



March 5, 2013

John Maier
Maier Pfeffer Kim & Geary, LLP
1440 Broadway, Suite 812
Oakland, CA 94612

Re: Review of transaction documents for North Fork Rancheria of Mono Indians

Dear Mr. Maier:

This letter responds to your request for the National Indian Gaming Commission Office of General Counsel ("OGC") to review the First Amended and Restated Development Agreement dated February 1, 2013, and the First Amended and Restated Promissory Note dated February 1, 2012 (collectively "the Transaction Documents"), between the North Fork Rancheria of Mono Indians of California (Tribe) and SC Madera Development, LLC (Developer). Specifically, you have asked for our opinion regarding whether the Transaction Documents are a management contract requiring the NIGC Chairwoman's review and approval under the Indian Gaming Regulatory Act. You also requested an opinion regarding whether the Transaction Documents violates IGRA's requirement that the Tribe have the sole proprietary interest in its gaming operations. After careful review, it is my opinion that the Transaction Documents are not a management contract requiring the review and approval of the Chairwoman. Additionally, it is my opinion that the Transaction Documents do not grant the Developer an improper proprietary interest in the gaming activity. However, because the Transaction Documents are collateral to a management contract, they are subject to further review by the NIGC. Therefore, as part of that review, you may be required to revise the terms of the Transaction Documents.

Management Contracts

IGRA provides the NIGC with authority to review and approve gaming-related 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-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).

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.” 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 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.

Although NIGC regulations do not define *management*, the agency has explained that the term encompasses activities such as planning, organizing, directing, coordinating, and controlling. See attached *NIGC Bulletin No. 94-5: “Approved Management Contracts v. Consulting Agreements (Unapproved Management Contracts are Void).”* 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 the gaming operation, the contract is a management contract within the meaning of 25 U.S.C. § 2711 and requires the NIGC Chairwoman’s approval. Management contracts not approved by the Chairman are void. 25 C.F.R. § 533.7; *Wells Fargo Bank, N.A. v. Lake of the Torches Economic Dev. Corp.*, No. 09-CV-768, 2010 U.S. Dist. LEXIS 1714 at *8-*9 (W.D. Wisc. January 11, 2010).

Sole Proprietary Interest

Among IGRA’s requirements is that “the Indian tribe will have the sole proprietary interest and responsibility for the conduct of any gaming activity.” 25 U.S.C. § 2710(b)(2)(A); see also 25 C.F.R. §§ 522.4(h)(1) and 522.6(c). *Proprietary interest* is not defined in the IGRA or the NIGC’s implementing regulations. As discussed in Notice of Violation # 11-02, OGC legal opinions concerning the sole proprietary interest

mandate have focused primarily on three criteria in its analysis of the requirement. The legal opinions examine: 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. 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*, 2013 WL 141725 (8th Cir. Jan. 14, 2013) (discussing NIGC adjudication of proprietary interest provision). Accordingly, final agency actions by NIGC and OGC legal opinions have 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. *Id.* 723-724.

Analysis

On April 22, 2004, the OGC issued a legal advisory opinion that opined that the original development agreement and promissory note, both dated December 8, 2003, were not management agreements requiring the approval of the Chairwoman. This opinion was confirmed by NIGC Attorney John R. Hay by letter dated October 5, 2004.

In addition to ministerial changes, the Amended and Restated Development Agreement (b) (4)

The Amended and Restated Promissory Note sets the interest rate on any advances made prior to the contemplated facility loan to (b) (4) and any advances made after the facility loan equal to (b) (4)

The changes instituted by the Transaction Documents do not include any actions that would constitute management. Additionally, the changes to the financial terms of the agreements do not individually result in the Developer receiving a proprietary interest in the gaming activity.

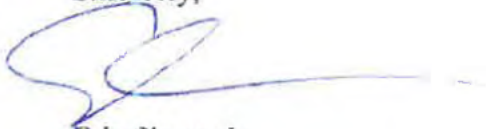
Conclusion

The Transaction Documents do not provide the Developer with any management rights. Therefore, it is my opinion that the Transaction Documents are not a management contract requiring the approval of the Chairwoman. It is also my opinion that the Transaction Documents do not violate IGRA's sole proprietary interest requirement.

I anticipate that this letter will be the subject of Freedom of Information Act (FOIA) requests. Since we believe that some of the information contained herein may fall within FOIA Exemption 4, which applies to confidential or privileged financial or commercial information, the release of which could cause substantial harm, I ask that you provide me with your views regarding release within ten days.

If you have any questions, please contact NIGC Senior Attorney John Hay at (202) 632-7003.

Sincerely,

A handwritten signature in blue ink, appearing to be "Eric Shepard", with a long horizontal flourish extending to the right.

Eric Shepard
Acting General Counsel

cc: Matthew Heinhold (mheinhold@fertitta.com)