterprise”), an instrumentality and enterprise of the Tribe, in favor of Wells Fargo Bank, National Association, for itself and as the agent on behalf of the Benefits Providers (as defined below) (in such capacity, the “Agent”), marked in upper right hand corner with Orrick Draft 12/14/2020 and in lower left-hand corner with 4159.6654.3912.2.

The 2020 Loan Documents contain terms similar to other agreements that OGC has previously reviewed and analyzed. Some of these opinion letters may be found on the NIGC's website located at www.nigc.gov. In applying the same analysis here, it is my opinion that, collectively, the 2020 Loan Documents are not management contracts and do not require the approval of the NIGC Chairman. It is also my opinion that they do not violate IGRA's sole proprietary interest requirement.

It is my understanding that the 2020 Loan Documents are 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 2020 Loan Documents change in any material way prior to closing or are inconsistent with the assumptions made herein. Further, this opinion is limited to the aforementioned 2020 Loan Documents and does not include or extend to any other agreements not submitted for review.

Please note it is my intent 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, highlighting the information you believe should be

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withheld.¹ If you object on the grounds that the information qualifies as confidential commercial information subject to withholding under Exemption Four of the Freedom of Information Act (FOIA),² please be advised that the information was voluntarily submitted and, as such, any withholding should be analyzed in accordance with the standard set forth in *Food Marketing Institute v. Argus Leader Media*.³ Any claim of confidentiality should also be supported with “a statement or certification by an officer or authorized representative of the submitter.”⁴ Please submit any written objection to FOIASubmitterReply@nigc.gov **within thirty (30) days of the date of this letter.** After this time elapses, this letter will be made public and objections will no longer be considered.⁵ 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 Maria Getoff, Senior Attorney, at (202) 632-7003.

Sincerely,



Michael Hoenig
General Counsel

¹ 25 C.F.R. § 517.7(c).

² Freedom of Information Act, 5 U.S.C. § 552(b)(4) (1966).

³ 139 S.Ct. 2356 (2019).

⁴ 25 C.F.R. § 517.7(c).

⁵ *Id.*