August 10, 2004

Ms. Eugenia Nogales
Tribal Chairperson
Cahuilla Band of Indians
P.O. Box 391760
Anza, CA 92539-1760

Dear Ms. Nogales:

The purpose of this letter is to respond to your request that the National Indian Gaming Commission (NIGC) review certain transaction documents executed by the Cahuilla Band of Indians (Tribe) and Abello, LLC, (Developer). The documents included a Development Agreement, Financial Services Engagement Letter, and a Cash Management Agreement (Agreements). The purpose of our review is to determine whether the Agreements, individually or collectively, constitute a management contract or collateral agreements to a management contract and therefore subject to our review and approval under the Indian Gaming Regulatory Act (IGRA). We conclude that the Agreements do not constitute a management agreement subject to our review and approval. However, we also conclude that the Agreements evidence a proprietary interest in the Tribe's gaming activity, contrary to IGRA, its implementing regulations and the Tribe's gaming ordinance.

Authority

The authority of the NIGC to review and approve gaming related contracts is limited by the IGRA to management contracts and collateral agreements to management contracts. 25 U.S.C. § 2711. The authority of the Secretary of the Interior to approve such agreements under 25 U.S.C. § 81 was transferred to the NIGC pursuant to the IGRA. 25 U.S.C. § 2711(h).

Management Contracts

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. The NIGC has defined "collateral agreement" to mean "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. Management encompasses activities such as planning, organizing, directing, coordinating, and controlling. *See NIGC Bulletin No. 94-5.* In the view of the NIGC, the performance of any one of these activities with respect to all or part of a gaming operation constitutes management for the purpose of determining whether an agreement for the performance of such activities is a management contract requiring NIGC approval.

After reviewing the Agreements, we conclude that the Agreements do not establish a management relationship.

Proprietary Interest

After reviewing the Agreements we conclude that the Developer has a substantial proprietary interest in the gaming operation. The Agreements concern the renovation of the Tribe's existing casino and possibly the building of a new gaming facility, entertainment venue, retail establishments and hotels or other lodgings. The Agreements delineate between two phases of proposed development. Phase IA Project entails the expansion of the existing Cahuilla Creek Casino to include up to 450 class III electronic or electromechanical games, the construction of a new permanent facility to house the Cahuilla Creek Casino, and related amenities such as lodging, a water park, a gas station, a convenience store, a car wash, and a recreational vehicle park.

Phase IB is defined as any development or renovations to the property put in to service following the completion of the Phase IA Project. The term of the agreement is from [ ] anniversary of the casino opening to the public unless the parties make the Phase IB project election whereby the termination date would be [ ] from the Effective Date. The Developer is granted the exclusive right to plan, design, develop, and construct any improvements on the property during the term of the agreement. 64

The Developer will advance all costs to the Tribe up to [ ] 64

In addition to the development agreement the Tribe has also entered into a Financial Services Agreement with the developer. The agreement retains the developer as a financial advisor with respect to financial matters related to the Project Financings to pay the costs and expenses associated with the Projects.

The Tribe will compensate the Developer by paying a Development Fee equal to [ ] The Tribe will further compensate the Developer by paying a Financial Services Fee equal to [ ] 64

Additionally, the Tribe will also pay a Financial Advisory Fee for each Project equal to [ ] for [ ] from the time the permanent casino opens to the public and through [ ] hat the Phase IB project is completed and open to the public. Following [ ] after the effective date the Financial Advisory Fee is reduced to [ ]

64

If the parties elect to proceed with Phase IB, the Tribe will compensate the Developer the same fees and percentages as in Phase I.

Applicable Law

Among IGRA's requirements for approval of tribal gaming ordinances 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). Under this section, if any entity other than a tribe possesses a proprietary interest in the gaming activity, gaming may not take place. The NIGC, in its regulations, also requires that all tribal gaming ordinances include such a provision. 25 CFR § 522.4(b)(1). Accordingly, the Cahuilla Creek Indians gaming ordinance, approved by the NIGC, specifically requires that "the Tribe shall have sole proprietary interest in and responsibility for the conduct of any gaming operation authorized by this Ordinance . . .". Ordinance of the Cahuilla Band of Indians, Sec. III.

"Proprietary interest" is defined in Black's Law Dictionary, 7th Edition (1999), as "the interest held by a property owner together with all appurtenant rights . . ." An 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. Reading these definitions together, proprietary interest creates the right to possess, use and convey something.

Although there are no cases directly on point, courts have defined proprietary interest in a number of contexts. In a criminal tax case, an appellate court discussed what the phrase proprietary interest meant, after the trial court had been criticized for not defining it for jurors, saying:

> It is assumed that the jury gave the phrase its common, ordinary meaning, such as 'one who has an interest in, control of, or present use of certain property.' Certainly, the phrase is not so technical, nor ambiguous, as to require a specific definition.

Evans v. United States, 349 F.2d 653 (5th Cir. 1965). In another tax case, Dondlinger v. United States, 1970 U.S. Dist. LEXIS 12693 (D. Neb. 1970), the issue was whether the plaintiff had a sufficient proprietary interest in a wagering establishment to be liable for taxes assessed against persons engaged in the business of accepting wagers. The court observed:

> It is not necessary that a partnership exist. It is only necessary that a plaintiff have some proprietary interest. . . One would have a proprietary interest if he were sharing in or deriving profit from the club as opposed to being a salaried employee merely performing clerical and ministerial duties. [emphasis added]

Id.

An additional aid to statutory interpretation includes the legislative history of the statute. The legislative history of the IGRA with respect to "proprietary interest" is scant, stating only that, "the tribe must be the sole owner of the gaming enterprise." S. Rep. 100-446, 1988 U.S.C.C.A.N. 3071-3106, 3078. "Enterprise" is defined as "a business venture or undertaking" in Black's Law Dictionary, 7th Edition (1999). Despite the brevity of this information, the drafters' concept of "proprietary interest" appears to be consistent with the ordinary definition of proprietary interest, while emphasizing the notion that entities other than tribes are not to share in the ownership of gaming enterprises.

Secondary sources also shed light on the definition of "proprietary interest." In a chapter on joint ventures in American Jurisprudence, 2nd Edition, the difference between having a proprietary interest and being compensated for services is discussed in the context of determining when a joint venture exists.

> Where a contract provides for the payment of a share of the profits of an enterprise, in consideration of services rendered in connection with it, the question is whether it is merely as a measure of compensation for such services or whether the agreement extends beyond that and provides for a proprietary interest in the subject matter out of which the profits arise and for an ownership in the profits themselves. If the payment constitutes merely compensation, the parties bear to each other, generally speaking, the relationship of principal and agent, or in some instances that of employer and employee [footnote omitted]. On the other hand, a proprietary interest or control may be evidence of a joint venture. [footnote omitted] [emphasis added]

46 Am. Jur. 2d *Contracts* § 57.

Finally, the preamble to the NIGC's regulations provides some examples of what contracts may be inconsistent with the sole proprietary interest requirement, but then concludes that "[i]t is not possible for the Commission to further define the term in any meaningful way. The Commission will, however, provide guidance in specific circumstances." 58 Fed. Reg. 5802, 5804 (Jan. 22, 1993).

Analysis

We are troubled that the Tribe is required to pay the developer[ ]for such a long period of time. Agreement provisions providing a large percentage of the gaming revenues over a long period of time are evidence that the developer has been granted an equity interest rather than merely compensation for services provided. Under the Agreement the primary responsibility of the Developer is to secure financing for the projects. In exchange for this the developer will receive a one-time payment of[ ]and a one-time payment of[ ]. In light of this, it seems to us that[ ]is excessive compensation for simply arranging financing. Based upon the Tribe's audits, for fiscal year 2002,[ ]would amount to over[ ]. For fiscal year 2003 it would be more than[ ]

64

We recognize that the tribe may request other services from the Developer related to their non-gaming projects but action on these services seems to be incidental to the contract.[1] The compensation to the developer is tied only to the gross revenues of the gaming operation, not to any of the non-gaming projects proposed for Phase IB.

Further evidence of an equity interest by the Developer is Section 7.5 of the Development Agreement that limits the tribal governments right to revoke the Developer's license. This provision undermines the tribe's authority to regulate the gaming operation and evidences a level of control that is consistent with an ownership interest. Additionally, Section 4(e) of the Financial Services Engagement Letter limits the Tribes ability to issue licenses. These provisions would be subject to the mandatory mediation provision contained at Section 8.2 (b)(iii). The issuance of a tribal gaming license is a function of the tribal government and therefore decisions granting or revoke tribal gaming licenses are within the exclusive authority of the empowered governmental structure and cannot be subject to mediation.

Finally, we examine the risks to the developer in providing financing for the development. The Tribe has land in trust for this development and has already entered a compact with the State of California. Further, they are currently operating a gaming facility. A tribal gaming facility in California with a tribe that has land in trust and a compact with the state is not a high-risk venture. We consider the risks to financing renovations to the current casino to be minimal and do not provide a justification for the level of compensation being provided to the developer. We are likewise of the opinion that if the Tribe decides to go forward with the construction of a new facility that the attendant risks would be minimal.

[1] Section 1(i) (ix) provides that the developer will, "provide other services as reasonably requested by the Tribe from time to time (other than any services with respect to Gaming Operations)."

Determination

We conclude that the Agreements bestow a proprietary interest in the gaming operation on the developer, in violation of the IGRA, its implementing regulations and the Tribe's gaming ordinance. This conclusion is based upon the excessive compensation not related to services and the limited ability of the Tribe to remove the developer if they are deemed unsuitable. The Agreements in this case memorialize an ownership interest for the developer rather than establishing terms for the receipt of ongoing services or goods by the Tribe. We further conclude that the Agreements are contrary to the public policy underlying the IGRA that prohibits entities other than tribes from having a proprietary interest in a gaming operation.

We are forwarding a copy of this letter and the Agreements to the Office of Indian Gaming Management (OIGM). They will perform a review to determine whether their approval is necessary.

Finally, we 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 falls within FOIA Exemption 4(c), which applies to confidential and proprietary information, the release of which could cause substantial competitive harm, we ask that you provide us with your views regarding release within 10 days.

If you have any questions, please contact John Hay, Staff Attorney.

Sincerely,

Penny J. Coleman

Penny J. Coleman
Acting General Counsel

cc: Director, OIGM (w/ incoming)