June 24, 2021

Greg Smith
Hobbs Straus Dean & Walker
1899 L Street NW, Ste. 1200
Washington, D.C. 20036

Re: Review of Marketing and Technical Services Consulting Agreement between the Catawba Indian Nation and DNC Gaming in King's Mountain, LLC

Dear Mr. Smith:

This letter responds to your June 4, 2021 request for the National Indian Gaming Commission's Office of General Counsel to review a Marketing and Technical Services Consulting Agreement between the Catawba Indian Nation (Tribe), Catawba Indian Nation Gaming Authority, and DNC Gaming in King's Mountain, LLC. Specifically, you have asked for my opinion whether the Marketing and Technical Services Consulting Agreement is a management contract requiring the NIGC Chairman's approval under the Indian Gaming Regulatory Act and whether the Marketing and Technical Services Consulting Agreement violates the IGRA's requirement that the Tribe have the sole proprietary interest in its gaming activity.

In my review, I considered the following submissions:

- Catawba Casino Corporation Pro Forma (April 12, 2021, 2 pages);
- Financial Model Notes (dated April 12, 2021, 1 page);
- Catawba Indian Nation Gaming Authority Charter (undated; 10 pages); and
- Marketing and Technical Services Consulting Agreement by and among the Catawba Indian Nation, the Catawba Indian Nation Gaming Authority and DNC Gaming in King's Mountain, LLC (unexecuted; 39 pages; June 23, 2021 draft)

Based on my review of these documents and discussions with the Tribe, it is my opinion that the Marketing and Technical Services Consulting Agreement is not a management contract and does not require the approval of the NIGC Chairman. It is also my opinion that the Marketing and Technical Services Consulting Agreement does not violate IGRA's sole proprietary interest requirement.

Summary of the Agreement:

The Tribe will hire DNC to provide recommendations and advice to the Catawba Gaming Authority related to four tranches of services (marketing, IT, gaming, and "other").[1] DNC will make all recommendations to the Authority's President, and the Authority's President can accept or reject DNC's recommendations.[2]

DNC will provide marketing services including print, digital, and video design, social media posting, email marketing, website updates and maintenance, and mobile application updates and maintenance, all under direction of the Gaming Authority's President.[3] The Tribe will also use DNC's "Lucky North Club" loyalty programs to market to the Tribe's patrons.

DNC will provide IT-related recommendations. The IT Services Schedule includes sixteen service areas for which DNC will provide recommendations subject to approval by the Gaming Authority President.[4] Some services and service providers, like the accounting system, are already identified in the Agreement. For others, DNC will provide recommendations and find service providers where necessary for the Tribe to hire.

DNC will also provide Gaming Service recommendations, including recommendations for policies, procedures, and internal controls for all casino departments to be approved by the Tribe's gaming commission. DNC will provide recommendations regarding the casino layout and amenities, slot machine mixing and pricing, and any enhancements that will improve guest services, safety, and revenue generation after the casino has opened.[5]

Finally, DNC will provide various recommendations related the casino's operating budget, business plan, hiring and staffing for the casino, layouts for front of house, back of house and support areas, point-of-sale systems, ad security forces and measures.[6] DNC will perform onsite visits and provide further recommendations related to the gaming operation, and will provide recommendations for the non-gaming aspects including hospitality, retail, food, and beverage operations.

In exchange for the recommendations and advice, DNC will receive (b) (4) .[7] The Agreement will expire at the earlier of 24 months or the date the

[1] Marketing and Technical Services Consulting Agreement §§ 1.01 ("Services"), 2.01(a); Schedules 1.01-1.04.
[2] *Id*. § 2.01.
[3] *Id*. at Schedule 1.01.
[4] *Id*. at Schedule 1.02.
[5] *Id*. at Schedule 1.03.
[6] *Id*. at Schedule 1.04.
[7] *Id*. § 2.01(d).

management contract between the Tribe and DNC is approved by the NIGC Chairman.[8] The management contract is currently being reviewed by the NIGC Finance Division.

Management Contracts:

The NIGC has defined a "management contract" to mean "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."[9] A "collateral agreement" is defined as "any contract, whether or not in writing, that is related, either directly or indirectly, to a management contract, or to any rights, duties or obligations created between a tribe (or any of its members, entities, or organizations) and a management contractor or subcontractor (or any person or entity related to a management contractor or subcontractor)."[10]

While NIGC regulations do not define "management," the Agency has clarified that the term encompasses activities such as planning, organizing, directing, coordinating, and controlling.[11] A "primary management official" includes "any person who has the authority … [t]o set up working policy for the gaming operation."[12] Further, management employees are "those who formulate and effectuate management policies by expressing and making operative the decision of their employer."[13] Whether a particular employee is managerial is not controlled by an employee's actual job responsibilities, authority, and relationship to management.[14] Essentially an employee may qualify as management if the employee possesses the actual authority to take discretionary actions – a *de jure* manager – or, in certain circumstances, where the employee acts as a *de facto* manager by directing the gaming operation through others possessing actual authority to manage the gaming operation.[15]

[8] *Id*. § 2.02.
[9] 25 C.F.R. § 502.15.
[10] 25 C.F.R. § 502.5.
[11] *See* NIGC Bulletin No. 94-5, "Approved Management Contracts v. Consulting Agreements (Unapproved Management Contracts are Void)."
[12] 25 C.F.R. § 502.19(b)(2).
[13] *N.L.R.B. v. Bell Aerospace Co.*, 416 U.S. 267, 288 (1974).
[14] *See Waldau v. M.S.P.B.*, 19 F.3d 1395, 1399 (Fed. Cir. 1994).
[15] *Id*. at 1399 (*citing N.L.R.B. v. Yeshiva*, 444 U.S. 672, 683 (1980)). It is uncommon to see *de facto* management in the terms of an agreement, as it is typically an activity that arises in the day-to-day implementation of a consulting agreement. If, for example, a tribe is required to make the ultimate decision on whether the accept the advice of a consultant, but has no one on staff with the expertise or experience to make such a determination, the consultant may become the *de facto* manager in the sense that he or she is simply executing management decisions through a tribal management official.

NIGC Bulletin 1994-5 states,

> An agreement that identifies finite tasks or assignments to be performed, specifies the dates by which such tasks are to be completed, and provides for compensation based on an hourly or daily rate or a fixed fee, may very well be determined to be a consulting agreement. On the other hand, a contract that does not provide for finite tasks or assignments to be performed, is open-ended as to the dates by which the work is to be completed, and provides for compensation that is not tied to specific work performed is more likely to be construed as a management contract.[16]

If a contract requires or permits the performance of any management activity with respect to all or part of the gaming operation, the contract is a management contract within the meaning of IGRA and requires the Chair's approval.[17] Management contracts that have not been approved by the Chair are void.[18]

Management Analysis:

The Marketing and Technical Services Consulting Agreement contains two indicia of management. The Agreement lacks a schedule when DNC will perform the scope of work. However, the Gaming Authority and DNC have agreed to develop schedules and specific deliverables for the recommendations that DNC will provide.[19] Also, DNC's fee is also not directly related to specific work to be performed.

Other factors indicate the Agreement is not a management contract and mitigate the lack of schedule and connection between the fee and work performed. The Agreement has a short term of up to two years, compared to the seven-year term in the original draft. The Agreement explicitly states that DNC is subject to the direction and control of the Gaming Authority President, and DNC will provide recommendations and advice for a clearly identified scope of work. The parties substantially improved the scope of work compared to the prior version of the Agreement, including four schedules that itemize the service areas and topics for which DNC will provide recommendations. All services are provided as recommendations and advice to be accepted or rejected by the Gaming Authority President. DNC is not authorized to act on its own regarding any service provided. Instead of a fee based on a percentage of gaming, DNC will receive a flat fee.

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[16] NIGC Bulletin No. 94-5, "Approved Management Contracts v. Consulting Agreements (Unapproved Management Contracts are Void)."
[17] 25 U.S.C. § 2711.
[18] 25 C.F.R. § 533.7; *see also Wells Fargo Bank, Nat'l Ass'n v. Lake of the Torches Econ. Dev. Corp.*, 658 F.3d 684, 688 (7th Cir. 2011).
[19] Marketing and Technical Services Consulting Agreement § 2.01(c).

While the Agreement lacks a schedule and does not link the fee to the work performed, the relatively short term, clearly identified scope of work, and flat fee reduce the likelihood that DNC will become a de facto manager of the Tribe's gaming operation. Therefore, it is my opinion that the Agreement is not a management contract that requires approval by the NIGC Chairman.

Sole Proprietary Interest:

IGRA requires a tribe to possess "the sole proprietary interest and responsibility for the conduct of any gaming activity."[20] "Proprietary interest" is not defined in IGRA or the NIGC's implementing regulations. Black's Law Dictionary defines a "proprietary interest" as an "interest held by a property owner together with all appurtenant rights …."[21] An "owner" is "one who has the right to possess, use, and convey something."[22] "Appurtenant" means "belonging to; accessory or incident to …."[23] Case law similarly defines "proprietary interest" as "one who has an interest in, control of, or present use of certain property." [24]

To determine whether an agreement violates the sole proprietary interest requirement, the NIGC analyzes three criteria: (1) the term of the relationship; (2) the amount of revenue paid to the third party; and (3) a third party's right to exercise control over all or any part of the gaming activity.[25] Accordingly, if a party, other than the tribe receives a high level of compensation, for a long period of time, and possess some aspect of control, an improper proprietary interest may exist.

Sole Proprietary Interest Analysis:

The Marketing and Technical Services Consulting Agreement does not grant DNC a proprietary interest in the Tribe's gaming operation. DNC's flat fee (b) (4) is not tied to a percentage of the Tribe's gaming revenue. Rather, the flat fee indicates the parties' valuation of the services that DNC will provide. DNC's fee will be approximately (b) (4) the Tribe's projected net gaming revenue for the two-year term. DNC was originally set to receive between (b) (4) of the Tribe's net gaming revenue under the prior draft of the Agreement.

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[20] 25 U.S.C. § 2710(b)(2)(A); *see also* 25 C.F.R. § 522.4(b)(1).
[21] BLACK'S LAW DICTIONARY (10th ed. 2014).
[22] *Id*.
[23] *Id*.
[24] *See Evans v. United States*, 349 F.2d 653, 659 (5th Cir. 1965).
[25] *See* NIGC NOV-11-02, (July 12, 2011); *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).

Regarding the term, the Agreement will last at most two years, which in general and when compared to a term of seven years as originally proposed by the parties, does not establish an ongoing relationship between the parties.

Regarding control, Tribe must use DNC as its exclusive marketing and technical services provider. However, this version of the Agreement clearly defines the scope of work and makes clear that DNC's work is provided to the Tribe as recommendations, which can be accepted or rejected by the Gaming Authority President. In the event DNC terminates the Agreement due a material breach of the Tribe, DNC is still entitled to the complete fee for the term of the agreement if DNC terminates for Tribe's material breach. This element of control is mitigated by the fact that the parties reduced the term to two years and reduced the fee so that the Tribe's potential liability is substantially reduced.

Accordingly, it is my opinion that the Marketing and Technical Services Consulting Agreement does not grant DNC a proprietary interest in the Tribe's gaming operation because of its short term, flat fee that is a relatively small percentage of the Tribe's net gaming revenue, and DNC's lack of control over the gaming operation.

It is my understanding that the draft Marketing and Technical Services Consulting Agreement is represented to be in substantially final form. If the Agreement changes in any material way prior to execution or is inconsistent with assumptions made herein, this opinion shall not apply. Further, this opinion is limited to the Marketing and Technical Services Consulting Agreement. This opinion does not include or extend to any other agreements.

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.[26] 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),[27] please be advised that any withholding should be analyzed under the standard set forth in *Food Marketing Institute v. Argus Leader Media*.[28] Any claim of confidentiality should also be supported with "a statement or certification by an officer or authorized representative of the submitter."[29] 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.[30] If you need any additional guidance regarding potential grounds for withholding, please see the United

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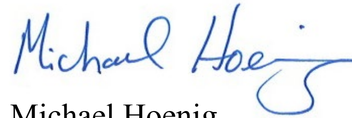
[26] *See* 25 C.F.R. § 517.7(c).
[27] 5 U.S.C. § 552(b)(4).
[28] 139 S. Ct. 2356 (2019).
[29] *See* 25 C.F.R. § 517.7(d).
[30] *Id.*

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 NIGC Staff Attorney Steve Iverson at (202) 632-7003 or by email at steven_iverson@nigc.gov.

Sincerely,



Michael Hoenig
General Counsel