



MAR 30 2009

Geraldine Johnson, Chairperson  
Elem Indian Colony of Pomo Indians  
P.O. Box 757  
Clearlake Oaks, CA 95423

Re: Memorandum of Agreement between Elem Indian Colony and Pacific  
Development Partners

Dear Chairperson Johnson:

This letter is in response to the Elem Indian Colony of Pomo Indians of the Sulphur Bank Rancheria's ("Tribe") request that the National Indian Gaming Commission ("NIGC") review a Memorandum of Agreement ("the Agreement") dated September 4, 2007, between the Tribe and Pacific Development Partners ("Pacific") to determine whether the Agreement constitutes a management contract pursuant to the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2711. It is my opinion that the Agreement is a management contract requiring the NIGC Chairman's approval.

#### Authority

The authority of the NIGC to review and approve gaming-related contracts is limited by IGRA to management contracts and collateral agreements to management contracts to the extent that they implicate management. *Catskill Development LLC v. Park Place Entertainment Corp.*, No. 06-5860, 2008 U.S. App. Lexis 21839 at \*38 (2<sup>nd</sup> Cir. October 21, 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).

## 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.

## Analysis

After reviewing the Agreement, it is my opinion that it establishes a management relationship. The Agreement requires the Tribe to enter an exclusive management agreement with Pacific, sets the compensation Pacific will receive, and specifies the term that Pacific will operate the gaming facility.

While the Agreement is stylized as a “Memorandum of Agreement,” it goes further than merely memorializing the parties intent to enter other agreements. On its

face, the Agreement clearly expresses the Tribe's intent to have Pacific manage the tribal casino. Specifically, the Agreement states in relevant part:

WHEREAS, the Tribe shall enter into the exclusive agreements with the Company to develop and operate Indian casino(s) (the "Casino(s)") on the Tribe's lands within [ ] of the execution of this MOA for a period of [ ] and

WHEREAS, The Tribe hereby represents and warrants this MOA, after execution and delivery to the Tribe, will be a valid and binding obligation of the Tribe, enforceable against the Tribe in accordance with its terms.

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Further, the Agreement states the terms under which Pacific will manage the casino. These terms include the following:

1. Pacific will have the exclusive right to manage the casino. Sec. II, Para. 1.
2. Pacific will be paid the sum of [ ] net revenues of the casino. Sec. II, Para. 3.
3. Pacific will manage the casino for a period of [ ] from the commencement of gaming operations at the Casino. Sec. II, Para. 4.
4. Pacific will be responsible for the selection of staff including the general manager. Sec. I, Para. 6.

It is clear that the purpose of the Agreement is to bind Pacific to develop and manage a casino for the Tribe. Moreover, the exclusive right to manage the day-to-day operations of the casino, the compensation under the Agreements, the term of years, and hiring of employees are all factors that indicate a management relationship.

#### Conclusion

It is my opinion that the Agreement constitutes a management agreement requiring the approval of the NIGC Chairman. If you have any questions, please contact NIGC Attorney John Hay at (202) 632-7003.

Sincerely,



Penny J. Coleman  
Acting General Counsel

cc: Pacific Tribal Partners, LLC  
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