June 16, 2016

Gabriel Ray, Chairman
Scotts Valley Band of Pomo Indians
1005 Parallel Drive
Lakeport, CA 95453

Re: Request for Review of First Amended Development Agreement between the Scotts Valley Band of Pomo Indians and Integrated Resort Development, L.L.C.

Dear Chairman Ray:

This letter responds to the Scotts Valley Band of Pomo Indians' request for the National Indian Gaming Commission's (NIGC) Office of General Counsel to review the First Amended Development Agreement for Gaming Facility (the "Development Agreement") between the Tribe and Integrated Resort Development, L.L.C. ("IRD"). Specifically, you have requested our opinion regarding whether the Development Agreement constitutes a management contract requiring the NIGC Chair's review and approval under the Indian Gaming Regulatory Act. You have also requested an opinion regarding whether the Development Agreement violates IGRA's requirement that the Tribe maintain the sole proprietary interest in its gaming operations. After careful review, it is my opinion that the Development Agreement does not constitute a management contract and does not currently require the review and approval of the Chair. It is also my opinion that the present Development Agreement does not violate IGRA's sole proprietary interest requirement.

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, 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

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[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 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.

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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]

IGRA also mandates that a tribe possess "the sole proprietary interest and responsibility for the conduct of any gaming activity."[11] *Proprietary interest* is not defined in IGRA, or the NIGC's implementing regulations. However, the notion of proprietary interest must be construed in favor of protecting tribal interests and be consistent with IGRA's purpose that tribes are the primary beneficiaries of the gaming activity.[12]

Proprietary interest it is defined in Black's Law Dictionary, 10th Edition (2014), as "the interest held by a property owner together with all appurtenant rights . . ." *Owner*

[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, 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).

is defined as "one who has the right to possess, use and convey something."[13] *Appurtenant* is defined as "belonging to; accessory or incident to . . ."[14] Cases define "proprietary interest" as "one who has an interest in, control of, or present use of certain property."[15]

Development Agreement Background

The Tribe and the Developer have not yet entered into the Development Agreement. The term of the Development Agreement begins on the Execution Date (date Development Agreement entered into) and continues through the Commencement date (the first date that the Gaming Facility is substantially complete and open to the general public to engage in Class II or Class III gaming activities), unless terminated earlier.[16]

Under the Development Agreement, Integrated Resorts Development agrees to lend its experience, expertise, and resources to assist the Tribe in developing and operating the gaming facility. More specifically, the Developer will advance funding to pay pre-development costs, assist in obtaining necessary financing, and supervise development and construction of the gaming facility. For example, the Developer will make an interim loan to the Tribe, the proceeds of which will be used to pay Reimbursable Project Costs.[17]

Moreover, the Developer will assist in financing the day-to-day operations of the Tribal government, acquiring the gaming site, preparing and submitting the Indian lands opinion request to the Secretary of the Interior, securing the Secretary's issuance of the opinion, preparing, submitting, and securing the Secretary's approval of the trust application, as well as the design, development, financing, construction and initial equipping of the gaming facility.

Management Analysis

The Development Agreement prohibits anyone but the Tribe from managing the gaming operation and does not provide IRD the right or responsibility for making management decisions at the Tribe's proposed gaming facility. Therefore, it is my opinion that the Development Agreement is not management agreement requiring the approval of the Chair.

I do note, however, that the NIGC and OGC have in the past found that compensation based on percentage of the gaming revenue in a contract may suggest that

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[13] *Black's Law Dictionary, 10th Edition (2014)*
[14] *Id.*
[15] *See, Evans v. United States*, 349 F.2d 653 (5th Cir. 1965).
[16] *See*, First Amended Development Agreement, article 6, § 6.1.
[17] *See*, First Amended Development Agreement, art. 2, § 2.1.

the agreement is a management contract requiring Commission approval.[18] However, that factor alone does not constitute management and, although the development fee here is based on a percentage of gaming revenue, there are no other indices of management of the gaming activity in the agreement.

Sole Proprietary Interest Analysis

You have also requested an opinion as to whether the Development Agreement violates IGRA's requirement that the Tribe maintain the sole proprietary interest in and responsibility for the conduct of its gaming. In order to determine whether an agreement violates this 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.[19] 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.

Term of the Relationship

The term of the Development Agreement begins on the Execution Date (date Development Agreement entered into) and continues through the Commencement date (the first date that the Gaming Facility is substantially complete and open to the general public to engage in Class II or Class III gaming activities), unless terminated earlier.[20] Because so many steps must occur before Class II or III gaming is available to the public, the Development Agreement is, in practice, open-ended as to its term. However, it does expire when the gaming facility opens. Therefore, by its terms, it does not provide for the Developer to have any role in the operation of the gaming facility.

Amount of Revenue Paid to the Third Party

In this instance, the Tribe agrees to pay a Developer Fee equal to 12% of the monthly Net Win for a period of seventy-two (72) months[21] as well as 4% of the overall construction and development costs.[22] Although the Developer Fee is equal to 12% of the monthly Net Win, the manner in which Net Win is defined in the Development Agreement more closely tracks with the NIGC definition of Gross Revenue and thus will actually be a higher percentage of overall revenue. As discussed above, the presence of a development fee based on gaming revenue may indicate management. Similarly, though, a share in the gaming revenue may also signal a proprietary interest in the Tribe's gaming facility. However, as with management, it is a factor to be considered, but not by itself decisive of the issue. Here, based on the services provided by the Developer, as well as

[18] *See, NIGC Bulletin No. 94-5*: "Approved Management Contracts v. Consulting Agreements (Unapproved Management Contracts are Void)."
[19] *See*, NIGC NOV-11-02 (July 12, 2011).
[20] *See*, First Amended Development Agreement, article 6, § 6.1.
[21] *See*, First Amended Development Agreement, article 8, § 8.2.
[22] *See*, First Amended Development Agreement, article 8, § 8.1.

the fact that the Developer will absorb some risk associated with the venture in that it has already entered into an agreement to purchase the gaming site for an aggregate purchase price of $5.5 million, the compensation does not indicate a violation of the sole proprietary interest requirement.[23] However, if IRD were to enter into additional agreements with the Tribe, including a loan agreement or management agreement, we would need to take into consideration and re-evaluate the overall amount of compensation being paid to IRD pursuant to such agreements and in light of IGRA's requirements.

Third Party's Right to Exercise Control over Gaming Activity

As discussed above, the Development Agreement itself does not give the developer management control over the gaming activity. All contracts, agreements, instruments or understandings that IRD proposes to execute with the architect in connection with the gaming facility are subject to the review and approval of the Tribal Council.[24] The scope of the gaming facility contemplated by the Development Agreement must be stated and established in the design agreements, and are subject to the approval of the Tribal Council.[25] Also, IRD is required to submit proposed budgets for all construction and development costs to the Tribal Council.[26] The Tribal Council has the right of approval for the concept design.[27] Moreover, IRD is required to prepare a preliminary evaluation of the proposed Project, including market analysis, planned phasing, and project schedule and timeline for review and approval by the Tribal Council.[28]

Also, IRD and the Tribe will collaboratively interview and approve all prospective general contractors, subcontractors, and vendors.[29] The IRD is required to provide contractor recommendations to the Tribe, but the contractor is subject to the final approval of the Tribal Council.[30] Significantly, the matters contemplated in the Development Agreement relate to the pre-operational development, and do not afford IRD any role with respect to the actual gaming operations to be conducted at the gaming facility. The Development Agreement contains a provision specifically prohibiting the Developer from exercising certain management activities.[31] 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 IRD.

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[23] *See,* First Amended Development Agreement, article 1, § 1.4.1.
[24] *See,* First Amended Development Agreement for Gaming Facility, article 3, §3.1.
[25] *Id.* at article 3, §3.2.
[26] *Id.* at article 3, §3.3.
[27] *Id.* at article 3, §3.4.
[28] *Id.* at article 3, §3.5.
[29] *Id.* at article 4, §4.1.
[30] *Id.* at article 4, §4.3.
[31] *See,* First Amended Development Agreement for Gaming Facility, article 1, § 1.2.1.

Conclusion

The Development Agreement prohibits anyone but the Tribe from managing the gaming operation and does not provide IRD the right or responsibility for making management decisions at the Tribe's proposed gaming facility. It is, therefore, my opinion that the Development Agreement is not management agreement requiring the approval of the Chair. Additionally, on its face, the agreement does not violate the IGRA requirement that the Tribe maintain the sole proprietary interest in its gaming operation.

I anticipate this letter will be posted to the NIGC's website. Prior to posting, the NIGC will notify you and give you an opportunity to identify and request that information subject to the exemptions under the Freedom of Information Act will be redacted or withheld. A list of the FOIA exemptions may be found at 5 U.S.C. § 552(b).

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

Sincerely,

Michael Hoenig
General Counsel

cc: Patrick R. Bergen – Fredericks, Peebles & Morgan, L.L.P.