



August 30, 2017

**VIA FIRST CLASS MAIL**

Teresa Leger de Fernandez  
Leger Law & Strategy, LLC  
414 Old Taos Highway  
Santa Fe, NM 87501

Re: Review of Loan Agreement, Master Equipment Lease Agreement, and related documents

Dear Ms. Leger de Fernandez:

This letter responds to your request of May 1, 2017, on behalf of the Tesuque Gaming Enterprise, LLC, for the National Indian Gaming Commission's Office of the General Counsel to review financing documents and a related Master Equipment Lease Agreement between the Tesuque Gaming Enterprise, LLC and (b) (4) and other lenders. Specifically, you have requested my opinion whether the financing documents and Master Equipment Lease Agreement submitted constitute a management contract requiring the NIGC Chair's approval under the Indian Gaming Regulatory Act. Additionally, you have requested my opinion whether this agreement violates IGRA's requirement that a Tribe possess and maintain the sole proprietary interest in its gaming operation. After careful review, it is my opinion that the Agreement is not a management contract and does not require the approval of the Chairman. It is also my opinion that it does not violate IGRA's sole proprietary interest requirement.

In my review, I considered the following submissions (collectively, the "Loan Documents"):

- **Loan Agreement** among the Tesuque Gaming Enterprise, LLC, (b) (4)  
(b) (4)
- **Pledge and Security Agreement** between the Tesuque Gaming Enterprise, LLC, (b) (4)  
(b) (4)
- **Deposit Account Control Agreement** by and among the Tesuque Gaming Enterprise, LLC, (b) (4)
- **Disbursement Agreement** among Tesuque Gaming Enterprise, LLC (b) (4)  
(b) (4)

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- **Fee Letter** addressed to Pueblo of Tesuque Development Corporation, (b) (4)  
(b) (4)
- **Guaranty** by Pueblo of Tesuque Development Corporation, a federally chartered tribal business corporation wholly owned by the Pueblo of Tesuque, (the "Guarantor") in  
(b) (4)
- **Master Equipment Lease Agreement** between [●] as Lessor, and Tesuque Gaming  
(b) (4)
- **Equipment Purchase Agreement** between Tesuque Gaming Enterprise, (b) (4)  
(b) (4)

### Management Contracts

The NIGC has defined 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."<sup>1</sup> 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)."<sup>2</sup>

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.<sup>3</sup> The definition of *Primary management official* includes "any person who has the authority to set up working policy for the gaming operation."<sup>4</sup> Further, management employees are "those who formulate and effectuate management policies by expressing and making operative the decision of their employer."<sup>5</sup> Whether a particular employee is "managerial" is not controlled by an employee's job title,<sup>6</sup> rather the question must be answered in terms of the employee's actual job responsibilities, authority and relationship to management.<sup>7</sup> Essentially,

<sup>1</sup> See, 25 C.F.R. § 502.15.

<sup>2</sup> See, 25 C.F.R. § 502.5.

<sup>3</sup> See, NIGC Bulletin No. 94-5: "Approved Management Contracts v. Consulting Agreements (Unapproved Management Contracts are Void)."

<sup>4</sup> See, 25 C.F.R. § 502.19(b)(3).

<sup>5</sup> See, *N.L.R.B. v. Bell Aerospace Co.*, 416 U.S. 267, 288 (1974).

<sup>6</sup> See, *Waldo v. M.S.P.B.* 19 F. 3d 1395 (Fed. Cir. 1994).

<sup>7</sup> *Id.* at 1399.

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and 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.<sup>8</sup>

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.<sup>9</sup>

### Management Analysis

Collectively, the Loan Documents prohibit (b) (4) from making any management decisions at the Pueblo's proposed gaming facility.<sup>10</sup> In particular, the Lease Agreement clearly states that only Tesuque Gaming Enterprise may manage and operate Camel Rock Casino, and the New Casino.<sup>11</sup> Furthermore, with regard to the use of the Leased Machines, the Lease Agreement provides that only Tesuque Gaming Enterprise may (i) select vendors from which Leased Machines will be acquired, (ii) select the Leased machines; (iii) negotiate pricing, and; (iv) determine where to place the Leased Machines on the casino floor.<sup>12</sup> The Lease Agreement further provides that only Tesuque Gaming Enterprise may decide to acquire a replacement machine, and only Tesuque Gaming Enterprise may dictate the timing of such acquisition.<sup>13</sup> Additionally, the Lease Agreement provides that only Tesuque Gaming Enterprise may determine the delivery schedule of any newly purchased gaming machines and any Software Licenses, support or maintenance agreements, and manufacturer warranties.<sup>14</sup> Finally, with regard to software, the Tesuque Gaming Enterprise will possess the sole authority and discretion to request all documentation, later versions, updates, and modifications.<sup>15</sup> Because the Loan Documents do not grant the lenders any direct control over management decisions it is my opinion that the Loan Documents are not management agreements requiring approval of the NIGC Chair.

<sup>8</sup> Id. at 1399, citing *N.L.R.B. v. Yeshiva*, 444 U.S. 672, 683 (1980).

<sup>9</sup> See, 25 C.F.R. § 522.7.

<sup>10</sup> See, Master Equipment Lease Agreement, article 14, § 14.10 ("THIS MASTER LEASE AGREEMENT DOES NOT PROVIDE FOR THE MANAGEMENT OF ALL OR ANY PART OF THE LESSEE'S OR GAMING ENTERPRISE BY ANY PERSON OTHER THAN LESSEE OR DEPRIVE LESSEE OF THE SOLE PROPRIETARY INTEREST AND RESPONSIBILITY FOR THE CONDUCT OF THE GAMING OPERATIONS..."); Loan Agreement, article 10, § 10.23.

<sup>11</sup> See, Master Gaming Lease Agreement, Recitals.

<sup>12</sup> Id.

<sup>13</sup> Id.

<sup>14</sup> See, Master Equipment Lease Agreement, article 2, § 2.02(b).

<sup>15</sup> See, Master Equipment Lease Agreement, article 6, § 6.01(e).

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### **Sole Proprietary Interest**

IGRA also requires a tribe to possess “the sole proprietary interest and responsibility for the conduct of any gaming activity.”<sup>16</sup> Proprietary interest is not defined in IGRA, or the NIGC’s implementing regulations. Black’s Law Dictionary, 10<sup>th</sup> Edition (2014), defines proprietary interest as “interest held by a property owner together with all appurtenant rights....” Owner is defined as “one who has the right to possess, use and convey something.”<sup>17</sup> Appurtenant is defined as “belonging to; accessory or incident to....”<sup>18</sup> Case law defines “proprietary interest” as “one who has an interest in, control of, or present use of certain property.”<sup>19</sup>

### **Sole Proprietary Interest Analysis**

In order to determine whether an agreement violates the sole proprietary interest requirement, the NIGC 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.<sup>20</sup> Accordingly, if a party, other than the 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.

(b) (4)



<sup>16</sup> See, 25 U.S.C. § 2710(b)(2)(10); see also, 25 C.F.R. § 522.4(b)(1).

<sup>17</sup> Black’s Law Dictionary, 10<sup>th</sup> Edition (2014).

<sup>18</sup> Id.

<sup>19</sup> See, *Evans v. United States*, 349 F.2d 653 (5<sup>th</sup> Cir. 1965).

<sup>20</sup> 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 (8<sup>th</sup> Cir. 2013) (discussing NIGC adjudication of proprietary interest provision).

<sup>21</sup> See, Master Equipment Lease Agreement, article 3, § 3.04.

<sup>22</sup> See, Master Equipment Lease Agreement, article 12, § 12.02.

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(b) (4)



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<sup>23</sup> See, Master Equipment Lease Agreement, article 4, § 4.02.

<sup>24</sup> See, Loan Agreement, article 2, § 2.5(a), Interest.

<sup>25</sup> See, Master Equipment Lease Agreement, article 8, § 8.03.

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(b) (4)



### Conclusion

The Loan Documents prohibit anyone but the Pueblo from managing the gaming operation and does not provide (b) (4) with the right or responsibility for making management decisions at the Pueblo's proposed gaming facility. It is, therefore, my opinion that the Loan Documents are not management agreements requiring the approval of the Chair. Additionally, the Loan Documents, on their face, do not violate the IGRA requirement that the Tribe maintain the sole proprietary interest in its gaming operation.

It is my understanding that the Agreement is represented to be in substantially final form with respect to terms affecting this opinion. If such terms change in any material way prior to closing, or are inconsistent with assumptions made herein, this opinion shall not apply. Further, this opinion is limited to the Loan Documents listed above. This opinion does not include or extend to any other agreements or documents not submitted for review.

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.<sup>28</sup> 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 (FOIA),<sup>29</sup> please be advised that the information was voluntarily submitted and, as such, that any withholding should be analyzed in accordance with the standard set forth in *Critical Mass Energy Project v. NRC*.<sup>30</sup> Any claim of confidentiality should also be supported

<sup>26</sup> See, Master Gaming Lease Agreement, Recitals.

<sup>27</sup> See Loan Agreement, article 2, § 2.6(c)(v).

<sup>28</sup> 25 C.F.R. §517.7(c).

<sup>29</sup> 5 U.S.C. § 552(b)(4).

<sup>30</sup> 975 F.2d 871 (D.C. Cir. 1992).




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with "a statement or certification by an officer or authorized representative of the submitter."<sup>31</sup> Please submit any written objection to FOIASubmitterReply@nigc.gov **within thirty (30) days of the date of this letter.** After this time elapses, the letter will be made public and objections will no longer be considered.<sup>32</sup> 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 Staff Attorney Rea L. Cisneros at (202) 632-7024.

Sincerely,

A handwritten signature in blue ink, appearing to read "Michael Hoenig", with a horizontal line extending to the right.

Michael Hoenig  
General Counsel

cc: Tim Brown, CEO, Pueblo of Tesuque Development Corporation  
Frank Reddick, Akin Gump Strauss Hauer & Feld, LLP

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<sup>31</sup> 25 C.F.R. § 517.7(c).

<sup>32</sup> *Id.*