DEC - 2 2009

Sherry Treppa, Chairperson
Habematolel Pomo of Upper Lake
375 E. Hwy. 20, Suite I
P.O. Box 516
Upper Lake, CA 95485

Re: Agreements between the Habematolel Pomo of Upper Lake and Luna Gaming Upper Lake LLC

Dear Chairperson Treppa:

This is in response to the Habematolel Pomo of Upper Lake ("Tribe") request that the National Indian Gaming Commission ("NIGC") review certain agreements between the Tribe and Luna Gaming Upper Lake LLC ("Luna") to determine whether the agreements constitute a managements contract pursuant to the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2711. Specifically, these agreements include: Senior Secured Credit Agreement; Senior Note; Junior Secured Credit Agreement; Amended and Restated Development Note; Amended and Restated Land Note; Security Agreement; Springing Depository Agreement; Account Control Agreement; and Subordination Agreement (collectively "the Transaction Agreements"). It should be noted that the parties had previously submitted a Development and Amended and Restated Management Agreement dated February 22, 2005. Those agreements have been terminated by the parties. After careful review, it is our opinion that the Transaction Agreements do not constitute a management agreement requiring the approval of the Chairman.

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

Suite 9100, Washington, DC 20005 Tel. 202.632.7003 Fax 202.632.7066 www.nigc.gov
REGIONAL OFFICES Portland, OR; Sacramento, CA; Phoenix, AZ; St. Paul, MN; Tulsa, OK

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).

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.

Conclusion

It is my opinion that the Transaction Agreements do not constitutes a management agreement requiring the approval of the NIGC Chairman.

Recently, we have been faced with issues related to the default provisions of financing agreements similar to the Transaction agreements. Specifically, the default provisions have conflicted with net gaming revenue allocations in tribal revenue allocation plans (RAP). In some instances, tribes have been faced with the prospect of either violating their RAP or defaulting on their financing agreements. We recognize that the Tribe has not yet adopted a RAP. However, if the Tribe does adopt one, we urge you to reconcile it with the provisions of your financing.

If you have any questions, please contact NIGC Senior Attorney John Hay at (202) 632-7003.

Sincerely,

Penny J. Coleman
Acting General Counsel

cc: Robert L. Gips, Esq.
Robert Rosette, Esq.