OCT 2 7 2006

Governor James Roger Madalena
Pueblo of Jemez
4471 Highway 4, Box 100
Jemez Pueblo, NM 87024

RE: Agreements Among the Pueblo of Jemez, the Pueblo of Jemez Tribal Gaming Enterprise, and Circle P Investments of New Mexico, LLC

Dear Governor Madalena:

On July 19, 2005, the Pueblo of Jemez ("Pueblo") requested that the National Indian Gaming Commission ("NIGC") review the Development, Financial Services and Non-Gaming Facilities Agreement ("Development Agreement" or "DA") and the Purchase Agreement ("Purchase Agreement") (together, "Agreements") among the Pueblo, The Pueblo's Tribal Gaming Enterprise ("Enterprise") and Circle P Investments of New Mexico, LLC ("Circle P"), both dated December 10, 2004. Specifically, the Tribe seeks a determination that the Agreements do not constitute a management contract, as defined in the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq*. In addition, we undertook an analysis of whether the Agreements violate the sole proprietary interest provision of the IGRA. 25 U.S.C. § 2710(b)(2)(A).

We conclude that the Agreement does not constitute a management contract subject to our review and approval. However, as is detailed fully below, the Agreement evidences Circle P's proprietary interest in the Pueblo's gaming activity contrary to IGRA, NIGC regulations, and the Pueblo's gaming ordinance. *See* 25 U.S.C. § 2710 (b)(2)(A); 25 C.F.R. § 522.4(b)(1); Pueblo of Jemez Tribal Gaming Ordinance (approved April 4, 2005) § 4.

We met with the Pueblo on March 29, 2006, to discuss the Agreements. We requested additional information to inform our sole proprietary interest determination. On May 24, 2006, we received a supplemental submission, which included information regarding revenue projections, cash flow analyses and a risk/benefit analysis.

Under the Development Agreement, Circle P would act as the Pueblo's exclusive agent to carry out any and all activities necessary for the development and financing of an off-reservation Class II and Class III casino project in Anthony, New Mexico. Circle P will assist in acquiring land; assist in preparation of Pueblo's land into trust application; advance funding to pay pre-development costs; assist in obtaining necessary financing; supervise development and construction of temporary and permanent casinos; and absorb legal and political risks associated with the venture.

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.[1] 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).

1. **Management Control**

A management contract is "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 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. *Id.*

The Development Agreement between the Pueblo and Circle P at issue here does not establish a management relationship and, consequently, does not require the Chairman's approval.

2. **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

[1] However, certain gaming-related agreements, such as consulting agreements or leases or sales of gaming equipment, should be submitted to the NIGC for review. *See NIGC Bulletin No. 93-3.*

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, the Development Agreement accords Circle P a proprietary interest in the gaming operation and related operations of the Pueblo. Essentially, Circle P's proprietary interest derives from the excessive amount of revenue it will obtain from the Pueblo's gaming facility and other operations relative to the services provided by Circle P. 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.

The Development Agreement provides that the Pueblo will pay Circle P a "Development Fee" of [ ] of both the net income of the casino and the net income of any Enterprise Developed Associated Facilities. DA §1.1 (Definition of Developer's Fee). Enterprise Developed Associated Facilities means any improvement on the site that is developed and managed by the Enterprise, other than the development of the casino by Circle P. DA §1.1 (Definitions of Associated Facilities and Project). This fee will be paid for a term of [ ] years.[2] b4

[2] The term negotiated in the Development Agreement is [ ] years. By letter dated May 19, 2006, the Pueblo advised the NIGC that Circle P agreed to shorten the period for repayment of the Development Fee to [ ] years, commencing upon the opening of the permanent casino operations. b4

The Development Agreement also provides that the Developer will be paid a "construction supervision fee" equal to [ ]Financial Pro-Forma Projections Post Approval Risk Analysis, dated May 3, 2006. However, to date and anticipated cost over-runs suggest that the ultimate cost, and related developer fee, will be higher than estimated. See Updated Risk/Benefit Analysis, May 10, 2006. Circle P has agreed that, if necessary to secure financing, this fee will be subordinate to third party financing. 64

This fee is to be paid from the proceeds of financing, but if not fully paid from financing, any remaining amounts shall be paid out of the Pueblo's share of the casino net income, Associated Facilities net income, and "Related Projects" net income. "Related Projects" are all non-gaming development and improvements on the "Related Project Site", which site remains owned by Circle P. DA § 1.1 (Definitions of Related Projects and Related Project Site). Circle P shall pay the Pueblo [ ]of the income from "Related Projects". The Pueblo has not submitted any specific information on "Related Projects" so it is unknown when the Pueblo would begin receiving its share of that income and for how long. 64

Circle P will have the exclusive right to facilitate acquisition of the gaming site; facilitate the land into trust application; plan, design, develop, construct, finance and furnish the gaming facility; perform financial advisory services; and develop and manage all non-gaming portions of the facility. With respect to financing, Circle P had, as of March 21, 2006, advanced more than [ ] 64

Although Circle P will provide several services, and has advanced the Pueblo a significant sum of money, Circle P will be reimbursed by the Pueblo from the proceeds of financing, or if not so reimbursed, as a priority payment from the casino's operating cash flow. DA § 5.1(c). Circle P will be so reimbursed for all costs and expenses, including all advances and accrued interest. *Id.*

Although Circle P will be fully reimbursed for its costs and expenses, and will be paid [ ]and likely more, the Pueblo will still be obligated to pay Circle P [ ]percent of casino net revenue. [64

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This amount of the net revenues of the gaming operation and its ancillary operations for such a long period of time is excessive compensation in light of the fact that Circle P's costs and expenses will be reimbursed from financing proceeds. Such a payment structure does not provide Circle P a fee for its services, but accords it an ownership interest in the profits of the gaming facility and its related operations for [ ]years. Therefore, the Development Agreement enables Circle P to collect large amounts of money, over a lengthy period of time, for doing nothing – performing no ongoing services for the Tribes, and, once Circle P's original costs are paid, giving the Tribe nothing in return. In this case, Circle P would be receiving a percentage of the net revenues similar to that which is allowed for a management contractor who 64

would provide ongoing services. *See* 25 U.S.C. § 2711 (c). As a consequence, the level of compensation extends far beyond what is reasonable for the services provided.

Finally, we examine the risks, apart from the outlay of start-up and land purchase option costs, to Circle P involved in this venture. The gaming facility is planned for an off-reservation site and the land is not yet in trust for this development. Circle P has been retained to assist in this effort, and a land-to-trust application is pending with the United States Bureau of Indian Affairs. We acknowledge that the current political climate is not friendly to off-reservation gaming, and that this may impact the land-to-trust application. However, there is relatively little financial risk associated with the land purchase. Circle P has not agreed to purchase the land outright, but instead agreed to purchase an option, evidenced by the Purchase Agreement, and the Pueblo is to reimburse Circle P for the cost of the option. PA § 2.1.1. As of December 31, 2005, the cost estimate of the option was [ ] The option expires on [ ] but could be extended, albeit at additional cost. Furthermore, Circle P's obligations under the Purchase Agreement are conditioned upon the ability of the Enterprise to obtain financing to purchase the property, PA § 8.1.2, and approval by the Secretary of the Interior to accept the land into trust for the benefit of the Pueblo. PA § 8.1.3. 64

The Pueblo suggests there is an on-going risk that the make-up of the local Board of County Commissioners could change and that a new County Commission would not support the casino. *See* Updated Risk/Benefit Analysis dated May 10, 2006. While that possibility does exist, it is significant that the Pueblo and the county have entered into an Intergovernmental Agreement, the current Board of County Commissions voted to support the casino, and the casino enjoys wide-spread support from the local population. *Id.*

If successful, a tribal gaming facility in southern New Mexico, close to the Las Cruces, New Mexico and El Paso, Texas markets, is not a high-risk venture and will in all likelihood be extremely profitable. While we understand it is estimated that Circle P could advance somewhere in the neighborhood of [ ] (Updated Risk/Benefit Analysis dated May 10, 2006) on the development of the casino, we also recognize that, in addition to the repayment of funds advanced, Circle P is likely to gain approximately [ ] in net revenue from the Pueblo's gaming operation and at least [ ] We conclude that the risks involved in this project do not justify this high compensation or the lengthy term of the Development Agreement. 64

Other provisions in the Development Agreement further evidence control by Circle P that is more consistent with one possessing a proprietary interest than simply providing a service. Section 6.5(d) directs that the Enterprise "shall also make the books and records of the Casino and Associated Facilities available to the Developer for its review and inspection and for the review and inspection of its professional advisor annually..." Additionally, the Pueblo must provide Circle P monthly operating statements and quarterly financial statements. DA § 6.5(d). These provisions evidence a level of control consistent with an ownership interest.

Conclusion

We conclude that the Development Agreement bestows a proprietary interest in the gaming operation on Circle P, in violation of the IGRA, its implementing regulations and the Pueblo's gaming ordinance. This conclusion is based upon the excessive compensation provided to Circle P over an extensive period of time that is not commensurate with Circle P's services. Thus, in this case, the Development Agreement memorializes an ownership interest for Circle P rather than establishing terms for the receipt of ongoing services or goods. Accordingly, the Development Agreement is contrary to the public policy underlying the IGRA that prohibits entities other than tribes from having a proprietary interest in a gaming operation.

A copy of this letter and the Agreements will be forwarded to the Office of Indian Gaming Management of the U.S. Department of the Interior for its review. If you have any questions, please contact Maria Getoff, Staff Attorney.

Sincerely,

Penny J Coleman

Penny J. Coleman
Acting General Counsel

cc: Director, OIGM w/enclosures
Ken Billingsley, NIGC Phoenix Region Director
Kirian Fixico, NIGC Field Auditor
Tom Foley