July 2, 2010

Via Facsimile and U.S. Mail

Mark A. Powless, Director
Gaming Commission
Big Sandy Rancheria Band
Of Western Mono Indians
P.O. Box 129
Auberry, CA 93602
(559) 855-4408

Re: Opinion regarding development documents between Big Sandy Rancheria and Brownstone LLC

Dear Director Powless:

This letter responds to your request on behalf of the Big Sandy Rancheria ("Tribe") and the Big Sandy Entertainment Authority ("Authority") for the National Indian Gaming Commission's Office of General Counsel ("OGC") to review the executed development and financing documents specified below (collectively, the "Agreements"). Specifically, you asked for our opinion regarding whether the Agreements are management contracts requiring the NIGC Chairwoman's review and approval under the Indian Gaming Regulatory Act and whether the Agreements violate IGRA's requirement that the Tribe have the sole proprietary interest in its gaming operations. After careful review, it is my opinion that the Agreements are not management contracts requiring the review and approval of the Chairwoman and do not violate IGRA's sole proprietary interest requirement.

In my review, I considered the following, which were represented to be accurate reproductions of the executed documents:

- Memorandum of understanding ("MOU") between the Tribe and Brownstone LLC, dated January 16, 2007;
- Development agreement between the Tribe, the Authority, and Brownstone, an agreement for the development, financing, and construction of a gaming operation, dated March 25, 2007 ("Development Agreement");
- Credit Agreement between the Tribe, the Authority, and Brownstone for an initial financing loan of [redacted] dated March 25, 2007 ("Credit Agreement"). b4

I also considered a June 16, 2010 opinion of the Tribe's legal counsel.

Briefly, by way of background, I understand the Tribe is planning to build a new casino with food and beverage space, hospitality, and recreational areas on the McCabe allotment near Friant, California. Brownstone is the developer of the gaming project. The financing for this will be provided in three stages: initial financing, bridge financing, and permanent financing. Brownstone provided the initial financing of [ ] and will assist in arranging the bridge and permanent financing. Under the Credit Agreement, the Tribe is required to repay the initial financing upon obtaining bridge financing. 64

I understand that the Tribe has entered into bridge financing and that the initial financing was repaid. Additionally, the OGC is reviewing the bridge financing agreements separately from the Brownstone Agreements, so this opinion is limited only to the above-mentioned Agreements.

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-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).

The NIGC has defined the term *management contract* to mean "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 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. Again, management encompasses activities such as planning, organizing, directing, coordinating, and controlling. *See* attached *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 the gaming operation, the contract is a management contract within the meaning of 25 U.S.C. § 2711 and requires the NIGC Chairwoman's approval. Management contracts not approved by the Chairwoman are void. 25 C.F.R. § 533.7; *Wells Fargo Bank. N.A. v. Lake of the Torches Economic Dev. Corp.*, No. 09-CV-768, 2010 U.S. Dist. LEXIS 1714 at *8-*9 (W.D. Wisc. January 11, 2010).

Further, no agreement may give a proprietary interest in any Indian gaming activity to any entity other than the tribe itself, except for certain individually owned gaming operations not at issue here. 25 U.S.C. § 2710(b)(2)(A); 25 U.S.C. § 2710(b)(4). Among IGRA's requirements is that "the Indian tribe will have the sole proprietary interest and responsibility for the conduct of any gaming activity." 25 U.S.C. § 2710(b)(2)(A). Under this section, if any entity other than a tribe possesses a proprietary interest in the gaming activity, gaming may not take place. *See also* 25 C.F.R. § 522.4(b)(1).

Proprietary interest is not defined in the IGRA or the NIGC's implementing regulations. However, it is defined in Black's Law Dictionary, 7th Edition (1999), as "the interest held by a property owner together with all appurtenant rights…" *Owner* is defined as "one who has the right to possess, use and convey something." *Id. Appurtenant* is defined as "belonging to; accessory or incident to…" *Id.* Reading these definitions together, a proprietary interest is ownership, with the right to possess, use, and convey something.

Additionally, the NIGC has provided a non-exhaustive list of arrangements that would violate the sole proprietary interest clause:

- an agreement whereby a vendor pay the tribe for the right to place gambling devices that are controlled by the vendor on the gaming floor;
- a security agreement whereby a tribe grants a security interest in a gaming operation, if such an interest would give a party other than the tribe the right to control gaming in the event of default by the tribe; and
- stock ownership in a tribal gaming operation, even by tribal members.

58 FR 5802, 5804 (Jan. 22, 1993).

Analysis

I am aware of the recent decision in *Wells Fargo v. Lake of the Torches* and the court's holding that any agreement in which receivership is a possible remedy upon default is a management contract. *See Wells Fargo v. Lake of the Torches*, at *11-*12. The court there found

a bond trust indenture to be a management contract in part because it contained a specific provision allowing for the appointment of a receiver upon default. *Id.* Moreover, the court specifically rejected Wells Fargo's argument that a receiver would not exercise managerial control because its sole function would be to ensure that the gaming operation deposited its revenues and paid its liabilities. *Id.* Specifically, the court stated: "[b]y forcing the Corporation [Lake of the Torches] to deposit its revenues and pay its liabilities, the receiver would in fact be exerting a form of managerial control since those monies could not be used for other purposes related to the operation of the Casino facility." *Id.* at *12. While I generally agree with the court's analysis, I do not think the circumstances here are the same.

None of the Agreements set out the appointment of a receiver as a specific remedy upon default. However, the Development Agreement provides that the Developer and the Tribal parties upon default may "exercise any other rights and remedies available to them under applicable law..." Development Agreement §§ 7.02 and 7.03. The Agreements are governed by the laws of the State of California. Development Agreement § 8.01 and Credit Agreement § 6.01. Those rights and remedies include the appointment of a receiver. However, to say that a clause that merely reserves to a creditor the rights available under the law makes the Agreements management contracts would produce undesirable results - many, if not most, development and financing agreements for Indian casinos would be deemed management contracts. It would also seem to go well beyond the intent of the parties, who have structured straightforward agreements.

More significantly, the Agreements themselves state that their provisions are to be read so as to exclude management:

> It is not the intent of the parties hereto that this Agreement, whether considered alone, or together with any other one or more documents, constitute a Management Contract within the meaning of IGRA or to allow any party other than the Tribe to have the "sole proprietary interest" in its Gaming Operation (a "SPI Violation"). Each of the Tribal Parties and Developer covenants that it shall not at any time assert, insist upon, or plead (as a defense or otherwise) or in any manner whatsoever claim or take the benefit or advantage of, that this Agreement constitutes a Management Contract within the meaning of IGRA or that this Agreement constitutes a SPI Violation. To the extent that any Gaming Authority (other than a Tribal Gaming Authority) or any federal or state court issues a final and non-appealable order that this Agreement, or any provision hereof, constitutes a Management Contract or a SPI Violation, each and every provision hereof shall be interpreted in a manner that does not cause this Agreement to constitute a Management Contract or an SPI Violation, whether considered alone, or together with any other one or more documents. In no event shall any provision of this Agreement be applied, or deemed in effect or enforceable, to the extent such provision allows any action or influence by Developer or any other person that constitutes management of gaming in violation of IGRA or an SPI Violation. This Section shall survive as an agreement separate and apart from the remainder of this Agreement in the event of any determination that any provision of this Agreement causes the Agreement to constitute a Management Contract or an SPI Violation within the meaning of IGRA

Development Agreement § 10.08. The Credit Agreement contains a substantively identical provision, § 8.09. The Development Agreement also expressly limits the remedies available on default to exclude the exercise of management by the Developer:

> The parties hereto acknowledge and agree that this Agreement and the other agreements and instruments contemplated hereby are not intended, and shall not be interpreted or construed, to: (a) provide for a right on the part of the Developer or any Related Party to manage (including, without limitation, the right to plan, organize, direct, coordinate or control) all or any part of the Gaming Activities; (b) constitute a "management contract" or a "collateral agreement" to a management contract within the meaning of IGRA; (c) deprive the Tribe of the sole proprietary interest and responsibility for the conduct of any gaming activity within the meaning of IGRA; (d) provide for exclusive or nearly exclusive proprietary control over tribal lands, or (e) encumber tribal lands.

Development Agreement § 10.13. The Credit Agreement contains a substantively identical provision, § 8.14.

Accordingly, the Agreements are fairly read to preclude the appointment of a receiver that would exert management control over the gaming facilities. Therefore, unlike the agreement in *Lake of the Torches*, the Agreements here lack the receivership provision that was one of the bases of the court's finding management there. *Wells Fargo v. Lake of the Torches*, at *11-*12.

I note finally that the Agreements allow recourse in default to "the assets and revenues derived from the Gaming Operations or any other casino facility operated by the Tribe in Fresno County, California, if any, other than the Mono Wind Casino." Development and Credit Agreements §§ 8.02(f) and 6.03(f), respectively. The only term defined in the Agreements is "gaming assets" which means "any now owned or hereafter acquired property that is used in, intended to be used in or associated with future Gaming Operations." Development and Credit Agreements §§ 9 and 8, respectively. Therefore, I assume that revenues refer to all gross gaming revenues of the operation.

Previous OGC opinions have posited that an agreement containing a security interest in a gaming facility's future gross revenues, without further limitation, authorizes management of the gaming facility. In January 2009, we provided guidance in the form of limiting language that would prevent a pledge of gross gaming revenues from resulting in a management contract. While this limiting language was developed subsequently to the execution of these Agreements, the Agreements do contain sufficient limiting language. See Development Agreement §10.13 and Credit Agreement §8.14. As such, the security interest in all assets and revenues in the Agreements does not make them management contracts.

I also conclude that the Agreements do not violate IGRA's sole proprietary interest provision. An area of concern when analyzing whether an entity other than the Tribe has a proprietary interest in a gaming operation is the compensation paid by the Tribe. The question is whether the compensation paid to the vendor is so large that it indicates an ownership interest rather than a reasonable measure of value for services provided or risks taken.

Here, the Agreements provide for a development fee, structuring fee, performance bonus, reimbursement of expenses, and repayment of the initial financing loan in principal and interest. Development Agreement §§ 4.01 and 4.02 and Credit Agreement § 1.04.

Under the Development Agreement, the parties agreed to a development fee equal to [ ] of project costs. Development Agreement § 4.01(a). Project costs are defined as: b4

> The aggregate costs of developing, constructing, equipping and opening the Project, and specifically includes all "hard" and "soft" costs, including but not limited to, the fees, costs and expenses of all materials, furniture, fixtures, equipment, contractors, architects, designers, attorneys and other professionals and consultants hired by or on behalf of the Tribe or its Affiliates in connection with the development, construction, equipping and opening of the Project.

Development Agreement § 9. Development agreements usually provide for [ ] fee as a percentage of project costs and this development fee [ ] Therefore, the development fee here does not constitute a proprietary interest in the Tribe's gaming operations.

The structuring fee in the Development Agreement is [ ] of the gross amount of the [ ] financing. Development Agreement § 4.01(b). While this fee is [ ] than others we have reviewed, it is based on a percentage of gross financing and not on the gaming operations revenues or profitability. It is more usual to see a structuring fee of 1%; however, during the current economic conditions it is not surprising to see a negotiated [ ] fee rate, [ ].

The [ ] depending on the timing between obtaining permanent financing and the opening of the gaming facility. Development Agreement § 4.01(c). This provision does not rise to the level of a proprietary interest; it merely appears to be an incentive for the Developer to move forward with the project. b4

Finally, reimbursement of the developer's expenses as defined in § 4.02 is reasonable. Additionally, the interest, defined as "the Effective Rate which is equal to [ ]" Credit Agreement §§ 1.02(a) and 8.0, is not excessive nor does it violate the sole proprietary interest of the Tribe.

More importantly, upon an event of default, the developer does not obtain a right to control the gaming operations under the Credit Agreement or any other Agreement. *See* Credit Agreement § 8.14. The Development Agreement contains a substantially similar provision at § 10.13. Nothing about the transaction indicates it is anything other than an agreement for the development, financing, and construction of a gaming operation and the proprietary interest in the gaming remains solely with the Tribe. Therefore, the fees and interest provisions in the Agreements do not provide the Developer an ownership interest and do not violate the sole proprietary interest requirements under IGRA.

Other Concerns

While the Agreements are not management contracts that require the Chairwoman's review and approval and do not violate the sole proprietary interest requirements of IGRA, I am concerned about the provisions in the Agreements pertaining to the licensing of Brownstone. These provisions assert that Brownstone is not required to be licensed by the Tribe:

> Except to the extent Sections 6.4.5 or 6.4.6 of the Compact may be deemed by a Person other then the Tribal Parties or any Related Party of the Tribe (including any Gaming Regulatory Authority of the Tribe) to require Developer to be licensed, it is not necessary under the Tribal Law that Developer be licensed, qualified or entitled to carry on business in any jurisdiction by reason of the execution, delivery, performance or enforcement of any of this Agreement. Neither the Tribal Parties or any Related Party of the Tribe (including the Gaming Regulatory Authority of the Tribe) have adopted any law, rule, regulation, ordinance or resolution which requires Developer to be licensed, including any law, rule regulation, ordinance or resolution pursuant to Sections 6.4.5 or 6.4.6 of the Compact or otherwise.

Development Agreement § 5.01(i). The Credit Agreement contains substantially the same provision, § 2.08.

First, it appears from the Tribe's gaming ordinance that Brownstone must be licensed. Under the ordinance, the gaming commission authority has a duty to:

> 4. Conduct, or cause to be conducted, background investigations regarding any person in any way connected with any gaming activities and issue licenses, at a minimum, to all key employees and primary management officials according to requirements at least as stringent as those required by 25 CFR §§ 556 and 558, as well as any employees, investors, contractors or others required to be licensed under standards established by Big Sandy, IGRA and the Compact.

Article IX(a). The ordinance was approved by the NIGC Chairman on November 27, 2002. The ordinance requires the Authority to license anyone required to be licensed by IGRA or the compact.

Under Section 6 of the Tribe's compact with California, Brownstone would be required to be licensed as it is both a "gaming resource supplier" and a "financial source" because it is providing all the necessary furnishings and equipment for the gaming facility and it provided initial financing of [redacted] Tribal-State Compact §§ 6.4.5 and 6.4.6. Additionally, under 25 U.S.C. § 2710(d)(1)(C) class III gaming must be conducted in conformance with a Tribal-State compact. Moreover, under 25 U.S.C. § 2713 the Chairman has the authority to enforce the provisions of IGRA for any violation of IGRA, NIGC regulations, or an approved tribal gaming ordinance. 64

The compact and, therefore, the Development Agreement, require Brownstone to be licensed to supply or finance the Tribe. *See* Tribal-State Compact §§ 6.4.5 and 6.4.6. Consequently, the Tribe's gaming ordinance also requires Brownstone to be licensed. Big Sandy Ordinance 02-10 Article IX(a). I understand that, to date, Brownstone has not undergone the necessary licensing requirements. Failure of Brownstone to become licensed is a violation of the compact and the Tribe's gaming ordinance, which must be remedied.

Conclusion

The Agreements can be fairly read to preclude management in the event of default because nothing in the provisions of the Agreements gives to the Developer the discretion or authority to manage any part of the Tribe's gaming operations. Therefore, it is my opinion that the Agreements are not management contracts requiring the approval of the NIGC Chairwoman, nor do they violate IGRA's sole proprietary interest requirement.

I anticipate that this letter will be the subject of Freedom of Information Act (FOIA) requests. Since we believe that some of the information contained herein may fall within FOIA Exemption 4(c), which applies to confidential proprietary information, the release of which could cause substantial harm, I ask that you provide me with your views regarding release within ten days.

I am also sending a copy of the submitted agreements to the Department of Interior Office of Indian Gaming for review under 25 U.S.C. § 81. If you have any questions, please contact NIGC Staff Attorney Dorinda Strmiska at (202) 632-7003.

Sincerely,

Penny J. Coleman

Penny J. Coleman
Acting General Counsel

cc: Paula Hart, Office of Indian Gaming Management, Bureau of Indian Affairs (w/ incoming)
Elizabeth D. Kipp, Chairwoman, Big Sandy Rancheria
John Peebles, Counsel for Big Sandy Rancheria
Sharon House, Counsel for Big Sandy Development Authority