August 10, 2018

Via First Class Mail

Bill Kekahbah
President, Kaw Gaming, Inc.
5640 N La Cann Road
Newkirk, OK 74647

Re: Review of Development Agreement between Kaw Gaming, Inc. and Cherokee Nation Hospitality Consulting, LLC

Dear President Kekahbah:

This letter responds to your June 21, 2018 request for the National Indian Gaming Commission's Office of General Counsel to review a proposed Development Agreement between the Kaw Gaming, Inc. (KGI) and Cherokee Nation Hospitality Consulting, LLC (Developer). Specifically, you have asked for my opinion whether the Development 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 Development Agreement violates IGRA's requirement that a tribe have the sole proprietary interest in its gaming activity.

In my review, I considered the following submission, which was unexecuted, but was represented to be in substantially final form:

- "Development Agreement," unsigned and no draft date, 20 pages including Exhibits A and B; stamped "DocuSign Envelope ID: C924ABB2-B01D-4A4B-B7BA-707186C4ABFC" in upper left corner; stamped "4844-1988-0540.1" in lower left corner

It is my opinion that the Development Agreement is not a management contract and does not require the approval of the NIGC Chair. It is also my opinion that the Development Agreement does not violate IGRA's sole proprietary interest requirements.

Authority:

I. Management Contracts

IGRA provides the NIGC with authority to review and approve gaming-related contracts and collateral agreements 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 management of all or part of a gaming operation."[2] Though NIGC regulations do not define *management,* the NIGC has explained that the term encompasses activities such as planning, organizing, directing, coordinating, and controlling.[3] A *primary management official* is "any person who has the authority to set up working policy for the gaming operation."[4] Further, management employees are "those who formulate and effectuate management policies by expressing and making operative the decision of their employer."[5]

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.[6] Management contracts not approved by the Chairman are void.[7]

The NIGC has issued guidance to determine the difference between a consulting agreement and a management contract. [8] 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 rate, a daily rate, or a fixed fee is more likely to be a consulting agreement. By contrast, 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 a management contract.

---

[1] *Catskill Development LLC v. Park Place Entertainment Corp., Catskill Development LLC v. Park Place Entertainment Corp,* 547 F.3d 115, 131 (2nd Cir. 2008); *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.'"); *Jena Band of Choctaw Indians v. Tri-Millennium Corp.,* 387 F. Supp. 2d 671, 677-78 (W.D. La. 2005).
[2] 25 C.F.R. § 502.15.
[3] NIGC Bulletin No. 94-5 ("Approved Management Contracts v. Consulting Agreements (Unapproved Management Contracts are Void)").
[4] 25 C.F.R. § 502.19(b)(2).
[5] *N.L.R.B. v. Bell Aerospace Co.,* 416 U.S. 267, 288 (1974).
[6] NIGC Bulletin No. 94-5.
[7] 25 C.F.R. § 533.7; *see also Wells Fargo Bank v. Lake of the Torches Econ. Dev. Corp.*, 658 F.3d 684, 686 (7th Cir. 2011).
[8] NIGC Bulletin No. 94-5.

II. Sole Proprietary Interest.

IGRA requires that "the Indian tribe will have the sole proprietary interest and responsibility for the conduct of any gaming activity."[9] Proprietary interest is not defined in the IGRA or the NIGC's regulations. As discussed in NIGC Notice of Violation No. 11-02, OGC legal opinions concerning the sole proprietary interest requirement have focused primarily on 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.[10] Accordingly, final agency actions by NIGC and OGC legal opinions have typically found an improper proprietary interest in agreements under which a party, other than a tribe, receives a high level of compensation, for a long period of time, and possesses some aspect of control.[11]

Analysis:

KGI is a corporation wholly owned by the Tribe and operates the Tribe's gaming ventures. KGI wants to hire the Developer, a corporation wholly owned by the Cherokee Nation Businesses, LLC, which in turn is wholly owned by the Cherokee Nation of Oklahoma. Developer will assist in the development and construction of a new gaming facility in Braman, Oklahoma (the "Project").

I. The Development Agreement is not a management contract that requires the Chair's review and approval.

a. Scope of Work and Time of Performance:

The Development Agreement addresses how KGI and the Developer will interact during the design and construction of the Project. The Developer has specific and finite responsibilities to perform during the term of the agreement. Most importantly, a vast majority of the Developer's tasks will be performed before the Project opens as a gaming operation. The Developer's tasks include providing advice and recommendations to KGI regarding design and construction, including, but not limited to, budgets, site surveys, hiring construction and other development professionals, change orders, and inspecting the construction work. [12] Once construction is completed for the Project, the Developer

---

[9] 25 U.S.C. § 2710(b)(2)(A); *see also* 25 C.F.R. §§ 522.4(b)(l) and 522.6(c).
[10] NIGC Notice of Violation No. 11-02 is available at https://www.nigc.gov/images/uploads/enforcement-actions/NOV1102redacted.pdf; *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, Inc. v. Nat'l Indian Gaming Com'n*, 812 F.3d 648, 652 (8th Cir. 2016).
[11] *City of Duluth*, 830 F. Supp. at 723-24.
[12] DA, Exhibit A.

will also provide a recommended punch list and advise KGI regarding any warranty issues.[13] These are the only tasks that Developer will perform when the Project is potentially open as a casino.

Under the Development Agreement, the Developer is not tasked to provide any advice or recommendations regarding the operation of the Project as a gaming operation. The tasks are not broad and open-ended; rather, they are finite, based on the progress of the design and construction of the Project, and have clear deliverables (meetings, site visits, and recommendations). Though the Development Agreement does not state when each task must be completed, the Developer's scope of work is completed shortly after the Project is completed. The Developer's relationship does not continue, open-ended, after the completion of the Project.

b. Type of Fee:

The Developer's fee is a percentage of "all costs incurred by or on behalf of KGI in connection with the pre-development, development, and commencement of operations of the Project[.]"[14] The Developer's fee has no relationship to the Project's performance as a casino and is similar to a construction manager or architect's fee charged based on a project's total cost. Additionally, the Developer is only entitled to its fee as long as the Development Agreement is effective. If the Development Agreement is terminated, the Developer's fee is prorated up to the calendar month in which termination occurs.[15] The percentage fee here does not indicate that the Developer will be able to manage the Project after it opens as a casino.

In my opinion, the Development Agreement is not a management contract that requires the NIGC Chair's approval because its scope of work is for pre-opening tasks, the scope of work is clearly defined, the relationship is not open-ended and has clear deliverables, and the fee is a percentage but does not relate to gaming revenues.

II. The Development Agreement does not violate IGRA's sole proprietary interest requirement.

a. Term:

The term of the Development Agreement is the earlier of 1) the completion of the Developer's tasks; 2) 18 months from the Project's financing; or 3) June 30, 2020.[16] The largest possible term is therefore approximately 22 months, a relatively short relationship.

---

[13] *Id.*
[14] *Id.* at §3(a).
[15] *Id.* at § 1(b).
[16] *Id.* at § 1(a).

The parties can extend the length of the agreement by written agreement,[17] but the Developer's scope of work relates to completing the Project, not during the Project's operation as a casino.

b. Amount of Revenue:

KGI currently projects the Project to cost approximately $125 million.[18] The Developer's fee is 1.2% of the Project's costs,[19] or approximately $1.5 million. This total amount is relatively small compared to the Project's total cost. Even more relevant is that the Developer's fee will be paid almost entirely before the Project opens as a gaming operation. The Developer's fee is based on the prior month's Project costs. As stated above, the Developer will complete almost all of its scope of work prior to the Project opening as a casino, meaning most of the Developer's fee will be paid either before the Project opens or shortly thereafter.

c. Control of the Gaming Operations:

The Developer has no control over KGI's gaming operations at the Project. The scope of work relates to pre-opening development and construction, not the casino's operation post-opening.[20]

The term for the Development Agreement is relatively short, the Developer's fee is small relative to the Project's total cost (and is not tied to KGI's gaming revenues), and the Developer has no control over KGI's gaming operation. The Developer's scope of work (and any possible control) is limited to pre-opening services. Accordingly, the Development Agreement does not violate IGRA's sole proprietary interest requirement.

For these reasons, the Development Agreement is a not a management contract that requires the Chair's approval, and the Development Agreement does not violate IGRA's sole proprietary interest requirement. It is my understanding that the draft Development Agreement is represented to be in substantially final form, and if the Development Agreement changes in any material way prior to closing or is inconsistent with assumptions made herein, this opinion shall not apply. Further, this opinion is limited to the Development Agreement 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

---

[17] *Id.*
[18] Telephone conversation with Robert Rossette, counsel for KGI (Aug. 3, 2018).
[19] DA § 3(a).
[20] *See generally* DA, Exhibit A (Tasks).

you believe should be withheld.[21] 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),[22] please be advised that the information was voluntarily submitted and, as such, that any withholding should be analyzed in accordance with the standard set forth in *Critical Mass Energy Project v. NRC*.[23] Any claim of confidentiality should also be supported with "a statement or certification by an officer or authorized representative of the submitter."[24] 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.[25] 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 NIGC Staff Attorney Steve Iverson at (202) 632-7003 or by email at steven_iverson@nigc.gov.

Sincerely,

Michael Hoenig
General Counsel

cc: Robert Rosette, Rosette, LLP (rosette@rosettelaw.com)
Ronne Tiger, Tiger Law, PLLC (yonne@tigerlawpllc.com)

---

[21] 25 C.F.R. § 517.7(c).
[22] 5 U.S.C. § 552(b)(4).
[23] 975 F.2d 871 (D.C. Cir. 1992).
[24] 25 C.F.R. § 517(c).
[25] *Id.*