



August 31, 2020

Via Email

Britt E. Clapham II
P.O. Box 22230
Tucson, AZ 85734
bclapham@ddaz.com

Re: Review of loan documents for the Tohono O'odham Nation

Dear Mr. Clapham:

This letter responds to your August 4, 2020 request for the National Indian Gaming Commission's Office of General Counsel to review loan agreements between the Tohono O'odham Gaming Enterprise and the Bank of America, N.A. Specifically, you have asked for my opinion whether the documents are management contracts requiring the NIGC Chair's approval under the Indian Gaming Regulatory Act. You also asked for my opinion whether the loan documents violate IGRA's requirement that the Tribe have the sole proprietary interest in its gaming activity.

In my review, I considered the following submissions (collectively, "the Loan Documents") all of which are unexecuted, but were represented to be in substantially final form:

- Amended and Restated **Credit Agreement**, SMRH 08/03/2020, SMRH: 4850-8570-0418.7 (hereinafter "CA");
- Conformed Copy of the Amended and Restated Credit Agreement, SMRH 08/03/2020, SMRH: 4848-2354-4771.7;
- **Exhibits** to Amended and Restated Credit Agreement, SMRH: 4848-2354-4771.1;
 - Exhibit A (amended form of Compliance Certificate, Exhibit E to the Amended Credit Agreement, SMRH 8/3/2020, SMRH 4843-3033-4659.2.
 - Exhibit B (Distribution Certificate, Exhibit Q to the Amended Credit Agreement, SMRH 8/3/2020, SMRH 4831-1490-4259.2.

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The Loan Documents contain terms similar to other agreements the Office of General Counsel has already reviewed and analyzed, which are available on the NIGC's website. Applying the same analysis here, it is my opinion that the Loan Documents are not management contracts and do not require the approval of the NIGC Chair. It is also my opinion that they do not violate IGRA's sole proprietary interest requirement.

It is my understanding that the drafts are represented to be in substantially final form, and if the Loan Documents change in any material way prior to closing or are inconsistent with assumptions made herein, this opinion shall not apply. Further, this opinion is limited to the Loan Documents listed above. This opinion does not include or extend to any other agreements not submitted for review.

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.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 any withholding should be analyzed under 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, the 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 <https://www.justice.gov/oip/doj-guide-freedom-information-act-0>.

If you have any questions, please contact Associate General Counsel, Rea Cisneros at (202) 632-7003 or by email at Rea_Cisneros@nigc.gov.

Sincerely,



Michael Hoenig
General Counsel

CC: Christine L. Swanick, Esq. (via e-mail)

¹ See 25 C.F.R. § 517.7(c).

² 5 U.S.C. § 552(b)(4).

³ 139 S.Ct. 2356 (2019).

⁴ See 25 C.F.R. § 517.7(d).

⁵ *Id.*

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Ned Norris, Jr., Chairman, Tohono O'odham Nation (via e-mail)

Frank Espino, Chief Executive Officer, Tohono O'odham Gaming Enterprise (via e-mail)