October 23, 2019

John Maier
Maier, Pfeffer, Kim, Geary, & Cohen LLP
1970 Broadway, Suite 825
Oakland, CA 94612

Re: Enterprise Bridge Consulting Agreement with Hard Rock Sacramento, FM

Dear Mr. Maier:

This letter responds to your October 18, 2019 request on behalf of the Estom Yumeka Maidu Tribe of the Enterprise Rancheria to the National Indian Gaming Commission's Office of General Counsel to review a Bridge Consulting Agreement between the Tribe, its Development Authority, and Hard Rock Sacramento FM, LLC. Specifically, you have asked for my opinion on whether the agreement is a management contract requiring the NIGC Chair's approval under the Indian Gaming Regulatory Act. You also asked for my opinion whether the documents violate IGRA's requirement that the Tribe have the sole proprietary interest in its gaming activity. After careful review, it is my opinion that the Bridge Consulting Agreement does not constitute a management contract and does not currently require the review and approval of the Chair. It is also my opinion that the Agreement does not violate IGRA's sole proprietary interest requirement.

In my review, for purposes of this letter, I considered only the Bridge Consulting Agreement, dated October [ ] 2019, document number NAI-1509231371v5.

Legal Background

IGRA provides the NIGC with authority to review and approve gaming-related management contracts and agreements collateral to management contracts to the extent they implicate management.[1] The NIGC has defined the term *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

[1] *See, Catskill Dev. LLC v. Park Place Entm't Corp.*, 547 F.3d 115, 130 (2d Cir. 2008) ("a collateral agreement is subject to agency approval under 25 C.F.R. § 533.7 only if it 'provides for management of all or part of a gaming operation'"); *Machal Inc. v. Jena Band of Choctaw Indians*, 387 F. Supp. 2d 659, 666 (W.D. La. 2005) ("collateral agreements are subject to approval by the NIGC, but only if that agreement 'relate[s] to the gaming activity'"). *Accord, Jena Band of Choctaw Indians v. Tri-Millennium Corp.*, 387 F. Supp. 2d 671, 678 (W.D. La. 2005); *United States ex rel. St. Regis Mohawk Tribe v. President R.C.-St. Regis Management Co.*, No. 7:02-CV-845, 2005 U.S. Dist. LEXIS 12456, at *3-*4, *9-*10 (N.D.N.Y. June 13, 2005), *aff'd on other grounds*, 451 F.3d 44 (2nd Cir. 2006).

management of all or part of a gaming operation."[2] *Collateral agreement* is defined as "any contract, whether or not in writing, that is related, either directly or indirectly, to a management contract, or 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)."[3]

While the NIGC regulations do not define *management*, the Agency has clarified that the term encompasses activities such as planning, organizing, directing, coordinating, and controlling.[4] The definition of *primary management official* is "any person who has the authority to set up working policy for the gaming operation."[5] Further, management employees are "those who formulate and effectuate management policies by expressing and making operative the decision of their employer."[6] Whether particular employees are "managerial" is not controlled by an employee's job title,[7] rather the question must be answered in terms of the employee's actual job responsibilities, authority and relationship to management.[8] Essentially, an employee may qualify as management if the employee possesses the actual authority to take discretionary actions – a *de jure* manager[9]

If a contract requires 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 25 U.S.C. § 2711 and requires the NIGC Chairman's approval. Management contracts that have not been approved by the Chairman are void.[10]

You have also inquired about sole proprietary interest. IGRA mandates that a tribe possess "the sole proprietary interest and responsibility for the conduct of any gaming activity."[11] Yet, *proprietary interest* is not defined in IGRA, or the NIGC's implementing regulations. IGRA does say that one of its purposes is that tribes are the primary beneficiaries of the gaming activity. [12] Therefore, in keeping with IGRA's expressed purpose, the notion of proprietary interest must be construed in favor of protecting tribal interests.

In order to determine whether an agreement violates this requirement, the NIGC typically analyzes three elements: 1) the term of the relationship; 2) the amount of revenue paid to the

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[2] *See,* 25 C.F.R. § 502.15.
[3] *See*, 25 C.F.R. § 502.5.
[4] *See,* attached *NIGC Bulletin No. 94-5*: "Approved Management Contracts v. Consulting Agreements (Unapproved Management Contracts are Void)."
[5] *See*, 25 C.F.R. § 502.19(b)(2).
[6] *See, N.L.R.B. v. Bell Aerospace Co.*, 416 U.S. 267, 288 (1974).
[7] *See, Waldo v. M.S.P.B.*, 19 F. 3d 1395 (Fed. Cir. 1994).
[8] *Id.* at 1399.
[9] *Id.* at 1399 *citing N.L.R.B. v. Yeshiva*, 444 U.S. 672, 683 (1980).
[10] *See*, 25 C.F.R. § 533.7; *Wells Fargo Bank v. Lake of the Torches Econ. Devl. Corp.*, 658 F.3d 684, 688 (7th Cir. 2011).
[11] *See*, 25 U.S.C. § 2710(b)(2)(A); *see also* 25 C.F.R. § 522.4(b)(1).
[12] *See, Rincon Band of Luiseno Indians v. Schwarzenegger,* 602 F.3d 1019, 1029 n. 9 (9th Cr. 2010); *see generally* NIGC NOV-11-02 (July 12, 2011).

third party; and 3) a third party's right to exercise control over all or any part of the gaming activity.[13] Accordingly, if a party, other than a tribe, receives a high level of compensation, for a long period of time, and possesses some aspect of control, an improper proprietary interest may exist.

Bridge Consulting Agreement Overview

The Tribe and Hard Rock Sacramento currently have a management contract pending before the NIGC. The gaming operation, however, is complete and ready to open. The parties are contemplating a Bridge Consulting Agreement that will allow the Tribe, through its Development Authority, to manage the gaming operation using Hard Rock's expert advice and technical assistance. The Bridge Consulting Agreement will last for a maximum of [redacted], or until the management contract is approved by the NIGC Chair, whichever occurs first.[14] The parties have not yet executed the Bridge Consulting Agreement.

Under the Bridge Consulting Agreement, Hard Rock will be primarily responsible for providing non-binding advice and technical assistance to the Tribe and Authority on a wide range of subjects relating to the gaming operation and its ancillary businesses.[15] In exchange for Hard Rock's advice and technical assistance, the Tribe has agreed to pay [redacted] of its net revenues as a consulting fee.[16]

Management Analysis

The Bridge Consulting Agreement expressly prohibits Hard Rock from managing—or exercising remedies that would allow for it or someone else to manage—the gaming operation, providing specific examples of common activities that would be considered management.[17] Additionally, the Agreement clarifies that the advice provided by Hard Rock is strictly non-binding[18] and the Tribe may freely choose to accept or reject it.[19]

There are some provisions in the Agreement that allow Hard Rock to make decisions, but these are limited to the Tribe's ancillary non-gaming endeavors (i.e., the Rock Shop, a retail store),[20] and the pre-opening period[21] before gaming has begun. Although these provisions allow

[13] 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); *See also, Bettor Racing v. National Indian Gaming Comm'n,* 812 F.3d 648, 652 (8th Cir. 2016).
[14] Bridge Consulting Agreement § 1.6
[15] Bridge Consulting Agreement § 4.2
[16] Bridge Consulting Agreement § 6.6
[17] Bridge Consulting Agreement §§ 30.1 and 30.2
[18] Bridge Consulting Agreement § 4.2
[19] In the case of proposed budget items, the Agreement does call for further discussion between the parties in the event of disagreement, but the additional discussion does not diminish the Tribe's right to accept or reject the Consultant's advice. Bridge Consulting Agreement § 4.11.4
[20] Bridge Consulting Agreement § 4.19
[21] Bridge Consulting Agreement § 4.9

for management by Hard Rock, they do not relate to the gaming activity and, therefore, are outside the scope of this review.

Nothing in the Agreement gives Hard Rock the right or responsibility for making management decisions for the Tribe's proposed gaming operation. Therefore, it is my opinion that the Bridge Consulting Agreement is not a management agreement requiring the approval of the Chair.

Sole Proprietary Interest Analysis

The term of the Bridge Consulting Agreement is one of the shortest reviewed by this office: [redacted] if agreed to by the parties.[22] No proprietary interest issues are raised by the length of this term.

Next, we examine the amount charged for Hard Rock's services. At [redacted] of net revenues,[23] compensation appears commercially reasonable and raises no issues.

As discussed above, the Bridge Consulting Agreement does not give Hard Rock control over the gaming activity or allow for any third party to assume control through exercise of a remedy upon default.[24] Additionally, the Agreement contains a provision specifically prohibiting Hard Rock from exercising certain management activities.[25] It is my opinion that the Bridge Consulting Agreement, in its present form, does not grant a proprietary interest in the Tribe's gaming operation to Hard Rock.

Conclusion

The Bridge Consulting Agreement prohibits Hard Rock from managing the gaming operation or exercising remedies that would allow a third party to manage the gaming operation. It also does not provide Hard Rock the right or responsibility for making management decisions at the Tribe's gaming facility. It is, therefore, my opinion that the Bridge Consulting Agreement is not a management agreement requiring the approval of the Chair. Additionally, it does not, on its face, violate the IGRA requirement that the Tribe maintain the sole proprietary interest in its gaming operation.

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

[22] Bridge Consulting Agreement § 3.2
[23] Bridge Consulting Agreement § 6.6
[24] Bridge Consulting Agreement § 30.1
[25] Bridge Consulting Agreement § 30.2
[26] 25 C.F.R. 517.7(c)

Information Act,[27] 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.*[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 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 have any questions, please contact NIGC Attorney Jennifer Lawson at (202) 632-7003.

Sincerely,

Michael Hoenig
General Counsel

cc: Joseph Webster, Esq. (JWebster@hobbsstraus.com)

[27] 5 U.S.C. § 552(b)(4)
[28] *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2366 (2019)
[29] 25 C.F.R. § 517.7(c)
[30] *Id.*