March 16, 2012

Rhonda L. Morningstar Pope
Tribal Chairperson
Buena Vista Rancheria of Me-Wuk Indians
P.O. Box 162283
Sacramento, CA 95816

Re: Review of consulting and financial services agreement and license agreement between the Buena Vista Rancheria of Me-Wuk Indians and WG-California.

Dear Chairperson Pope:

This letter responds to the Buena Vista Rancheria of Me-Wuk Indians (Tribe) request for the National Indian Gaming Commission's Office of General Counsel ("OGC") to review a pre-opening consulting and financing services agreement and a license agreement (collectively "the agreements") between the Tribe and WG-California LLC ("WG"). Specifically, you have asked for our opinion regarding whether the draft agreements are management contracts requiring the NIGC Chairwoman's review and approval under the Indian Gaming Regulatory Act. You also requested an opinion regarding whether the agreements violate IGRA's requirement that the Tribe have the sole proprietary interest in its gaming operations. After careful review, it is my opinion that the agreements are not management contracts requiring the review and approval of the Chairwoman. It is also my opinion that they do not violate IGRA's sole proprietary interest requirement.

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.

Though its regulations do not define *management*, the NIGC 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 Chairman'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(b)(1). *Proprietary interest* is not defined in the IGRA or the NIGC's implementing regulations. However, it is defined in Black's Law Dictionary, 7th Edition (1999), as "the interest held by a property owner together with all appurtenant rights . . . " *Owner* is defined as "one who has the right to possess, use and convey something." *Id.* *Appurtenant* is defined as "belonging to; accessory or incident to . . . " *Id.*

Analysis

The Pre-Opening Consulting and Financing Services Agreement requires WG to assist the Tribe in the development, construction, equipping and furnishing of a casino. As compensation for these services WG will receive two separate fees. The first fee is equal to (b) (4) The second fee is a (b) (4)
(b) (4)

The pre-opening consulting and financing services agreement expires when the gaming facility opens. Therefore, by its terms, the agreement does not provide for the management of the gaming activity. Notwithstanding the expiration date, the agreement limits the ability of WG to manage the gaming activity. Specifically, the agreement states:

> CONSULTANT IS ENGAGED HEREUNDER SOLELY IN A CONSULTING AND ADVISORY CAPACITY. Nothing contained in this Agreement permits or authorizes, nor shall anything be construed to permit or authorize, Consultant to: (i) operate or manage any gaming conducted at the Casino or to establish the costs of operating or administering the same; (ii) hire, terminate or determine wages, salaries or benefits for any employee of the Authority or any person employed to work at the Casino; (iii) establish policies and procedures for the operation or management of the Casino; (iv) instruct, direct or supervise the Authority's employees or any other person employed to work at or about the Casino regarding the operation or management of the Casino; (v) bind the Authority or to act as an agent of the Authority with regard to the operation and management of the Casino; (vi) plan, organize, direct,

(b) (4)

> coordinate or control any part of any gaming operation within the meaning of the Indian Gaming Regulatory Act, the regulation promulgated thereunder, or case law construing the provisions thereof ("IGRA"); (vii) undertake any other activity which constitutes "management" of gaming operations; or (viii) take any other action that could reasonable be construed as managing or operating the Casino or that would otherwise violate the purpose and intent of this Agreement. For purposes of clarification, some of the Services may entail the Consultant providing advice or recommendations to the Authority with respect to some of the foregoing-described matters, but THE AUTHORITY SHALL HAVE COMPLETE AND ABSOLUTE DISCRETION WITH RESPECT TO THE IMPLEMENTATION OF ADVICE AND RECOMMENDATIONS MADE BY THE CONSULTANT.

Pre-Opening Consulting and Financing Services Agreement § 2(c).

The License Agreement provides that the Tribe will license from WG a reporting and analytical database system used for marketing, slot and table analytics, labor management, and financial analysis and reporting. In exchange for this license, the Tribe will pay WG (b) (4) The License Agreement also provides the Tribe with the option of engaging WG as the manager of the facility. The license agreement contains a provision that prohibits WG from managing the gaming activity. Specifically, it states:

> Except to the extent that the Management Agreement may be entered into and take effect upon approval by the chairperson of the NIGC and all other Governmental Authorities as required under applicable Legal Requirements, nothing contained in this Agreement permits or authorizes, nor shall anything be construed to permit or to authorize, Licensor to: (i) operate or manage any gaming conducted at the Casino or to establish the costs of operating or administering the same; (ii) hire, terminate or determine wages, salaries or benefits for any employee of the Licensee or any other person employed to work at the Casino; (iii) establish policies and procedures for the operation or management of the Casino; (iv) instruct, direct or supervise the Licensee's employees or any other person employed to work at or about the Casino regarding the operation or management of the Casino; (v) bind the Licensee or to act as an agent of the Licensee with regard to the operation and management of the Casino; (vi) plan, organize, direct, coordinate or control any part of any gaming operation within the meaning of IGRA; (vii) undertake any other activity which constitutes "management" of gaming operation; or (viii) take any other action that could reasonably be construed as managing or operating the Casino or that would otherwise violate the purpose and intent of this Agreement.

License Agreement § 5(c).

On their face, the agreements prohibit any entity other than the Tribe from managing the gaming operation. Therefore, the agreements are not management agreements and do not require the approval of the Chairwoman.

Finally, you asked for my opinion as to whether the agreements violate IGRA's requirement that the Tribe have the sole proprietary interest in its gaming enterprise. Based on the financial projections provided by the parties, WG is projected to be paid (b) (4) for offering pre-opening consulting services and licensing software to the Tribe. The parties have represented to us that the compensation to be paid to WG is warranted due to the Tribe being unable to obtain the financing necessary to complete the project without WG's involvement. Additionally, on their face, the agreements do not provide WG with any control over the gaming operation that would indicate a proprietary interest.

Based on the unique facts of this particular project, it is my opinion that the agreements do not grant a proprietary interest in the Tribe's gaming operation to WG. However, this opinion is based upon, and thus is limited to the financial projections provided by the parties as well as the parties' representations given that WG's fee is (b) (4) (b) (4) Given this, if the financial projections are not accurate and do not reflect the actual financial circumstances, I would be inclined to reexamine the proprietary interest issue. Likewise, if WG were to enter into a management agreement[2] with the Tribe, we would need to take into consideration and possibly reevaluate the amount of compensation being paid to WG pursuant to the agreements in light of IGRA's requirements. *See* 25 U.S.C. § 2711(c).

Conclusion

The Pre-Opening Consulting and Financing Services Agreement and the License Agreement specifically exclude anyone but the Tribe from managing the facility. Therefore, it is my opinion that they are not management agreements requiring the approval of the Chairwoman. Additionally, on their face, the agreements do not prevent the Tribe from maintaining the sole proprietary interest in the gaming operation.

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(c), which applies to confidential proprietary information, the release of which could cause substantial harm, I ask that you provide me with your views regarding release within ten days.

I am also sending a copy of the submitted agreements to the Department of Interior Office of Indian Gaming for review under 25 U.S.C. § 81. If you have any questions, please contact NIGC Senior Attorney John Hay at (202) 632-7003.

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[2] The parties have included a draft management agreement as an exhibit to the License Agreement but have not asked for an opinion on it.

Sincerely,

Lawrence S. Roberts
General Counsel

cc: Paula Hart, Director
Office of Indian Gaming
(via US Mail w/ incoming)