February 4, 2013

Robert Pinto, Sr.
Tribal Chairman
Ewiiaapaayp Band of Kumeyaay Indians
4054 Willows Road
Alpine, CA 91901

Re: Request for review of Pre-Opening Consulting Agreement and Development Agreement between the Ewiiaapaayp Band of Kumeyaay Indians and WGSD, LLC.

Dear Chairman Pinto:

This letter responds to the Ewiiaapaayp Band of Kumeyaay Indians' ("Tribe") request for the National Indian Gaming Commission's Office of General Counsel ("OGC") to review a Amended and Restated Pre-Opening Consulting Agreement (x-ready 01-15-13) (the "A & R Consulting Agreement) and an unexecuted Amended and Restated Development Agreement (x-ready 01-15-13) (the "A & R Development Agreement") to be entered into by the Tribe and WGSD, LLC, a subsidiary of Warner Gaming, LLC, ("WGSD"). Specifically, the Tribe has asked for our opinion regarding whether the agreements are management contracts requiring the NIGC Chair's review and approval under the Indian Gaming Regulatory Act. The Tribe 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 Chair. 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.*, *Catskill Development LLC v. Park Place Entertainment Corp*, 547 F.3d 115, 131 (2nd Cir. 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 v. Lake of the Torches Econ. Devl. Corp.*, 658 F.3d 684, 686 (7th Cir. 2011).

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) and 522.6(c). *Proprietary interest* is not defined in the IGRA or the NIGC's implementing regulations. As discussed in NIGC

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

A & R Consulting Agreement

The A & R Consulting Agreement has a stated term, expiring the day before Class II and/or Class III gaming is first operated at the facility. *See* Section 1(a). But because so many steps must occur, including potentially obtaining a lands opinion, relocating an existing healthcare facility, etc, before gaming is available to the public, the contract is, in practice, open-ended as to its term. Compensation to WGSD, under this contract, (b) (4) [redacted]

Under the A & R Consulting Agreement, WGSD will evaluate the Tribe's casino operation development plans and make recommendations regarding: floor lay-out, game selection, wager limits, personnel matters, marketing strategies, technology systems, food and beverage, internal control systems, and hotel operations. WGSD will refer vendors to the tribe, but is not authorized to engage them. Finally, WGSD will advise the Tribe on "financial issues" relating to the development of the casino operation. *See* Section 2(a). While these provisions are broad, WGSD is specifically prohibited from managing the facility. Specifically, WGSD's does not have the ability to operate or manage the gaming, to hire, fire, or set wages, establish policies for operation, supervise employees, bind or act as an agent on behalf of the Tribe, control the gaming operation, or take any action what would be construed as managing. *See* Section 2(d).

While the term of the A & R Consulting Agreement is not for a fixed term, it does, however, expire when the gaming facility opens. Therefore, by its terms, the agreement does not provide for the management of the gaming activity. Additionally, though compensation does not appear to be tied to specific work performance and specific tasks with finite performance dates are not provided, WGSD is only to provide advice. Specifically, the A & R Consulting Agreement states that the Tribe shall have "absolute discretion with respect to the implementation" of the advice. Therefore, the A

& R Consulting Agreement does not provide for management of the Tribe's proposed gaming facility and does not require the approval of the Chair.

A & R Development Agreement

Like the Consulting Agreement, the term of the A & R Development Agreement is dependent on certain events occurring, primarily Class II and/or III gaming becoming available to the public. *See* Sections 2.1, Article I, Definitions, and Recital D. The agreement will be in effect for five years past that opening date. *Id.* Though the contract term is not open-ended, it does not have a specific duration.

Under the A & R Development Agreement, WGSD agrees to perform "Development Services:" evaluate and consult with Tribe regarding site selection and scope of facility and project; select an architect; select a general contractor; administer design agreements and construction contracts on behalf of tribe; select and procure furnishings and equipment (including gaming machines); fund advances to the Tribe; develop a pre-opening marketing plan; hire employees prior to opening; consult with the Tribe and any vendors. *See* Section 3.1 and Article I, Definitions. As compensation, WGSD will receive a fee equal to (b) (4) [redacted]

Either party may terminate the agreement, with written consent of the other party or by a buy-out from the Tribe. *See* Sections 2.2 and 5.4. However, termination requires the Tribe to reimburse WGSD for any advances or other unpaid compensation owed under either agreement (b) (4) [redacted], all set forth in the detailed termination provisions. *See* Sections 2.3, 8.3., 8.4, and Article I, Definitions.

In sum the A & R Development Agreement does not provide WGSD the right or responsibility for making management decisions at the Tribe's proposed gaming facility and does not require the approval of the Chair.

Sole Proprietary Interest

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. On their face, the agreements do not provide WGSD with any control over the gaming operation that would indicate a proprietary interest.

It is my opinion that the agreements do not grant a proprietary interest in the Tribe's gaming operation to WGSD. However, if WGSD were to enter into a management agreement with the Tribe, we would need to take into consideration and possibly reevaluate the amount of compensation being paid to WGSD pursuant to the agreements in light of IGRA's requirements. *See* 25 U.S.C. § 2711(c).

Conclusion

The A & R Pre-Opening Consulting Agreement and A & R Development Agreement prohibit anyone but the Tribe from managing the gaming operation. Therefore, it is my opinion that they are not management agreements requiring the approval of the Chair. 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, 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.

If you have any questions, please contact NIGC staff attorney Heather Corson at (202) 632-7003.

Sincerely,

Eric Shepard
Acting General Counsel

cc: Bradley Bledsoe Downes
Bledsoe Downes, PC
(via email: bdownes@brdlaw.com)

Robert E. Bruce
Warner Gaming, LLC
(via email: bob@warnergaming.com)