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Helpful Hints for Submitting Requests for a Legal Opinion to the NIGC Office of General Counsel

I. Introduction

From time to time, the National Indian Gaming Commission's Office of General Counsel (OGC) is asked to give its opinion on certain discrete legal questions from the gaming industry or other interested parties. The overwhelming majority of these requests seek the General Counsel's legal opinion that an agreement is not a management contract requiring the approval of the NIGC Chair and does not violate IGRA's sole proprietary interest mandate. Such legal opinions are more commonly referred to as "declination letters." Less frequently, the OGC also receives requests for legal opinions on other matters, such as whether certain lands are Indian lands eligible for gaming under IGRA or whether a specific game is considered class II or class III gaming.

As a general matter, legal opinions are issued by the OGC as a courtesy, and neither IGRA nor NIGC regulations require the OGC to issue a legal opinion on any matter. Further, the legal opinion of the General Counsel is not agency action and the issuance of a legal opinion is a voluntary process, both for the party making the request and the OGC. That being said, the OGC offers the following suggestions to help submitters through the process of obtaining an opinion.

II. The Submission Process

In order to facilitate requests for legal opinions and ensure the timely review of submitted documents, we ask that submitters and their attorneys send their request and all relevant documents to the OGC in electronic format via e-mail to legal_opinions@nigc.gov.

For requests seeking a legal opinion regarding whether a contract constitutes a management contract, please submit documents in final or substantially final form. This does not mean that the documents need to be signed and executed. In fact, documents should be submitted prior to their execution as the General Counsel is not inclined to provide a legal opinion on any documents that have already been executed or in cases where litigation related to the documents is pending.¹ The submitted documents should, however, reflect as closely as possible the document the parties intend to execute.

The submission should also include all of the documents to be reviewed and specify the date by which the parties hope to receive a legal opinion. Please note that the submission of additional documents or changes to any previously submitted documents will delay OGC

¹ The proper mechanism for addressing executed agreements that may violate IGRA is to refer them to the NIGC Compliance Division.

review and thus the issuance of the opinion.

III. The Review Process

The initial review of the request and the supporting documents will be conducted by OGC staff attorneys. The amount of time it takes to finish that review is dependent upon several factors, including the completeness of each submission, the complexity of the documents, the responsiveness of the parties, the availability of OGC staff, and competing priorities set by the Commission.

The OGC will always attempt to meet reasonable time frames for providing an opinion, but submitters should expect the review to take weeks, not days. Upon receiving the request, the staff attorney assigned to the review will reach out to the submitter to discuss the request and the supporting documents. The submitters are encouraged to discuss time frames at that point. Further, submitters should also feel free to contact NIGC OGC at any point throughout the process.

During the review stage, OGC staff attorneys may contact the parties and ask for additional information or inform the parties that a legal opinion cannot be issued. The parties may also withdraw a request for a legal opinion at any time prior to an opinion being issued. The review process is not a negotiation between the parties and the NIGC OGC, as the NIGC OGC is simply providing a legal opinion.

Following review, OGC staff attorneys will make a recommendation to the Associate General Counsels and the General Counsel. This recommendation, as well as the submitted documents, will be reviewed by Associate General Counsels prior to submission to the General Counsel. Once the Associate General Counsel has completed his or her review, the recommendation and supporting documents will be submitted to the General Counsel, and the General Counsel will make the final decision on whether to issue the legal opinion.

As OGC legal opinions are intended to inform the public and bring clarity to the Indian gaming industry, the opinions will be posted to the NIGC website for public review. The opinions and submission materials are also likely to be the subject of Freedom of Information Act (FOIA) requests.² To that end, submitters are encouraged to mark the specific financial and confidential terms found in the submissions in accordance with FOIA Exemption Four.³ FOIA further imposes a “segregability requirement” that requires the NIGC to release all reasonably segregable nonexempt material.⁴ As such, OGC strongly recommends that submitters do not request that NIGC withhold or entirely redact documents, but identify only the specific material that comes within the scope of the exemption. Failure to identify exempt information and designations that appear obviously frivolous may, pursuant to NIGC regulation, be subject to disclosure without future opportunities to object.⁵ That being said, the NIGC FOIA Office will provide submitter notices to the submitters, when appropriate, to ensure that the submitters are provided with an opportunity to convey their specific redactions and the bases for them.⁶

² The Freedom of Information Act can be found at 5 U.S.C. § 552.

³ 5 U.S.C. § 552(b)(4).

⁴ See 5 U.S.C. § 552(b).

⁵ 25 C.F.R. § 517.7(f)(4)-(5).

⁶ 25 C.F.R. § 517.7(a).

IV. Available Resources

OGC recommends that parties planning to request a legal opinion visit the NIGC's website at www.nigc.gov. Most of the legal opinions issued by the OGC over the years can be found on the "Reading Room" page of the site. There, interested parties can find OGC legal opinions regarding Indian lands, game classification, management, and sole proprietary interest. A party may find that the issue on which they seek an opinion has already been considered by the OGC.

In addition, although OGC attorneys cannot and will not provide legal advice to the parties or edit any portion of a document submitted for review, they are generally available to answer any questions the parties may have, both before and after the submission of documents.