May 5, 2015

By U.S. mail and email

John M. Peebles
2020 L Street, Suite 250
Sacramento, CA 95811

Re: Review of financing documents for the Battle Mountain Band of the Te-Moak Tribe

Dear Mr. Peebles

This letter responds to your December 2, 2015 request[1] on behalf of the Battle Mountain Band of the Te-Moak Tribe of Western Shoshone (Band) for the National Indian Gaming Commission's Office of General Counsel to review a development agreement between the Band and Platform 10 Development, LLC (Developer). Specifically, you have asked for my opinion whether the documents are management contracts requiring the NIGC Chair's approval under the Indian Gaming Regulatory Act. You also asked for my opinion whether the development agreements violate IGRA's requirement that the Tribe have the sole proprietary interest in its gaming activity. After careful review, it is my opinion that the agreements are not management contacts requiring the review and approval of the Chair. It is also my opinion that they do not violate IGRA's sole proprietary interest requirement.

In my review, I considered the following submissions (Development Documents) which are executed, but not yet effective:

- Development Agreement, revised and submitted to NIGC February 26, 2015
- Nonrecourse Promissory Note
- Resolution No. 14-BM-20

IGRA provides the NIGC with authority to review and approve gaming-related contracts and collateral agreements to management contracts to the extent that they implicate management. *Catskill Dev., L.L.C. 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

[1] Supplemented by a revised Development Agreement on February 26, 2015.

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-Millenium Corp.*, 387 F. Supp. 2d 671, 678 (W.D. La. 2005); *U.S. ex rel. The Saint Regis Mohawk Tribe v. President R.C.--St. Regis Mgmt. Co.*, 451 F.3d 44, 48 (2d Cir. 2006), *as corrected* (June 27, 2006).

Management Contracts

The NIGC has defined the term *management contract* as "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. *Collateral agreement* is defined as "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 Activity

Though NIGC regulations do not define *management*, the term has its ordinary meaning. Management encompasses activities such as planning, organizing, directing, coordinating, and controlling. *NIGC Bulletin No.* 94-5: "Approved Management Contracts v. Consulting Agreements (Unapproved Management Contracts are Void)." Accordingly, the definition of *primary management official* is "any person who has the authority to set up working policy for the gaming operation." 25 C.F.R. § 502.19(b)(2). Further, management employees are "those who formulate and effectuate management policies by expressing and making operative the decision of their employer." *N.L.R.B. v. Bell Aerospace Co.,* 416 U.S. 267, 288 (1974). Whether particular employees are "managerial" is not controlled by an employee's job title. *Waldo v. M.S.P.B.*, 19 F. 3d 1395 (Fed. Cir. 1994). Rather, the question must be answered in terms of the employee's actual job responsibilities, authority and relationship to management. *Id.* at 1399. In essence, an employee can qualify as management if the employee actually has 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. *Id.* at 1399 *citing N.L.R.B. v. Yeshiva*, 444 U.S. 672, 683 (1980).

If a contract requires the performance of any management activity with respect to all or part of a 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 not approved by the Chairman are void. 25 C.F.R. § 533.7; *Wells Fargo Bank, Nat. Ass'n v. Lake of the Torches Econ. Dev. Corp.*, 658 F.3d 684, 688 (7th Cir. 2011).

Sole Proprietary Interest

Among IGRA's requirements is that "the Indian tribe will have the sole proprietary interest an responsibility for the conduct of any gaming activity." 25 U.S.C. § 2710(b)(2)(A); *see also* 25 C.F.R. § 522.4(b)(1). *Proprietary interest* is not defined in the IGRA or the NIGC's implemeneting regulations. However, 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* is defined as "belonging to; accessory or incident to . . ." *Id. Appurtenant* is defined as "belonging to; accessory or incident to . . ." *Id.* When determining whether a proprietary interest in the gaming operation has vested with a third party, NIGC examines three criteria: (1) the term of the relationship; (2) the amount of revenue paid to the third party; and (3) the right of control provided to the third party over the gaming activity. *City of Duluth v. Nat'l Indian Gaming* Comm'n, No. 1:13-CV-246, at 11, fn 8 (D.D.C. March 31, 2015).

Analysis

The Development Agreement requires Platform 10 to assist the Band in the development, financing, design, construction, equipping, and furnishing of a gaming facility.[2] As compensation for these services, Platform 10 will receive the following fees:

- Developers Fee equal to 12% of Net Win[3] (Development Agreement § 8.2), payable monthly for 83 months from the date gaming commences (*Id.* § 6.1)[4];
- Construction Management fee equal to 4% total construction cost of the project (*Id.* § 8.1);
- Guaranty fee equal to 0.5% the total amount of the guaranty (applicable only if Lender requires Platform 10 to guaranty the loan) (*Id.* § 7.1(v)); and
- Interest on the Interim Loan equal to the Bank of America Prime Rate plus 2.5% (*Id.* § 2.1).

Although the Development Agreement extends 83 months past the date gaming commences at the facility, it confines Platform 10's responsibilities to the development and construction phase of the project. "The Band further expressly acknowledges and agrees that Developer has absolutely no obligation whatsoever to provide any goods or services to or in connection with the Band or the Gaming the

[2] A fuel distribution facility and convenience store are also contemplated by this agreement with specific terms to be detailed in future agreements.

[3] Net Win is defined as amount wagered *less* prizes paid, amount charged for progressive jackpots, and gaming machine leases.

[4] Platform 10 has agreed to subordinate its Developers Fee to a $20,000 Monthly Tribal Distribution Payment. *Id. § 8.2.*

[*sic*] Facility, or any other entity related in any way thereto, after the Commencement Date." *Id.* § 8.2. Therefore, by its terms, the agreement does not provide for the management of the gaming activity. Notwithstanding the responsibilities detailed in the agreement, its terms prohibit Platform 10 from engaging in management activities for the gaming operation. Specifically, the agreement states:

> [N]either the Developer nor any other lender shall engage in any of the following: planning, organizing, directing, coordinating, or controlling all or any portion of the Band's gaming operations . . . including, but not limited to
>
> 1. The training, supervision, direction, hiring, firing, retention, compensation (including benefits) of any employee (whether or not a management employee) or contractor;
> 2. Any employment policies or practices;
> 3. The hours or days of operation
> 4. Any accounting systems or procedures
> 5. Any advertising, promotions or other marketing activities;
> 6. The purchase, lease, or substitution of any gaming device or related equipment or software, including player tracking equipment;
> 7. The vendor, type, theme, percentage of pay-out, display or placement of any gaming device or equipment;
> 8. Budgeting, allocating, or conditioning payments of the lender's operating expenses . . .. *Id.* § 1.2.1

Furthermore, at each stage of the development and construction, the Developer is responsible for making recommendations that are subject to Band Council approval. *See Id.* §§ 3.1 – 3.6; 4.1; 5.1; and 7.1(x).

On their face, the Development Documents prohibit any entity other than the Band from managing the gaming operation. Therefore, the Development Documents are not management agreements and do not require the approval of the Chair.

Finally, you asked for my opinion as to whether the Development Documents violate IGRA's requirement that the Band have the sole proprietary interest in its gaming enterprise. The Development Agreement is limited to just under seven years, a term comparable to many development, financing, and management contracts in the industry. The Band represents that the Developers Fee is a fair, reasonable, and adequate compensation for the risks, obligations, and liabilities Developer has assumed and agreed to perform under the agreement. *Id.* § 8.2. The remaining fees—Construction Management, interest rate, and Guaranty fee—are each directly and rationally tied to the total amount of the services being provided. Additionally, on its face, the agreement does not provide Platform 10 with

any control over the gaming operation that would indicate a property interest.

Conclusion

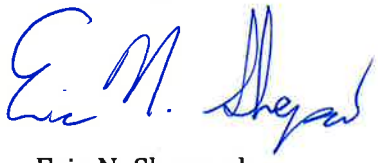
The Development Documents specifically exclude anyone but the Band from managing the facility. Therefore, it is my opinion that they are not individually or collectively a management contract requiring the approval of the Chair. Additionally, the Development Documents do not prevent the Band from maintaining the sole proprietary interest in the gaming operation.

If the Development Documents change in any material way or are inconsistent with assumptions made herein, this opinion shall not apply. Further, this opinion is limited to the Development Documents listed above. I understand that additional loan and construction documents are contemplated by the Development Agreement. This opinion does not include or extend to those or any other agreements not submitted for review.

I anticipate that this letter will be the subject of Freedom of Information Act (FOIA) requests. Since we believe that some of the information in this letter may fall within FOIA exemption 4 (25 U.S.C. § 552(b)(4)), which applies to commercial or financial information that is privileged or confidential, the release of which could cause substantial harm, I ask that you provide me with your views regarding release within ten days.

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

Sincerely,



Eric N. Shepard
General Counsel