



January 2, 2020

VIA FIRST CLASS MAIL AND EMAIL

William Brooks
Special Counsel
Nottawaseppi Huron Band of the Potawatomi
1485 Mno-Bmadzewen Way
Fulton, MI 49052

**Re: Review of Agreements between FireKeepers Development Authority and
NYX Digital Gaming (USA), LLC**

Dear Mr. Brooks:

This letter responds to your August 21, 2019 request for the National Indian Gaming Commission's Office of General Counsel to review agreements between the FireKeepers Development Authority, d/b/a FireKeepers Casino Hotel (FireKeepers), and NYX Digital Gaming (USA), LLC, d/b/a SG Digital (SG Digital). Specifically, you have asked for my opinion whether the agreements are management contracts requiring the NIGC Chair's approval under the Indian Gaming Regulatory Act. You also asked for my opinion whether the agreements 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 FireKeepers Agreements") all of which are unexecuted, but were represented to be in substantially final form:

- "Sports Betting and Casino Software License and Services Agreement" (no identifying marks; draft dated October 2, 2019, 46 total pages, 12 schedules) (Sports Betting and Casino Agreement)
 - Schedule 1 – Definitions
 - Schedule 2 – List of Products Licensed by FireKeepers
 - Schedule 3 – Customizations Services / Bespoke Product Development Team
 - Schedule 4 – Acceptance testing
 - Schedule 5 – Risk Analysis Services
 - Schedule 6 – Marketing Services
 - Schedule 7 – Operations and strategy Services
 - Schedule 8 – Customer Service, fraud, and anti-money laundering Services
 - Schedule 9 – Fees
 - Schedule 10 – Third Party Game terms
 - Schedule 11 – Hardware and software requirements

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- Schedule 12 – Service Level Agreement for USA
- “Hardware Agreement & Operations Reimbursement Letter” (no identifying marks, draft date September 18, 2019, 4 total pages) (Hardware Agreement)

FireKeepers is organized under a charter approved by the Nottawaseppi Huron Band of Potawatomi’s (NHBP) Tribal Council to serve as a wholly-owned instrumentality and political subdivision to own and operate the FireKeepers Casino Hotel. FireKeepers intends to expand its gaming portfolio by offering retail sports betting and online sports betting and casino games through a website hosted by FireKeepers. In two separate bills, the State of Michigan approved online sports betting and online casino games.¹

Hardware Agreement:

To create the sports betting and online gaming platforms contemplated in the Sports Betting and Casino Agreement, SG Digital will purchase a substantial amount of computer hardware and software. FireKeepers agrees to purchase this hardware and software from SG Digital (b) (4) (b) (4)

(b) (4) Based on estimates provided by the parties, the hardware and software needed to construct the sports betting platform will cost (b) (4) (b) (4) The cost to construct the online casino platform will be (b) (4) and the online platform will use hardware and software (b) (4) (b) (4)

¹ See Michigan House Bill Nos. 4311 (online casino games), 4916 (online sports betting) (Dec. 20, 2019) available at [https://www.legislature.mi.gov/\(S\(tcbagccqu2jbmjnszpkjm55r\)\)/mileg.aspx?page=getObject&objectName=2019-HB-4311](https://www.legislature.mi.gov/(S(tcbagccqu2jbmjnszpkjm55r))/mileg.aspx?page=getObject&objectName=2019-HB-4311) and

[https://www.legislature.mi.gov/\(S\(tcbagccqu2jbmjnszpkjm55r\)\)/mileg.aspx?page=getObject&objectName=2019-HB-4916](https://www.legislature.mi.gov/(S(tcbagccqu2jbmjnszpkjm55r))/mileg.aspx?page=getObject&objectName=2019-HB-4916).

² Sports Betting and Casino Services Agreement (SBCS Agreement) § 4.4.4. Schedule 11 of the Sports Betting and Casino Agreement will describe the hardware and software required for the initial construction of the various platforms.

³ See Hardware Agreement, pp. 1-2.

⁴ *Id.* at p. 1.

⁵ Telephone conference with William Brooks, Special Counsel Nottawaseppi Band (Sept. 4, 2019).

Sports Betting and Casino Agreement:

The Sports Betting and Casino Agreement has (b) (4) term. The agreement has an initial term (b) (4) from the "Go-Live" date, which is the date that either sports betting or internet casino gaming is offered to the public.⁶ The agreement (b) (4)

(b) (4)

Under the Sports Betting and Casino Agreement, either party may terminate the agreement if (1) (b) (4)

(b) (4)

(b) (4)

I. Sports Betting Platforms:

FireKeepers will purchase certain hardware and software¹⁰ from SG Digital (b) (4) (b) (4) SG Digital will install the hardware and will be responsible for maintenance, upgrades, and repairs to the hardware.¹² SG Digital will license its proprietary sports betting software, called (b) (4) to FireKeepers, and FireKeepers is required to use the OpenBet platform for its sports betting platform.

FireKeepers has three options for sports betting platforms: (1) retail; (2) mobile/internet-based; and (3) self-serve betting kiosks (anonymous and account-based).¹³ The retail platform will include electronic points of sale to accept anonymous, cash wagers.¹⁴ FireKeepers staff will handle all betting at physical locations within FireKeepers casinos. The mobile/internet-based platform will include the same software from the retail phase but with a mobile and internet-based user interface to allow patrons to initiate bets online or through mobile devices.¹⁵ The mobile/internet phase will also allow patrons to link their wagers to player accounts (account-

⁶ SBCS Agreement § 13.1 and Schedule 1 (Definitions "initial term" and "Go-Live Date").

⁷ SBCS Agreement § 13.1.

⁸ *Id.* § 13.6.1. "Territory" is defined as "the geographic area within which the Nottawaseppi Huron Band of Potawatomi ("NHBP") and/or FireKeepers is legally permitted to offer and accept Bets on Sports Betting and/or other Games through the OGS under the laws of NHBP, the State of Michigan, and applicable federal and tribal laws[.]" SBCS Agreement at Schedule 1 (Definitions). This definition is broader than Indian lands, likely because the Tribe is anticipating that its online casino and sportsbook will accept wagers from patrons located on and off Indian lands. For those wagers accepted from patrons located off Indian lands, HB 4311 and HB 4916 would apply and the Tribe must be licensed by the State of Michigan.

⁹ SBCS Agreement §§ 13.6, 13.8.

¹⁰ *Id.* at Schedule 11 (to be determined).

¹¹ *Id.* § 4.4.4.

¹² *Id.* § 4.4.1.

¹³ *Id.* at Schedule 2.

¹⁴ *Id.* at Schedule 2 (p. 33).

¹⁵ *Id.* at Schedule 2 (p. 35).

based wagering). The self-serve betting kiosk platform has two options (b) (4)

(b) (4)
(b) (4) Each phase, or functionality of a phase, is contingent on that activity or function being permitted by the applicable law.

The development and installation of (b) (4) is determined by FireKeepers. The (b) (4) (b) (4) will automatically begin once the agreement is executed and FireKeepers is permitted to offer sports betting according to its compact. FireKeepers and SG Digital have already agreed to the hardware and software for (b) (4). Each (b) (4) of the sports betting platform is determined by FireKeepers.¹⁸ Once constructed, SG Digital will submit the work for FireKeepers' testing and acceptance.¹⁹

FireKeepers is also granting a (b) (4) if FireKeepers wishes to launch a sportsbook beyond the "Territory,"²⁰ which is defined as "the geographic area within which the Nottawaseppi Huron Band of Potawatomi (NHBP) and/or FireKeepers is legally permitted to offer and accept Bets on Sports Betting and/or other Games through the OGS under the laws of NHBP, the State of Michigan, and applicable federal and tribal laws[.]"²¹

II. The RAS and Supporting Services:

SG Digital's Risk Analysis Services (RAS) will be incorporated into the OpenBet software used in the sports betting platforms. SG Digital's RAS will include a live data feed of odds on sporting events (including pregame odds, live odds, and results), pricing models, warnings of perceived risks, and event suspension suggestions. FireKeepers is not required to use (b) (4) and (b) (4). FireKeepers may adjust the line on a sporting event or suspend betting if FireKeepers disagrees with SG Digital's RAS or for whatever reason. FireKeepers retains overall control over the day-to-day operations of its sportsbook and always maintains the discretion to use or disregard SG Digital's RAS. SG Digital has no authority to direct how FireKeepers must use the RAS. (b) (4) (b) (4) FireKeepers is responsible for (b) (4) (b) (4) that vendor's data into the respective sports betting platform.²²

FireKeepers can also purchase additional sports book-related services from SG Digital at pre-determined rates. These optional services include (b) (4)

¹⁶ *Id.* at Schedule 2 (pp. 36-37).

¹⁷ *See* Hardware Agreement, pp 1-2.

¹⁸ SBCS Agreement § 4.5.

¹⁹ SBCS Agreement, Schedule 4 ("Acceptance Testing").

²⁰ *Id.* § 3.5. The right of first refusal also applies where FireKeepers desires to expand online gaming beyond the Territory. *Id.*

²¹ *Id.* at Schedule 1 (Definitions "Territory").

²² *Id.* at Schedule 5.

(b) (4) Schedules 6
and 7 of the Sports Book and Casino Agreement describe (b) (4)
FireKeepers can also request development services from SG Digital (b) (4)
(b) (4) The parties have anticipated this need and agreed to a pre-determined daily
rates.²³ Regardless of the services chosen, FireKeepers retains discretion to request services and
discretion whether to use the end product created by SG Digital.²⁶

III. Online Casino Platform:

The online casino platform will be hosted on a server outfitted with SG Digital's Open
Gaming System (software used for real money, online and mobile gaming) and SG Digital's
player account management software, the same software used to manage patron accounts for the
sports betting platform. FireKeepers agrees to exclusively use SG Digital's Open Gaming
System for FireKeepers' online gaming platform if online gaming is legal.²⁷ SG Digital will host
the online gaming platform on servers (b) (4)

(b) (4) The hardware and software to outfit the server will be predetermined in
Schedule 11.

(b) (4)

While SG Digital will host the online platform, FireKeepers will choose which games to
offer to patrons.³² (b) (4)

(b) (4)

²³ *Id.* at Schedule 9; *see also id.* at Schedules 6 and 7.

²⁴ *Id.* at Schedules 6 and 7.

²⁵ *SPCS Agreement*, Schedule 3.

²⁶ (b) (4)

(b) (4)

Id. at Schedule 3.

²⁷ *Id.* §§ 3.1.1, 3.1.2.

²⁸ *Id.* § 4.4.1.

²⁹ *Id.* § 4.4.1.

³⁰ *Id.* § 3.1.3.

³¹ *Id.* § 3.5.

³² *Id.* § 7.1.

³³ *Id.* § 7.1.

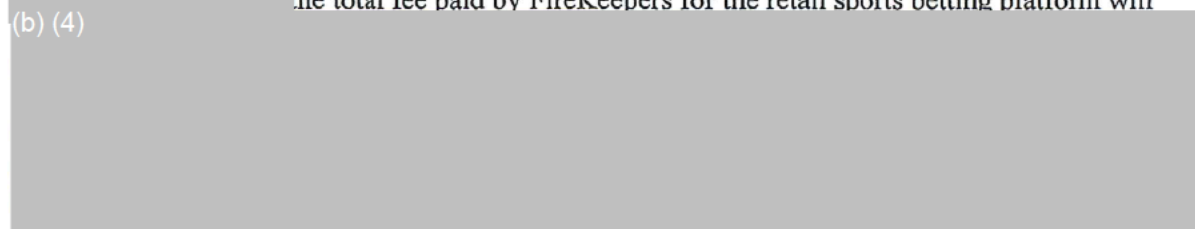
³⁴ *Id.* §§ 7.1.1-7.1.5.

IV. Fees:

SG Digital will receive (b) (4) fees for building the sportsbook platforms.³⁵ SG Digital will receive (b) (4) for offering the OpenBet platform in its various forms (retail, mobile/internet-based, and SSBT) and the patron account management (PAM) on specific phases (mobile/internet/SSBT 2.0).³⁶ The following chart is a summary of SG Digital's (b) (4) structure for the sports betting platforms:



Assuming FireKeepers' monthly "net gaming revenue" (NGR) (as defined by the Agreement) is (b) (4), the total fee paid by FireKeepers for the retail sports betting platform will (b) (4).



³⁵ *Id.* at Schedule 9.

³⁶ *Id.*

(b) (4)



(b) (4)

(b) (4)

FireKeepers may also purchase optional services for (b) (4)
(b) (4) at predetermined rates. These optional
services cost (b) (4)

(b) (4) The following chart lists the optional services and their respective
fees.³⁸

(b) (4)

(b) (4) SG Digital's fee for the online casino will be (b) (4)

(b) (4) According to the Tribe's Special Counsel, the fees for the
intellectual property associated with the Branded SG Digital game content (b) (4)

(b) (4)

³⁸ SBSC Agreement, Schedule 9.

(b) (4)



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.”³⁹ A “collateral contract” 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).”⁴⁰

While NIGC regulations do not define “management,” the Agency has clarified that the term encompasses activities such as planning, organizing, directing, coordinating, and controlling.⁴¹ A “primary management official” includes “any person who has the authority ... [t]o set up working policy for the gaming operation.”⁴² Further, management employees are “those who formulate and effectuate management policies by expressing and making operative the decision of their employer.”⁴³ Whether a particular employee is managerial is not controlled by an employee’s actual job responsibilities, authority, and relationship to management.⁴⁴ 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.⁴⁵

³⁹ 25 C.F.R. § 502.15.

⁴⁰ 25 C.F.R. § 502.5.

⁴¹ See NIGC Bulletin No. 94-5, “Approved Management Contracts v. Consulting Agreements (Unapproved Management Contracts are Void).”

⁴² 25 C.F.R. § 502.19(b)(2).

⁴³ *N.L.R.B. v. Bell Aerospace Co.*, 416 U.S. 267, 288 (1974).

⁴⁴ See *Waldau v. M.S.P.B.*, 19 F.3d 1395, 1399 (Fed. Cir. 1994).

⁴⁵ *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 to 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

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.⁴⁶ Management contracts that have not been approved by the Chair are void.⁴⁷

Management Analysis:

On its face, the FireKeepers Agreements do not permit any management by SG Digital. The scope of services for the sports betting and online casino game platforms are finite and well-defined. The functions and capabilities of the platforms are pre-determined by the schedules and phases.⁴⁸ SG Digital will receive a (b) (4) from FireKeepers' sports book and online gaming, but SG Digital's (b) (4) is tied to specific work performed. The (b) (4) increases and decreases based on the selected services and phases. The (b) (4) for each additional service are pre-determined.

Regarding any planning, organizing, directing, coordinating, and controlling, the Sports Betting and Casino Agreement contains a provision that explicitly prohibits SG Digital from performing any management activities.⁴⁹ Further, the FireKeepers Agreements do not grant SG Digital the ability to plan, organize, direct, or control all or part of FireKeepers gaming operations. SG Digital will provide the RAS for the sports book, but FireKeepers retains the discretion to use or not use the data and services. FireKeepers is not required to implement the data or services, and FireKeepers may adjust the line or suspend betting for a sporting event if it disagrees with SG Digital's data feed or for whatever reason. SG Digital will provide online content selected by FireKeepers for the online casino games. This relationship will function essentially like a gaming machine lease between a vendor and a tribe where the games are selected by the tribe. Accordingly, it is my opinion that the FireKeepers Agreements are not management agreements and do not need to be submitted to the NIGC Chairman for review and approval.

Sole Proprietary Interest:

IGRA requires a tribe to possess "the sole proprietary interest and responsibility for the conduct of any gaming activity."⁵⁰ "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"⁵¹ An "owner" is "one who has

become the *de facto* manager in the sense that he or she is simply executing management decisions through a tribal management official.

⁴⁶ 25 U.S.C. § 2711.

⁴⁷ 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).

⁴⁸ *See generally* SBCS Agreement, Schedules 2-9.

⁴⁹ *Id.* § 15.4.

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

⁵¹ BLACK'S LAW DICTIONARY (10th ed. 2014).

the right to possess, use, and convey something.”⁵² “Appurtenant” means “belonging to; accessory or incident to”⁵³ Case law similarly defines “proprietary interest” as “one who has an interest in, control of, or present use of certain property.”⁵⁴

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.⁵⁵ 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:

Term of the Relationship:

The Sports Book and Casino Agreement has (b) (4) The General Counsel has reviewed other agreements with (b) (4) and concluded that those agreements on their faces did not violate IGRA’s sole proprietary interest requirement.

Amount of Revenue Paid to a Third Party:

The Sports Book and Casino Agreement provides a (b) (4) where baseline and optional services have (b) (4) SG Digital’s (b) (4) the sports book will be comprised of (b) (4) For example, FireKeepers estimates paying SG Digital (b) (4) for the OpenBet services, but paying (b) (4) (b) (4) or the PAM. If FireKeepers earns more than its projections, especially once the sports book becomes established in the marketplace. SG Digital’s fee will be (b) (4) Based on financial projections which show substantial due diligence by FireKeepers, the parties estimate that SG Digital will receive (b) (4) from FireKeepers’ retail and online sports book.

SG Digital’s fee for the online casino games will be based entirely on (b) (4) (b) (4) Based on financial projections from FireKeepers, SG Digital will receive (b) (4) from the online casino games.

Overall, SG Digital’s fees seem reasonable. FireKeepers described its process of interviewing potential vendors and the goals FireKeepers wanted to accomplish with its retail

⁵² *Id.*

⁵³ *Id.*

⁵⁴ See *Evans v. United States*, 349 F.2d 653, 659 (5th Cir. 1965).

⁵⁵ 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).

sports book and online sportsbook and casino games. FireKeepers determined that SG Digital met its specific needs regarding experience, content, integration, and branding. Further, FireKeepers received proposals from other vendors for comparable services that were substantially (b) (4) from the sports book. For all of these reasons, the fee contemplated in the FireKeepers Agreements does not raise a sole proprietary interest concern.

Third Party's Right to Exercise Control over Gaming Activity:

Both the hardware and software platforms, including (b) (4) for the sports book, are pre-determined. FireKeepers and SG Digital have agreed to a pre-determined list of hardware, and the scope and functionalities of the sports betting and online casino platforms are also pre-determined. SG Digital has no discretion to change the platform's capabilities. Regarding the sports book, FireKeepers has the discretion to accept or reject the sports betting data provided by SG Digital, and FireKeepers bears the risk of loss from wagers. Accordingly, there are no issues of control in the FireKeepers Agreements.

Upon review of these three criteria – term, compensation, and control – it is my opinion that the FireKeepers Agreements do not violate IGRA's requirement that the Tribe maintain the sole proprietary interest in its gaming operation. It is important to note that the Office of General Counsel reviews each agreement on its own terms. We did so here with the FireKeepers Agreements. This opinion does not mean that every agreement with a similar fee or term, including future agreements proposed by the Tribe, will necessarily result in a favorable declination letter opinion.

Additional Considerations:

The FireKeepers Agreements contemplate several areas that require additional attention to clarify the scope of this opinion and this office's stance on issues related to Indian gaming. Based on the financial projections provided by FireKeepers, the optional services described in Sports Betting and Casino Agreement will require (b) (4) on SG Digital if FireKeepers chooses (b) (4). If FireKeepers (b) (4) (b) (4)

(b) (4) his opinion shall no longer apply.

Additionally, the analysis of financial projections provided by FireKeepers for both internet sports betting and internet casino games included certain fees and taxes. FireKeepers will be required to pay application fees, license fees, fees paid to sports leagues for use of official league data for in-play wagers, and taxes paid to the State of Michigan calculated as a percentage of "adjusted gross receipts" derived from wagers initiated or placed by persons who are not physically present on Indian lands at the time such wagers are initiated or placed. Those fees and taxes are required by legislation recently enacted by the State of Michigan in order for the Tribe to receive internet wagers initiated by persons located off Indian lands, but accepted by the Tribe

on Indian lands. The Sports Betting and Casino Agreement implicitly references those fees and taxes by providing that such amounts are deducted from “gross gaming revenues” before calculating the fees payable to SG Digital.

While gaming activity that occurs off of Indian lands, as defined by IGRA, is not subject to the Act or NIGC jurisdiction, the gaming activity that does occur on Indian lands is. IGRA sets forth what role a state may play in IGRA gaming⁵⁶ and the permissible uses of gaming revenue.⁵⁷ It also explicitly prohibits the application of state taxes on IGRA gaming revenue.⁵⁸ In reaching a determination that the fees paid to SG Digital under the Sports Betting and Casino Agreement do not indicate a violation of IGRA’s sole proprietary interest requirement, I do not opine on the permissibility of those fees or the tax under IGRA or any other federal law.

It is my understanding that the drafts are represented to be in substantially final form, and if the FireKeepers Agreements 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 FireKeepers Agreements 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.⁵⁹ 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),⁶⁰ please be advised that any withholding should be analyzed under the standard set forth in *Food Marketing Institute v. Argus Leader Media*.⁶¹ Any claim of confidentiality should also be supported with “a statement or certification by an officer or authorized representative of the submitter.”⁶² 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.⁶³ 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>.

⁵⁶ 25 U.S.C. § 2710(d)(3)(C).

⁵⁷ 25 U.S.C. § 2710(b)(2)(B).

⁵⁸ 25 U.S.C. § 2710(d)(4).

⁵⁹ See 25 C.F.R. § 517.7(c).

⁶⁰ 5 U.S.C. § 552(b)(4).

⁶¹ 139 S. Ct. 2356 (2019).

⁶² See 25 C.F.R. § 517.7(d).

⁶³ *Id.*

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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,

A handwritten signature in blue ink, appearing to read "Michael Hoenig", followed by a horizontal line.

Michael Hoenig
General Counsel