



DEC 12 2005

Tracy Nelson
Chairman
La Jolla Band of Mission Indians
22000 Hwy 76
Pauma Valley, CA 92061

Dear Chairman Nelson:

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 La Jolla Band of Mission Indians (Tribe) and Gold River, LLC (Developer). The documents, each of which is dated as of August 9, 2004, specifically include: (i) the Development Agreement; (ii) the Limited Recourse Promissory Note; (iii) the Security Agreement; (iv) Memorandum of Understanding; and (v) Limited Recourse Promissory Note between the Tribe and Nevada Gold & Casino Inc. Collectively, the documents are referred to herein as "Transaction Documents." The purpose of our review is to determine whether these documents, 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. The "Transaction Documents" raise some significant concerns.

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.

The Transaction Documents between the Tribe and the Developer do not establish a management relationship and, consequently, do not require the Chairman's approval.

Proprietary Interest

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. NIGC regulations also require that all tribal gaming ordinances include such a provision. *See* 25 C.F.R. § 522.4(b)(1).

"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.

Id. (emphasis added).

The legislative history of IGRA is an additional aid for interpreting the statute's mandate that a tribe "have the sole proprietary interest and responsibility for the conduct of any gaming activity." 25 U.S.C. § 2710(b)(2)(A). 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]

46 Am. Jur. 2d *Contracts* § 57 (emphasis added).

Consequently, if a joint venture is found to exist it would be further evidence that the Tribes did not hold the sole proprietary interest in the gaming operation.

Finally, the preamble to NIGC 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).

Determination

In this instance, we are concerned that the Transaction Documents may accord the Developer a proprietary interest in the gaming operation of the Tribe. Generally, agreement provisions that provide a large percentage of the gaming revenues over a long period of time are evidence that a developer has been granted an equity interest rather than merely compensation for services provided.

Pursuant to the Development Agreement, the Tribe is required to pay Gold River []

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[] Under IGRA, standard management agreements cannot have a term longer than 5 years.

In exchange for this compensation the Developer is to: 1) fund the Phase I Preliminary Development Loan and the Phase II Preliminary Development Loan; 2) assist the Tribe in arranging permanent financing for the Phase I and II development; and 3) provide development services for the Project Facilities. Under the Development agreement the Phase I costs are not to exceed []

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Although the four corners of the Transaction Documents do not reflect an agreement to assume management responsibilities, we are troubled by the "development fees" for both phases of the development. The Tribe is responsible for []

Such an arrangement is an unusual fee for the services provided. [] does not apply if a management agreement between the parties is approved by the NIGC. Such an arrangement suggests two alternatives: first, the company is receiving a management fee under the guise of a development agreement and plans to manage whether or not a management contract is approved; or second, since the developer is providing little services for [] the developer is acquiring an equity interest in the casino. Either alternative is an impermissible arrangement.

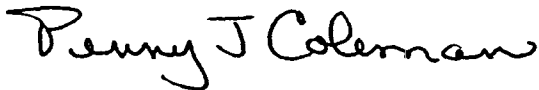
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In some instances we have found that similar agreements did not bestow a proprietary interest since the developer was assuming a large risk. In this case, however, it does not

appear that there is a great risk. Indian gaming in southern California has been a lucrative industry. The Tribe has trust land as well as a compact with the State of California. We feel that the Tribe will be able to easily obtain financing for this project further mitigating any risk to the Developer. The services provided and the risks assumed do not seem to be related to the compensation provided to the Developer. We, therefore, without further information, conclude that the risk involved in this project does not justify the high level of compensation or the long length of the agreement

We will forward a copy of this Agreement to the Bureau of Indian Affairs for its review. If you have any questions, please contact John Hay at (202) 632-7003.

Sincerely,

A handwritten signature in cursive script that reads "Penny J. Coleman".

Penny J. Coleman
Acting General Counsel

cc: Director, Indian Gaming Management Staff w/ incoming