April 23, 2009

Nicolas C. Fonseca, Chairman
Shingle Springs Band of Miwok Indians
5281 Honpie Rd.
Shingle Springs, CA 95682

Matthew G. Jacobs, Esq.
DLA Piper
400 Capitol Mall, Suite 2400
Sacramento, CA 95814

Re: Chairman's decision regarding agreements between the Shingle Springs Band of Miwok Indians (Band) and Sharp Image Gaming Inc. (Sharp).

Dear Chairman Fonseca and Mr. Jacobs:

This decision reviews two agreements between the Band and Sharp. The first agreement, called the "Gaming Machine Agreement," (1996 GMA) was executed on May 24, 1996, and was originally submitted to the National Indian Gaming Commission (NIGC) in 1996. The second agreement, called an "Equipment Lease Agreement" (1997 ELA), was executed on November 15, 1997, and was not submitted to the NIGC contemporaneously with its execution.

The fundamental question presented is whether these agreements, individually or collectively, constitute management contracts or collateral agreements to management contracts subject to my review for approval or disapproval under the Indian Gaming Regulatory Act ("IGRA"). 25 U.S.C. § 2711. The question whether a contract is a management contract is a matter of federal law, and the NIGC is the federal agency with the authority to make such a determination. *United States ex rel. Saint Regis Mohawk Tribe v. President R.C. – St. Regis Management Company*, 451 F. 3d 44, 51 (2nd Cir. 2006) (NIGC has broad power to determine what does and does not require approval). Such a determination is necessary because an unapproved management contract is void. 25 C.F.R. § 533.7; *United States ex. rel. Bernard v. Casino Magic Corp.*, 293 F.3d 419, 421 (8th Cir. 2001) (for a management agreement involving Indian land to become a binding legal document, it must be approved by the NIGC).

On June 14, 2007, the Office of the General Counsel (OGC) opined that the 1996 GMA and the 1997 ELA were management contracts under IGRA and void because no Chairman of the NIGC has ever approved them. The Band has requested that I review this opinion and make a formal determination under 25 U.S.C. § 2711. I have done so. I determine that each agreement individually is a management contract, and I disapprove them both. The contracts fail to include certain statutory provisions required for management contracts. Further, approval of these contracts would be inconsistent with the exercise of my fiduciary responsibilities to the Band. Since both the contracts are disapproved, they are, therefore, void. This decision is subject to appeal to the full Commission. 25 C.F.R. Part 539. A full Commission decision would be a final agency action for the purposes of appeal to a federal district court. 25 U.S.C. § 2714.

PROCEDURAL HISTORY BEFORE THE NIGC

The 1996 GMA was executed on May 24, 1996, by the Band and Sharp and submitted to OGC for an opinion on its status under IGRA. On November 5, 1996, the OGC opined that the agreement was null and void because it provided for leasing Class III machines without a tribal-state compact in violation of both IGRA and the Johnson Act. Letter from Michael D. Cox, General Counsel, National Indian Gaming Commission, to William D. Murray, Chairman, Shingle Spring Rancheria (November 5, 1996).

More than ten years later, on April 13, 2007, the Band again submitted the 1996 GMA to OGC and, for the first time, submitted the 1997 ELA. The Band again requested a determination as to the nature of both agreements, i.e., whether they were management contracts or collateral agreements to management contracts subject to the Chairman's review under 25 U.S.C. § 2711. Sharp was suing the Band in California state court, El Dorado County Superior Court, PC 20070154, filed March 12, 2007, for breach of these contracts, and the Band sought to introduce evidence as to their status under IGRA. Letter from Kent E. Richey, Special Counsel, Shingle Springs Band of Miwok Indians, to Penny Coleman, Acting General Counsel, National Indian Gaming Commission (April 13, 2007).

As is the ordinary practice, the OGC reviewed the submissions and on June 14, 2007, issued an advisory opinion finding that both the 1996 GMA and the 1997 ELA are management contracts. Letter from Penny J. Coleman, Acting General Counsel, NIGC, to Kent E Richey, Esq. (June 14, 2007) (2007 OGC Opinion). Both contracts had sufficient indicia of management control to conclude that they were management contracts requiring the approval of the Chairman. As neither contract had been approved by the Chairman, the OGC opined that both contracts were void. 2007 OGC Opinion at 8.

On January 24, 2008, the Band requested this determination of me. Letter from Nicholas Fonseca, Chairman, Shingle Springs Tribal Counsel, to Philip N. Hogen, Chairman, the National Indian Gaming Commission (January 24, 2008).

On July 18, 2008, the NIGC Acting General Counsel, Penny Coleman, sent a letter to both the Band and Sharp requesting that the parties submit their views concerning the advisory opinion

and the status of the agreements. Her letter noted that parties to the agreements were engaged in litigation in California state court. Letter from Penny Coleman, the Acting General Counsel, the National Indian Gaming Commission, to Nicholas Fonseca, Chairman, Shingle Springs Band of Miwok Indians and Matthew G. Jacobs, Esq., attorney for Sharp Image Gaming, DLA Piper US LLP, to (July 18, 2008).

On August 1, 2008, counsel for Sharp submitted a letter brief that presented Sharp's position and, *inter alia*, demanded a copy of all communications between the Band and the NIGC. Letter from Matthew G. Jacobs, attorney for Sharp Image Gaming, DLA Piper US LLP, to Penny J. Coleman, Acting General Counsel, the National Indian Gaming Commission, (Aug. 1, 2008).

On August 22, 2008, the Band's counsel submitted a letter brief. Letter from Mary Kay Lacey, attorney for the Shingle Springs Band of Miwok Indians, Sonnenschein, Nath and Rosenthal LLP, to Matthew G. Jacobs, attorney for Sharp Image Gaming, DLA Piper US LLP (Aug. 22, 2009).

On October 2, 2008, the Band's counsel updated the status of the California state court action. Letter from Mary Kay Lacey, attorney for the Shingle Springs Band of Miwok Indians, Sonnenschein, Nath and Rosenthal LLP, to Philip N. Hogen, Chairman, the National Indian Gaming Commission (Oct. 2, 2009).

On October 3, 2008, Sharp requested that the Chairman refuse to examine the two agreements as requested by the Band. Letter from Matthew G. Jacobs, attorney for Sharp Image Gaming, DLA Piper US LLP, to Penny J. Coleman, Acting General Counsel, the National Indian Gaming Commission, (October 3, 2008).

On October 6, 2008, the NIGC staff sent a letter to Sharp's counsel, acknowledged the October 3, 2008 letter, and requested any additional submissions within two weeks. Letter from Antonia Cowan, staff attorney, the National Indian Gaming Commission, to Nate McKitterick, attorney for Sharp Image Gaming, DLA Piper US LLP, (Oct. 6, 2008).

On October 17, 2008, Sharp requested that the record before the Chairman be kept open until discovery was concluded in the civil matter in California, i.e., by the end of January 2009. Letter from Nate McKitterick, attorney for Sharp Image Gaming, DLA Piper US LLP, to Antonia Cowan, staff attorney, the National Indian Gaming Commission, (Oct. 17, 2008).

On November 7, 2008, the Band requested that the Chairman close the record by January 30, 2009. Letter from Mary Kay Lacey, attorney for the Shingle Springs Band of Miwok Indians, Sonnenschein, Nath and Rosenthal LLP, to Philip N. Hogen, Chairman, the National Indian Gaming Commission, (Nov. 7, 2008).

On November 11, 2008, Sharp reiterated its previous request to keep the record open until after the close of discovery, which it expected to happen by the end of 2008. Letter from

Nate McKitterick, attorney for Sharp Image Gaming, DLA Piper US LLP to Philip N. Hogen, Chairman, the National Indian Gaming Commission, (Nov. 11, 2008).

On November 12, 2008, the Sharp's request to keep the record open for more than two months was denied. Sharp was granted another two-week period to make submissions. Letter from Antonia Cowan, staff attorney, the National Indian Gaming Commission, to Nate McKitterick, attorney for Sharp Image Gaming, DLA Piper US LLP (Nov. 12, 2008).

On November 17, 2008, the Band's counsel repeated his request to keep the record open until January 30, 2009. Letter from Nate McKitterick, attorney for Sharp Image Gaming, DLA Piper US LLP to Philip N. Hogen, Chairman, the National Indian Gaming Commission, (Nov. 17, 2008).

On November 23, 2008, the NIGC staff described to Sharp what submissions might be made and stated that the record before the Chairman would be open for additional submissions until the Chairman issued a decision. Letter from Antonia Cowan, staff attorney, the National Indian Gaming Commission, to Nate McKitterick, attorney for Sharp Image Gaming, DLA Piper US LLP (Nov. 23, 2008).

On December 8, 2008, counsel for the Band urged the Chairman to make a determination as to the agreements before the California state court ruled. Letter from Mary Kay Lacey, attorney for the Shingle Springs Band of Miwok Indians, Sonnenschein, Nath and Rosenthal LLP, to Antonia Cowan, staff attorney, the National Indian Gaming Commission, (Dec.8, 2008).

On December 11, 2008, Sharp submitted another letter brief, repeating the arguments it made in its August 1 brief and arguing that the Chairman had no legal authority over the agreements. Letter from Matthew G. Jacobs, attorney for Sharp Image Gaming, DLA Piper US LLP, to Philip N. Hogen, Chairman, the National Indian Gaming Commission, (Dec.11, 2008).

The record remained open to receive any additional submissions from Sharp or the Band through the end of discovery in the California matter and until the date of this decision. No additional submissions were made by either party. I have considered all submissions from both the Band and Sharp in arriving at this decision – the major substantive and procedural communications listed here and all other miscellaneous communications. I note that discovery in the civil action is irrelevant to this decision, which is based on the record before me.

DISCUSSION

This case presents an unusual situation. Typically, when an agreement is submitted for review and approval, there is no dispute as to whether it is a management contract, and it is submitted at or near the time of execution. In the ordinary course, the parties submit agreements *as* management contracts, and the process of approval is focused on a review of the content and submission requirements, i.e., whether the contract contain the provisions required by 25 C.F.R. § 531.1, whether the parties submitted all documents necessary pursuant to 25 C.F.R. § 533.3, and whether any provisions violate IGRA. In the normal course of management contract submissions, if the contract requires revision, or the submission requirements have not been met, the NIGC sends the parties a list of deficiencies and then works together with the parties to achieve a complete submission. Here, however, the two contracts were not submitted as management contracts but for a legal opinion, and, what is more, seeking revisions would be futile. There has been no performance under the contracts by either party for quite some time, and the Band has stated it will not agree to any modifications of them. *See* Letter from Nicholas Fonseca, Chairman, Shingle Springs Band of Miwok Indians, to Philip N. Hogen, Chairman, NIGC (January 24, 2008).

However, because I must in the course of reviewing and approving contracts necessarily draw a conclusion as to whether an agreement is, as it is presently drafted, a management contract, there is no reason why I cannot issue a conclusive determination on that issue now. In fact, it is in the parties' interest that I to do so as an unapproved contract is void. 25 C.F.R. § 533.7; *Casino Magic,* 293 F.3d at 421.

THE 1996 GMA AGREEMENT

The Band originally submitted the 1996 GMA to the OGC for review. On November 5, 1996, the OGC opined that that the agreement was illegal and, therefore, void under the provisions of IGRA, 25 U.S.C. § 2710(d)(1), and the Johnson Act, 15 U.S.C. § 1175. The opinion states:

> Pursuant to the agreement, Sharp Image will lease to the Tribe [Band] 400 gambling machines valued at $3,000,000 for a term of 60 months beginning on the date of the opening of the Tribe's casino. As compensation for the leasing of the gambling machines, Sharp Image will receive 30% of net revenues derived from the machines. While the agreement does not describe the machines, it is clear from conversations between Tribal officials and NIGC staff that the Tribe intends to offer class III gambling devices…Class III gaming may not be lawfully conducted by an Indian Tribe on Indian lands without a compact entered into by an Indian tribe and the state that has been approved by the Secretary of the Interior….

Though I am mindful of OGC's 1996 opinion, the Band entered into a Class III gaming compact with California in 2007, and it is the 2007 OGC Opinion that the Band asks me to review here.

TERMS OF THE AGREEMENTS

A. 1996 GMA Provisions

The provisions of 1996 GMA discussed below establish that both it and its successor agreement, the 1997 ELA, contain many of the same or similar provisions. The 1996 GMA provisions important to the analysis here are:

1. Sharp initially has the right to provide an initial 400 gaming machines in the gaming facility. The machines will remain the property of Sharp.1996 GMA § 1, § 4. A similar provision is in the 1997 ELA at § 1.

2. Sharp has the exclusive right to supply machines to this facility or any other gaming establishment of the Band. *Id.* The same or similar provision is in the 1997 ELA at § 2.

3. Sharp receives 30% of net revenues, defined as all gross revenues received by the Band in connection with its operation of all machines or table games on the casino premises or reservation, minus all jackpots or payouts made through such equipment. Id. § 2. The same or similar provision is in the 1997 ELA at § 3(a).

4. Sharp has this exclusive right to provide machines for five years. *Id.* § 3. The same or similar provision is in the 1997 ELA at § 2.

5. The Band may purchase the machines at the end of five years; however, if it does not to exercise this option, then the agreement is automatically extended for another two years. *Id.* § 4. The same or similar provision is in the 1997 ELA at § 19.

6. The Band is responsible for all operating expenses of the casino. *Id.* § 5.

7. Sharp will reimburse the Band 30% of the costs incurred for casino promotions. Sharp shall maintain complete responsibility for the promotions and provide direction to the casino's general manager. *Id.* § 6.

8. Sharp will have a representative on-sight during the initial start-up to assist in the implementation of operating, maintenance, and accounting procedures. *Id.* § 7. And

9. Sharp has the right to inspect and copy the casino's books and records pertaining to the machines. *Id.* § 10. The same or similar provision is in the 1997 ELA at § 7, with the right to inspect enlarged to include the books and records of all gaming revenues and equipment.

The authority of the NIGC to review and approve gaming-related contracts is limited by IGRA to management contracts and collateral agreements to management contracts to the extent that they implicate management. *Catskill Development LLC v. Park Place Entertainment Corp.*, No. 06-5860, 2008 U.S. App. Lexis 21839 at *38 (2nd Cir. October 21, 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-Millenium 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).

The NIGC has defined the term *management contract* as "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." 25 C.F.R. § 502.15. *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, organizations) and a management contractor or subcontractor (or any person or entity related to a management contractor or subcontractor)." 25 C.F.R. § 502.5.

Though NIGC regulations do not define *management*, the term has its ordinary meaning. Management encompasses activities such as planning, organizing, directing, coordinating, and controlling. *NIGC Bulletin No.* 94-5: "Approved Management Contracts v. Consulting Agreements (Unapproved Management Contracts are Void)." Accordingly, the definition of *primary management official* is "any person who has the authority to set up working policy for the gaming operation." 25 C.F.R.§ 502.19(b)(2). Further, management employees are "those who formulate and effectuate management policies by expressing and making operative the decision of their employer." *N.L.R.B. v. Bell Aerospace Co.*, 416 U.S. 267, 288 (1974). Whether particular employees are "managerial" is not controlled by an employee's job title. *Waldo v. M.S.P.B.*, 19 F. 3d 1395 (Fed. Cir. 1994). Rather, the question must be answered in terms of the employee's actual job responsibilities, authority and relationship to management. *Id.* at 1399. In essence, an employee can qualify as management if the employee actually has authority to take discretionary actions – a *de jure* manager – or recommends discretionary actions that are implemented by others possessing actual authority to control employer policy – a *de facto* manager. *Id.* at 1399 *citing N.L.R.B. v. Yeshiva*, 444 U.S. 672, 683 (1980).

If a contract requires the performance of any management activity with respect to all or part of a 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 not approved by the Chairman are void. 25 C.F.R. § 533.7.

Here, to begin with, under the 1996 GMA, Sharp has responsibility for casino promotions and provides direction to the casino's general manager. 1996 GMA § 6.This directing, coordinating, and controlling alone makes the 1996 GMA a management contract under IGRA.

Beyond this, both agreements provide Sharp with broad operational control sufficient to make them management contracts. In short, Sharp will have the exclusive right to provide gaming machines for all of the casino floor space at such facilities for five, and potentially seven, years. Freedom to configure the gaming floor, the essence of managing a casino, is not in the control of the Band.. This too is sufficient to make both agreements management contracts. I therefore adopt the management analysis in the 2007 OGC opinion. The 1996 GMA and 1997 ELA are management contracts within the meaning of IGRA, 25 U.S.C. § 2711, and, as such, must be reviewed and approved by the NIGC Chairman. I disapprove the two contracts here.

THE CONTRACTS FAIL TO PROVIDE REQUIRED PROVISIONS

IGRA requires management contracts to contain certain provisions. Many of these are missing from the contracts here. The contracts fail to state that all gaming covered by the contract will be conducted in accordance with IGRA and relevant tribal ordinances, as required by 25 CFR 531.1(a).

The contracts fail to enumerate, as required by 25 CFR 531.1(b), the responsibilities of each party for the following:

1. Maintaining and improving the gaming facility. 25 C.F.R. § 531.1(b)(1).
2. The provision of operating capital. 25 C.F.R. § 531.1(b)(2).
3. Responsibilities for establishing operating days and hours. 25 C.F.R. § 531.1(b)(3).
4. Responsibilities for hiring, firing, training, and promoting employees. 25 C.F.R. § 531.1(4).
5. Maintaining the gaming operation's books and records. 25 C.F.R. § 531.1(b)(5).
6. The preparation of the operation's financial statements and reports. 25 C.F.R. 531.1(b)(6).
7. The payment for services of the independent auditor engaged pursuant to 25 C.F.R. §571.12. 25 C.F.R. § 531.1(b)(7).
8. The hiring and supervision of security personnel. 25 C.F.R. § 531.1(b)(8).
9. The provision of fire protection services. 25 C.F.R. § 531.1(b)(9).

10. Setting the advertising budget and placing advertising. 25 C.F.R. § 531.1(b)(10). Although the contracts include some provisions concerning advertising and promotions, nothing sets the advertising budget or determines who will place the advertising.

11. Paying bills and expenses. 25 C.F.R. § 531.1(b)(11). The contracts provide for Sharp to pay 30% of the advertizing budget and for the Band to pay other expenses, including but not limited to: operational and administrative staffing, insurance, and modifications and repairs to gaming equipment (even thought the devices are owned by Sharp). There are, however, no provisions that allocate paying bills and expenses between the Band and Sharp for the many missing requirements such as fire protection services, public safety, security personnel, independent auditors, etc.

12. Establishing and administering employment practices. 25 C.F.R. § 531.1(b)(12).

13. Compliance with all applicable provisions of the Internal Revenue Code, 25 C.F.R. § 531.1(b)(14).

14. Payment of the costs of any increased public safety services. 25 C.F.R. § 531.1(b)(15). And

15. Proving all information necessary for compliance with NEPA to the NIGC. 25 C.F.R. § 531.1(b)(16).

In addition, the contracts do not, as required by 25 C.F.R. § 531.1(c), provide for the establishment and maintenance of satisfactory accounting systems and procedures that, at a minimum:

1. Include an adequate system of internal accounting controls.

2. Permit the preparation of financial statements in accordance with GAAP.

3. Are susceptible to audit.

4. Allow the Band and the NIGC to calculate annual fees under 25 C.F.R. § 514.1.

5. Permit the calculation and payment of manager's fees. And

6. Provide for the allocation of operating expenses or overhead expenses among the Band, tribal gaming operation, the contractor, and any other user of shared facilities and services.

25 C.F.R. §§ 531.1(c)(1) - (6).

Further still, the contracts fail to provide the following:

1. A minimum guaranteed monthly payment to the Band in a sum certain that has preference over the retirement of development and construction costs. 25 C.F.R. § 531.1(f).

2. An agreed-upon maximum dollar amount for the recoupment of development and construction costs. 25 C.F.R. § 531.1(g).

3. A dispute resolution mechanism for disputes between the management contractor and customers. 25 C.F.R. § 531.1(k)(1).

4. A dispute resolution mechanism for disputes between the management contractor and the gaming operation employees. 25 C.F.R. § 531.1(k)(3). And

5. A statement that the effective date of the contract is conditioned upon approval by the NIGC Chairman. 25 C.F.R. § 531.1(n).

In addition to the above substantive deficiencies, I find that the parties have failed to submit the following documents required for each contract by 25 C.F.R. § 533.3:

1. A letter, signed by the tribal chairman, setting out the authority for an authorized tribal official to act for the Band concerning the management contract. 25 CFR § 533.3(b).

2. Copies of documents evidencing the authority under the preceding requirement (i.e., a copy of the tribal constitution and resolution or other appropriate documents). 25 CFR § 533.3(b).

3. For a new contract and a new operation, a three-year business plan that sets forth the parties' goals, objectives, budgets, financial plans, and related matters. 25 CFR § 533.3(e).

4. A list of all persons and entities with a financial interest in, or having management responsibilities for, the management contract under 25 CFR §§ 537.1(a), (c)(1). 25 CFR § 533.3(d).

5. Applications for each person with management responsibility for, or a financial interest in, the management contract under 25 CFR § 537.1. CFR § 533.3(d) (1).

6. Applications for each entity with management responsibility for, or a financial interest in, the management contract under 25 CFR § 537.1. 25 CFR § 533.3(d) (1).

7. A bond, letter of credit, or deposit to cover the cost of the background investigation for the management contractor when the contract includes management of Class II gaming. 25 CFR § 537.3.

8. Justification consistent with provisions of 25 CFR § 531.1(i), for any fee in excess of 30% of net revenue as defined by 25 CFR §502.16 but not more than 40%. 25 CFR § 533.3(g).

9. Terms consistent with 25 CFR § 531. 25 CFR § 533.3(a)(3)(ii).

Based on the failure to comply with the above requirements of IGRA and Commission regulations, I disapprove the 1996 GMA and the 1997 ELA.

In addition, 25 U.S.C. § 2711(e)(4) and 25 C.F.R. § 533.6(b)(4) authorize me to disapprove a contract if I determine that a trustee, exercising the skill and diligence that a trustee is commonly held to, would not approve the contract. Here, the parties have been in litigation for some time over the termination of these agreements. In light of the ill will that now exists between the parties, it would not be in the best interests of the Band to approve any agreement allowing Sharp to provide services to the Band. *See* 2A W. Fratcher, Scott on Trusts § 170 (4th ed.1987) (It is the duty of a trustee to administer the trust solely in the interest of the beneficiaries).

Given all of the foregoing, based on the aspects of control provided in the terms of the agreements, I find both the 1996 GMA and the 1997 ELA to be management contracts within the meaning of IGRA. 25 U.S.C. § 2711. Based on the failure to include in the contracts many mandatory provisions, and based upon and my judgment as a trustee that it would not be in the best interests of the Band to allow Sharp to provide services to the Band, I disapprove both contracts.

IGRA REQUIRES TRIBES TO BE THE PRIMARY BENEFICIARIES OF GAMING

All of that said, tribes, not their contractors, are supposed to be the primary beneficiaries of Indian gaming. 25 U.S.C. § 2702(2). Under the contracts reviewed here, not only would Sharp have a significant level of control over the Band's gaming activity, it would receive the majority of the benefit from the operation over a five- or seven-year term. Sharp would be receiving a share of the compensation from the gaming machines it is leasing and the same share from card games and pull tab devices This type of arrangement evidences that the terms are contrary to IGRA's sole proprietary interest mandate 25 U.S.C. § 2710(b)(2)(A).

Further, management contracts approved by the Chairman have a fee cap set at 30% of net revenues or 40% of net revenues if the Chairman determines that the capital investment required and the gaming operation's income projections warrant the higher fee. 25 U.S.C. §2711(c)(1)-(2). IGRA defines *net revenues* as: "gross revenues of an Indian gaming activity less amounts paid out as, or paid for, prizes *and total operating expenses*, excluding management fees." 25 U.S.C. § 2703(9) (emphasis added). Here, the contracts give Sharp a fee equaling 30% of adjusted *gross* revenue because they define *net revenue* not as IGRA does

but rather as all gross revenues received by the Band of all machines or table games, minus all jackpots or payouts.

Sharp's 30% of adjusted gross revenue will equal a far higher percentage of net revenue because operating costs, such as electricity, building maintenance, and employee salaries, have not been deducted. From analysis of the breakdown of other tribal management contracts, it can be estimated that the actual percentage of net revenue that would go to Sharp would be 50% to 60% of the net revenues from the gaming operation, not the 30% stated in the contracts. Consequently, the majority of the benefit of Band's gaming would be conveyed to Sharp.

I do not disagree with the 2007 OGC Opinion when it suggests that the contracts give Sharp a prohibited proprietary interest in the Band's gaming operation. However, I do not rely on that fact to disapprove the contracts. There are so many statutory requirements that are not met by the contracts that discussion of an impermissible proprietorship by Sharp is not necessary to my decision.

ADDITIONAL CONCERNS RAISED BY SHARP

Finally, Sharp has raised a number of arguments that it alleges preclude me from reviewing the 1996 GMA and 1997 ELA. I have reviewed these arguments, and I conclude that there is insufficient merit in them, whether considered individually or collectively, to justify a different outcome here.

Generally, Sharp alleges that the NIGC has no legal authority to proceed to review the agreements because the agreements were not intended to be management contracts and were not submitted as such. It notes, for example, that the 1997 ELA states expressly it "is not a management contract." Sharp is in error as to the responsibilities of the NIGC under IGRA.

Abraham Lincoln famously asked how many legs a horse has if you call the tail a leg. The answer, of course, is four, since calling the tail a leg does not make it one. Despite what it calls itself, the 1997 ELA is a management contract. I must, in the course of reviewing and approving contracts, necessarily draw a conclusion as to whether an agreement is, as it is presently drafted, a management contract. That these contracts were executed some time ago is of no import as long as any issue remains as to the requirements of IGRA and whether the contracts are in compliance with those requirements. 25 C.F.R. § 533.7; *Casino Magic Corp.*, 293 F.3d at 421. IGRA requires the NIGC Chairman to approve management contracts, no matter how the agreement comes before him, e.g. through voluntary submission or through NIGC's own regulatory investigation. In short, whether an agreement is a management contract pursuant to the IGRA is most properly a matter of legal concern for this agency and completely consistent with the purposes of the Act as stated in 25 U.S.C. § 2702(2):

> (2) to provide a statutory basis for the regulation of gaming...to ensure that the Indian tribe is the primary beneficiary of the gaming operation...

More particularly, Sharp charges that it is denied due process, including notice and an opportunity to be heard by a fair and impartial tribunal. Sharp alleges that the NIGC has had *ex parte* communications with the Band. This allegation is based on an e-mail to the NIGC Acting General Counsel from a Band attorney that included some friendly discussion about a vacation. This e-mail was dated shortly before the 2007 OGC Opinion. Under the circumstances, this communication is of no consequence.

An OGC advisory opinion is just that, only informal guidance by the OGC. Any communications or notice concerning this informal guidance did not taking place in the context of adversarial litigation or any formal agency action. What is more, my review of management contracts under IGRA, and my approval or disapproval of them, is not a formal adjudication under the Administrative Procedures Act (APA) to which its prohibition on *ex parte* communication applies.

By its terms, section 554 of the APA applies to "every case of adjudication required by statute to be determined on the record after [the] opportunity for an agency hearing." 5 U.S.C. § 554(a); *Girard v. Klopfenstein*, 930 F.2d 738, 741 (9th Cir), *cert. denied*, 116 L. Ed. 2d 136 (1991). That section also provides that any hearing conducted with be "in accordance with sections 556 and 557 of this title," 5 U.S.C. § 554(c)(2), including, of necessity, the ban on *ex parte* communications in 5 U.S.C. § 557(d)(1). The review and approval of management contracts under IGRA, however, is not a formal adjudication under the APA because IGRA does not require them to be on the record after a hearing. 25 U.S.C. § 2711.

That being said, I am fully aware of why *ex parte* communications are prohibited in judicial or quasi-judicial adjudications, so that agency decisions are made on their merits and not influenced by private, off-the-record communications from those with a personal stake in the outcome. *See, e.g., Raz Inland Navigation Co. v. ICC*, 625 F.2d 258, 260 (9th Cir. 1980). I do not see here, however, any prejudice to Sharp.

Sharp has been provided, in response to its Freedom of Information Act (FOIA) request, a copy of all documents available under that statute. Furthermore, this record was left open for months and Sharp was invited to submit any documents in its support that it wished to supplement the record for an extended period of time.

Sharp also states that it has somehow been placed at a disadvantage by the functioning of the NIGC sufficient to support a civil rights action under 28 U.S.C. § 1983. As there is no such statute per se, I take this to refer to 42 U.S.C. § 1983 and its jurisdictional counterpart, 28 U.S.C. § 1343. Allegations such as these do not appear to have any basis when this agency is fulfilling its responsibilities under IGRA to the tribes and to the public. It is not at all clear to me how such an action could lie nor have you provided any analysis to support your allegations.

I do not recognize any constitutional or statutory deprivations visited upon Sharp; it is not at all clear to me how, in acting upon contracts under IGRA, I or this agency could have been acting "under color of state law," as the statute requires; and it is well settled that neither

the United States nor any of its agencies are "persons" subject to liability under 42 U.S.C. 1983. *See, e.g. Hoffman v. United States* Dep't of Housing and Urban Development, 519 F2d. 1160, 1165 (5th Cir. 1976); *Accardi v. United States*, 435 F. 2d 1239, 1241 (3rd Cir 1970); *La Roughe v. City of New York*, 369 F. Supp. 565, 567 (S.D.N.Y.1974).

CONCLUSION

After a review of the law and the provisions of both the 1996 GMA and the 1997 ELA, I find that these individual agreements are now, and have been since their execution, management contracts. These contracts are disapproved because they are not in compliance with the requirements of IGRA and NIGC regulations and because it would not be consistent with my fiduciary responsibilities to the Band to approve the contracts. *See* 25 U.S.C. § 2710 (b)(2)(A); 25 C.F.R. § 522.4(b)(1); 25 U.S.C. § 2711(e)(4) and 25 C.F.R. § 533.6(b)(4). The contracts are therefore void. 25 C.F.R. § 533.7.

The parties have the right to appeal this determination to the full Commission. Pursuant to 25 C.F.R. § 539.2, an appeal must be filed within 30 days after the Chairman serves his determination. Failure to file an appeal within the time provided shall result in a waiver of the opportunity to appeal.

Sincerely,

Philip. N. Hogen
Chairman

cc: Mary Kay Lacey, Esq.
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