SEP - 2 2009

Patricia Hermosillo, Chairperson
Cloverdale Rancheria of Pomo Indians
555 S. Cloverdale Blvd.
Cloverdale, CA 95425

Re: Agreements between the Cloverdale Rancheria of Pomo Indians of California and End to End Enterprises, LLC

Dear Chairperson Hermosillo:

This is in response to the Cloverdale Rancheria of Pomo Indians of California's ("Tribe") request that the National Indian Gaming Commission ("NIGC") review certain agreements between the Tribe and End to End Enterprise,LLC ("E2E") to determine whether the agreements constitute management contracts pursuant to the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2711. Specifically, these agreements are entitled: Letter of Intent; Development Agreement; Loan Agreement; Security Agreement; and Promissory Note (collectively "the Agreements"). The parties have also submitted a management agreement ("MA") for the Chairman's review and approval. After careful review, it is my opinion that the Letter of Intent is a management agreement requiring the approval of the Chairman. However, I decline to render an opinion on the remaining agreements, which are inextricably linked to the MA, so much as they share default provisions. As collateral agreements so closely bound up with the MA, they should be considered by the Chairman along with it.

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 (2nd 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-Millenium 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).

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.

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

Pursuant to *NIGC Bulletin No. 94-5*, the presence of certain management activities in a contract between a tribe and an outside party indicates that the contract is a management contract. There are several indicators in the Letter of Intent ("the Letter") that leads me to conclude that the contractor will exercise management responsibilities. These indicators include:

(1) The Letter provides (page 7) that Sealaska, the parent company of E2E, will hire all of the casino's management personnel specifically including the General Manager and the Chief Financial Officer. All of these positions will be employees of Sealaska.

(2) The Letter provides (page 8) that Sealaska will be paid a management fee of [ ] of the casino's net revenues for a period of [ ] years.

The above mentioned provisions indicate that Sealaska will be providing management services in the gaming facility. Choosing management officials is in itself a management decision. Therefore, if enforceable, the Letter is a management agreement.

Under NIGC regulations, a collateral agreement includes any agreement that is related to a management contract. 25 C.F.R. § 502.5. All of the remaining documents define the term "transaction documents" to include the MA. Under the terms of these agreements, a default of any of these agreements would be a default of the others and of the MA. (See MA Sec. 1.1, page 14). Therefore all of these documents are collateral to the MA. In fact, they are so closely related to the MA that it is not clear to me how they can be meaningfully separated for analysis as management contracts.

Conclusion

It is my opinion that the Letter of Intent constitutes a management agreement requiring the approval of the NIGC Chairman and that the remaining documents are collateral documents that must be reviewed with the MA. If you have any questions, please contact NIGC Attorney John Hay at (202) 632-7003.

Sincerely,

Penny J. Coleman

Penny J. Coleman
Acting General Counsel

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