

**NATIONAL
INDIAN
GAMING
COMMISSION**

JUN 10 1997

Building Concepts, Inc.
1240 East Indian School Road
Phoenix, AZ 85014

Dear Sir/Madam:

On June 6, 1997, the National Indian Gaming Commission (NIGC) received a number of documents from the Bear River Band of Rohnerville Rancheria (Tribe) for a determination as to whether any of the documents require the approval of the NIGC Chairman. The documents reviewed include: (1) a Financing and Development Agreement (2) a Loan Agreement (3) a Master Lease (4) a Participating Lease (5) an Assignment of Rents and Leases and (6) an Adjustable Rate Promissory Note. We conclude that the Financing and Development Agreement contains several management provisions and thus constitutes a management agreement, requiring the approval of the NIGC Chairman. The Loan Agreement is collateral to the management contract and also requires approval.

Because the Financing and Development Agreement and Loan Agreement require NIGC approval, they are null and void absent such approval. Thus the Tribe should not take any further action pursuant to the contract and should immediately cease all activities with regard to any Class II or Class III gaming operations.

It is our understanding that the Tribe has commenced construction activities. We note that while a Draft Environmental Assessment was prepared, that document has not been accepted by the government and no Finding of No Significant Impact has been issued. Thus, without the required approvals and NEPA compliance, it is unlawful for the Tribe to continue construction.

The Master Lease, Participating Lease, Assignment of Rents and Leases and the Adjustable Rate Promissory Note do not require the approval of the Chairman of the NIGC. They do, however, require review and possible approval of the Bureau of Indian Affairs (BIA). These documents will be forwarded to the BIA for review.

The NIGC's authority to review and approve gaming-related agreements is limited by the Indian Gaming Regulatory Act (IGRA) to management contracts and collateral agreements to management contracts. 25 U.S.C. § 2711. The authority of the Secretary of the Interior to approve such agreements under 25 U.S.C. § 81 was transferred to the NIGC pursuant to the IGRA. 25 U.S.C. § 2711(h).

The NIGC 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. The NIGC defined "collateral agreement" to mean "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 encompasses many activities such as planning, organizing, directing, coordinating, and controlling. In the view of the NIGC, the performance of any one of these activities with respect to all or part of a gaming operation constitutes management for the purpose of determining whether an agreement requires the approval of the Chairman.

The Financing and Development Agreement between the Tribe and the Developer has several provisions that indicate management activity. As discussed in the NIGC's Bulletin No. 94-5, the presence of certain provisions in an agreement strongly suggest that the agreement is a management contract requiring the approval of the Chairman. Examples of management provisions discussed in the bulletin include: development and construction costs incurred or financed by a party other than the tribe, term of contract that establishes an ongoing relationship, compensation based on a percentage fee, and open-ended scope of duties. See NIGC October 14, 1994 Bulletin, No. 94-5, enclosed. The Financing and Development Agreement submitted by the Tribe contains several of these provisions. While each of these provisions individually may not be enough to create a management contract, collectively they demonstrate a management relationship.

The provisions that are indicators of a management contract include:

1. Term. The Term of the Agreement is for the longer of 5 years from date of completion of development or the date upon which all funds advanced to the Tribe have been repaid. Paragraph 1, p.1.
2. Development. Development services and operational, soft money and permanent loans including a building reserve fund are all financed by the Developer. Paragraphs 2, 3, and 4, pps. 2-3. These monies provide for design, development and construction of the facility, payment of past salaries and operating debts of the Tribe, and cash fills, as well as other expenses.
3. Compensation. Compensation to Building Concepts Inc. that is calculated as 85% of the net profits while the loan is still outstanding, and then 40% of net profits until expiration of the Agreement. Paragraph 6, p.4.
4. Gaming Equipment. The developer is granted the exclusive right to provide for progressive play on games. Paragraph 5 (c), pps. 3-4.

5. Design, Development and Construction of the Facilities. Pursuant to the agreement, Developer "has provided and agrees to continue to provide consulting services relating to the design, development and construction of the Retail Enterprise." Paragraph 2, page 2.

6. Cash Handling. The Developer shall have the right to inspect all accounting books and records at any time, and to withdraw amounts to satisfy loans and as compensation to Developer. Paragraph 7(c), pps. 5-6.

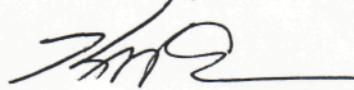
7. Exclusivity. "The Developer shall have the exclusive right to construct, develop, provide for or otherwise finance or contract for gaming conducted by the Tribe on all lands belonging to the Tribe in the State of California. Paragraph 8, p.6.

When these provisions are considered together it appears that the Developer will advance all funds necessary for construction and operation, manage construction of the facility, supply all the equipment, own both the facility and the equipment, and lease the land on which the gaming operation is located. The Tribe will have only limited ability to terminate this relationship for a period of five years. All of these factors together illustrate a management relationship that requires the approval of the NIGC Chairman.

Because the Financing and Development Agreement is a management contract, other items must be submitted with the contract pursuant to 25 U.S.C. § 2711 & 25 C.F.R. §§ 533.3, 537.1 and 537.3. Also, documents such as the Master Lease and Participatory Lease are collateral documents to the Financing and Development Agreement, and would have to be reviewed, but not approved by the NIGC when the management agreement is formally submitted. Please contact Elaine Trimble at (202) 632-7003 in the NIGC Division of Contracts and Audits for further instructions on submitting the necessary documents for review. The documents you have provided thus far will be forwarded to our Enforcement Division.

Finally, all of the documents will be forwarded to the Bureau of Indian Affairs for a determination as to whether they require BIA approval. If you have any questions regarding this letter, please contact Maria Getoff, NIGC Staff Attorney at (202) 632-7003.

Sincerely,



Kevin Meisner
Acting General Counsel

Enclosure