March 1, 2018

John Maier
Maier, Pfeffer, Kim, Geary, & Cohen LLP
1970 Broadway, Suite 825
Oakland, CA 94612

Re: Submission and Request for Declination Letter

Dear Mr. Maier:

This letter responds to your November 13, 2017 request on behalf of the Estom Yumeka Maidu Tribe of the Enterprise Rancheria to the National Indian Gaming Commission's Office of General Counsel to review a development agreement and related promissory note between the Tribe, its Development Authority, and Hard Rock Sacramento FM, LLC. Specifically, you have asked for my opinion on whether the agreement is a management contract requiring the NIGC Chair's approval under the Indian Gaming Regulatory Act. You also asked for my opinion whether the documents violate IGRA's requirement that the Tribe have the sole proprietary interest in its gaming activity. After careful review, it is my opinion that neither the Development Agreement nor the Note constitutes a management contract and does not currently require the review and approval of the Chair. It is also my opinion that neither document violates IGRA's sole proprietary interest requirement.

In my review, for purposes of this letter, I considered the following documents:

- Development Agreement among Estom Yumeka Maidu Tribe of the Enterprise Rancheria, Enterprise Development Authority and Hard Rock Sacramento FM, LLC (Nov. 8 2017).
- Exhibit C of the Development Agreement, Form of Promissory Note (Nov. 8 2017).

<u>Legal Background</u>

IGRA provides the NIGC with authority to review and approve gaming-related management contracts and agreements collateral to management contracts to the extent they implicate management.[1] The NIGC has defined the term *management contract* to mean "any contract,

[1] *See, Catskill Dev. LLC v. Park Place Entm't Corp.*, 547 F.3d 115, 130 (2d 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*

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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."[2] *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, or organizations) and a management contractor or subcontractor (or any person or entity related to a management contractor or subcontractor)."[3]

While the NIGC regulations do not define *management*, the Agency has clarified that the term encompasses activities such as planning, organizing, directing, coordinating, and controlling.[4] The definition of *primary management official* is "any person who has the authority to set up working policy for the gaming operation."[5] Further, management employees are "those who formulate and effectuate management policies by expressing and making operative the decision of their employer."[6] Whether particular employees are "managerial" is not controlled by an employee's job title,[7] rather the question must be answered in terms of the employee's actual job responsibilities, authority and relationship to management.[8] Essentially, an employee may qualify as management if the employee possesses the actual 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.[9]

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 that have not been approved by the Chairman are void.[10]

You have also inquired about sole proprietary interest. IGRA also mandates that a tribe possess "the sole proprietary interest and responsibility for the conduct of any gaming activity."[11] Yet, *proprietary interest* is not defined in IGRA, or the NIGC's implementing regulations. IGRA does say that one of its purposes is that tribes are the primary beneficiaries of the gaming activity. [12] Therefore, in keeping with IGRA's expressed purpose, the notion of proprietary interest must be construed in favor of protecting tribal interests.

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).

[2] *See*, 25 C.F.R. § 502.15.

[3] *See*, 25 C.F.R. § 502.5.

[4] *See*, attached *NIGC Bulletin No. 94-5*: "Approved Management Contracts v. Consulting Agreements (Unapproved Management Contracts are Void)."

[5] *See*, 25 C.F.R. § 502.19(b)(2).

[6] *See*, *N.L.R.B. v. Bell Aerospace Co.*, 416 U.S. 267, 288 (1974).

[7] *See*, *Waldo v. M.S.P.B.*, 19 F. 3d 1395 (Fed. Cir. 1994).

[8] *Id.* at 1399.

[9] *Id.* at 1399 *citing N.L.R.B. v. Yeshiva*, 444 U.S. 672, 683 (1980).

[10] *See*, 25 C.F.R. § 533.7; *Wells Fargo Bank v. Lake of the Torches Econ. Devl. Corp.*, 658 F.3d 684, 688 (7th Cir. 2011).

[11] *See*, 25 U.S.C. § 2710(b)(2)(A); *see also* 25 C.F.R. § 522.4(b)(1).

[12] *See*, *Rincon Band of Luiseno Indians v. Schwarzenegger*, 602 F.3d 1019, 1029 n. 9 (9th Cr. 2010); *see generally* NIGC NOV-11-02 (July 12, 2011).

In order to determine whether an agreement violates this requirement, the NIGC typically analyzes three elements: 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.[13] Accordingly, if a party, other than a tribe, receives a high level of compensation, for a long period of time, and possesses some aspect of control, an improper proprietary interest may exist.

Development Agreement Overview

The Tribe and the Developer have not yet executed the Development Agreement. When they do, the term is understood to have begun November 8, 2017 and continues through completion of the Project unless terminated earlier.[14]

Under the Development Agreement, Hard Rock will administer and oversee the design, development, construction and initial equipping of the gaming facility and supporting businesses and structures, including restaurants, parking, gift shop, and a spa. More specifically Hard Rock will assume the following major responsibilities, including the following:

1. Advise and consult with the Tribe and Authority in their selection and retention of an architect and other necessary construction professionals;[15]
2. Oversee, coordinate, and supervise construction professionals in their duties, specifically including preparation of an approved plan and specifications; [16]
3. Develop and propose a project budget for the Tribe and Authority's approval;[17]
4. Recommend any revisions to the plan and budget and unilaterally approve any modifications that do not result in a material change to the concept of the Project or a Material Budget Amendment;[18]
5. Assist in the procurement of furniture, trade fixtures, equipment, and furnishings;[19]
6. Hard Rock will also help the Tribe secure financing for the project.[20]

For its expertise and services, Hard Rock will be entitled to a Development fee equal to 2% of the total Project Costs.[21]

Management Analysis

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[13] See, NIGC NOV-11-02 (July 12, 2011); *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,* 702 F.3d 1147 (8th Cir. 2013) (discussing NIGC adjudication of proprietary interest provision); *See also Bettor Racing v. National Indian Gaming Com'n,* 812 F.3d 648, 652 (8th Cir. 2016).
[14] *See*, Development Agreement, introductory paragraph, and § 1.1, *Term. See also,* Development Agreement Recitals, § D, defining the Project as the development and construction of the Facilities (defined in Management Agreement § 1.3) on the Property.
[15] Development Agreement § 2.2(a)
[16] *Id.*
[17] Development Agreement § 2.3
[18] Development Agreement § 2.4
[19] Development Agreement § 4.1
[20] Development Agreement § 5.3
[21] Development Agreement § 5.4

The Development Agreement and Promissory Note each prohibit anyone but the Tribe from managing the gaming operation, providing specific examples of common activities that would be considered management.[22] Further, neither gives Hard Rock the right or responsibility for making management decisions for the Tribe's proposed gaming operation. Therefore, it is my opinion that the Development Agreement is not management agreement requiring the approval of the Chair.

Sole Proprietary Interest Analysis

The term of the Development Agreement is limited to the development and construction of the Project and expires upon its completion, unless terminated earlier.[23] Although development can be a lengthy process, nearly all of it necessarily takes place prior to the opening of the gaming operation. The Promissory Note, on the other hand, is for a very short term, reaching maturity on April 1, 2018.[24] Neither term raises sole proprietary interest concerns.

Next, we examine the amount charged for Hard Rock's services and preliminary financing. The Development fees are tied to the scope of the project[25] and interest appears to be a commercially reasonable rate.[26] Compensation does not appear excessive.

As discussed above, neither the Development Agreement nor the Promissory Note gives the developer management control over the gaming activity. The Development Agreement contemplates the facilities being constructed and operated under the Hard Rock brand, and consequently requires many decisions to be made jointly with Hard Rock. These decisions include plans and specifications, scope of services, project costs, and development budget.[27] Significantly, however, the matters contemplated in the Development Agreement relate to the pre-operational development, and do not afford Hard Rock any role with respect to the actual gaming operations to be conducted at the gaming facility. Additionally, the Development Agreement and Promissory Note each contain a provision specifically prohibiting the Developer from exercising certain management activities.[28] It is my opinion that the Development Agreement, in its present form, does not grant a control interest in the Tribe's gaming operation to Hard Rock.

Conclusion

The Development Agreement and Promissory Note each prohibit anyone but the Tribe from managing the gaming operation and do not provide Hard Rock the right or responsibility for making management decisions at the Tribe's proposed gaming facility. It is, therefore, my opinion that neither the Development Agreement nor the Promissory Note is a management agreement requiring

[22] Development Agreement §§ 8.22 and 8.23
[23] *See*, Development Agreement, introductory paragraph, and § 1.1, *Term. See also,* Development Agreement Recitals, § D, defining the Project as the development and construction of the Facilities on the Property.
[24] Promissory Note § 1 "Maturity Date"
[25] Development Agreement § 5.4
[26] Development Agreement § 1.1 "Project interest rate" (Prime Rate plus 3%); Promissory Note § 3 (also Prime Rate plus 3%).
[27] Development Agreement § 2.1(g)
[28] Development Agreement §§ 8.22 and 8.23 and Promissory Note § 16(c)

the approval of the Chair. Additionally, neither, on its face, violates the IGRA requirement that the Tribe maintain the sole proprietary interest in its gaming operation.

Please note that it is my intent that this letter be released to the public through the NIGC's website. If you have any objection to this disclosure, please provide a written statement explaining the grounds for the objection and highlighting the information that you believe should be withheld.[29] If you object on the grounds that the information qualifies as confidential commercial information subject to withholding under Exemption Four of the Freedom of Information Act,[30] please be advised that the information was voluntarily submitted and, as such, any withholding should be analyzed in accordance with the standard set forth in *Critical Mass Energy Project v. NRC.*[31] Any claim of confidentiality should also be supported with "a statement or certification by an officer or authorized representative of the submitter."[32] Please submit any written objection to *FOIASubmitterReply@nigc.gov* **within 45 days of the date of this letter.** After this time elapses, the letter will be made public and objections will no longer be considered.[33] If you need any additional guidance regarding potential grounds for withholding, please see the United States Department of Justice's Guide to the Freedom of Information Act at http://www.justice.gov/oip/doj-guide-freedom-information-act-0.

If you have any questions, please contact NIGC Attorney Jennifer Lawson at (202) 632-7003.

Sincerely,

Michael Hoenig
General Counsel

cc: Joseph Webster, Esq. (JWebster@hobbsstraus.com)

[29] 25 C.F.R. 517.7(c)
[30] 5 U.S.C. § 552(b)(4)
[31] 975 F.2d 871 (D.C. Cir. 1992)
[32] 25 C.F.R. § 517.7(c)
[33] *Id.*