



August 19, 2004

Erick Mason
Timbisha Shoshone Gaming Commission
110 Edwards Street
Bishop, CA 93514

Re: Rinaldo Corporation Development Agreement

Dear Chairman Mason:

This letter responds to your letter of August 12, 2004, in which provided us information about the actions of Rinaldo Corporation (Developer) as it relates to the development of a Tribal gaming facility. You requested our opinion on whether the developer's funding of a tribal meeting (absent a request by the Tribal Council) as well as providing inducements for tribal members to attend the meeting violates federal law. We are concerned about the Developers attempt to influence tribal members. We are likewise concerned that the Developer is mischaracterizing the NIGC's position.

First, your letter expressed concern that the Developer was exerting undue influence over members of the Tribe and Tribal General Council by calling a meeting of the tribal membership and providing transportation and lodging as well as other benefits for members who attend. We share your concern that the developer may be attempting to influence, for its own gain, a process of the tribal government relating to the gaming activity. As you point out by reference to 24 U.S.C. § 2711(e)(2), were the agreement a management contract, it would be subject to disapproval by the NIGC Chairman if the Chairman found out that the management contractor had engaged in activity that unduly interfered with a tribal government process relating to the gaming activity. We cannot state that this action by the developer is a violation of the law. However, we will forward the information you provided to us to the appropriate law enforcement agency for review.

Second, you provided a report from the developer that refers to our April 22, 2004, letter and states, "[T]he NIGC found that it is not a management contract, which means it is not under their jurisdiction."(emphasis in original). Further, the report states, "[T]he NIGC did have several comments that we as the developer offered to agree to in order to expedite the process. The result of these comments would reduce the term that the developer gets paid from [] years to less than [] years and the percentage the

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developer gets from [] to [] We believe these statements do not correctly portray our position on the development agreement.

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In 1988, Congress enacted the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721, to create a comprehensive system for regulating gambling activities on Indian lands. IGRA established the National Indian Gaming Commission to help implement and enforce the Act, cornerstones of which are to ensure that tribes, not individuals, are the primary beneficiaries of Indian gaming and to shield gaming operations from organized crime and other corruption. See 25 U.S.C. § 2702. Above all, the NIGC was given the responsibility of safeguarding the integrity of Indian gaming so that it would remain a viable resource for tribal governments. IGRA confers extensive powers upon the NIGC and its Chairman. IGRA gives the NIGC the authority, *inter alia*, to monitor gaming on Indian lands, conduct background investigations and impose serious consequences for violations of IGRA, including assessing civil fines and closing gaming operations. See 25 U.S.C. §§ 2706(a) and (b). The Chairman is charged with the responsibility for approving management contracts and reviewing agreements that are collateral to management agreements. See 25 C.F.R. § 502. Along with this responsibility is the power to institute actions against entities that attempt to exert managerial control over Indian gaming without prior approval.

We are concerned by the developer's statement that since we determined the development agreement was not a management agreement that we no longer have any authority. This is an overly simplistic interpretation of IGRA and runs counter to the actions that the NIGC takes on a daily basis. The authority of the NIGC to review and approve gaming-related contracts is limited by the IGRA to management contracts and collateral agreements to management contracts. 25 U.S.C. § 2711. If it is found that the agreement between the parties is an unapproved management agreement, then it is void. See 25 C.F.R. § 533.7. The only way this determination can be made is by examining the relationship of the parties, and applying the facts of this relationship to the legal principals of IGRA.¹ It is this type of determination that the NIGC makes in its decision to bring an enforcement action. Despite an approval or disapproval, the NIGC retains a significant interest in tribal gaming operations and IGRA provisions continue to have force. The NIGC's authority over consultants and developers who manage a casino is not eliminated by the existence of contracts that on their face do not require agency approval.

Our letter of April 22, 2004, found that the agreement bestowed a proprietary interest on the developer. Under IGRA, the Tribe must have the sole proprietary interest in any gaming operation. If the Tribe does not have the sole proprietary interest then a violation of IGRA has occurred. In such a case, it is within the authority of the NIGC to bring an enforcement action against the Tribe that could result in the imposition of a civil fine and/or the closure of the gaming operation. The changes in term and percentage suggested by the Developer would not necessarily result in the NIGC concluding that the

¹ Federal courts have recognized that the NIGC's original determination that a contract was a "consulting agreement" is incidental to the fact that actual managerial control will render such a contract void. See United States v. Casino Magic Corp., 295 F.3d 419, 425 (8th Cir. 2002).

agreement no longer violated the requirement that tribes have the sole proprietary interest in the gaming operation.

Finally, we note that the Developer's report states, "[W]e fully anticipate the ground being accepted into trust this year." To the best of our knowledge, the Tribe has not yet submitted an application to have any land taken in to trust.

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

Sincerely,

A handwritten signature in cursive script that reads "Penny J. Coleman". The signature is written in dark ink and is positioned above the typed name.

Penny J. Coleman
Acting General Counsel

cc: Director, Office of Indian Gaming Management (w/incoming)