August 27, 2013

George Gholson, Chairman
Timbisha Shoshone Tribe
621 W. Line St., Suite 109
Bishop, CA 93514

Re: Review of development agreement and termination agreements

Dear Chairman Gholson:

This letter responds to the Timbisha Shoshone Tribe's (Tribe) request for the National Indian Gaming Commission Office of General Counsel ("OGC") to review a Development Agreement between the Tribe and CCR Timbisha LLC ("Developer"), and a Termination of Contracts Agreement, Confidentiality and Non-Competition Agreement, Promissory Installment Note, Promissory Note, and Release of Obligations and Claims (collectively "the Transaction Documents") entered into with Global Investment Enterprise LLC ("Global"). All of the Transaction Documents were dated August 18, 2012. Additionally, on July 25, 2013, we received a document titled First Amended and Restated Development Agreement, dated, February 18, 2013. Specifically, you have asked for our opinion regarding whether the Transaction Documents are a management contract requiring the NIGC Chairwoman's review and approval under the Indian Gaming Regulatory Act. You also requested an opinion regarding whether the Transaction Documents violates IGRA's requirement that the Tribe have the sole proprietary interest in its gaming operations. After careful review, it is my opinion that the Transaction Documents are not a management contract requiring the review and approval of the Chairwoman. Additionally, it is my opinion that the Transaction Documents do not grant the Developer or Global an improper proprietary interest in the gaming activity. However, since the Tribe and the Developer have submitted a management agreement for approval the Development Agreement with CCR is a collateral agreement that will be reviewed with the management agreement. Finally, I have concerns about (b) (4) from the Developer which may effect the approval of any management agreement.

Management Contracts

IGRA provides the NIGC with authority to review and approve gaming-related 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.

Although NIGC regulations do not define *management*, the agency has explained that the term 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)." 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 Chairman are void. 25 C.F.R. § 533.7; *Wells Fargo Bank, N.A. v. Lake of the Torches Economic Dev. Corp.*, 677 F. Supp.2d 1056 (W.D. Wisc. 2010), *aff'd* 658 F.3d 684 (7th Cir. 2011).

Sole Proprietary Interest

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); *see also* 25 C.F.R. §§ 522.4(b)(1) and 522.6(c). *Proprietary interest* is not defined in the IGRA or the NIGC's implementing regulations. As discussed in Notice of Violation # 11-02, OGC legal opinions concerning the sole proprietary interest mandate have focused primarily on three criteria in its analysis of the requirement. The legal opinions examine: 1) the term of the relationship; 2) the amount of revenue paid to the third party; and 3) a third party's right to exercise control over all or any part of the gaming activity. *See also City of Duluth v. Fond du Lac Band of Lake Superior Chippewa*, 830 F. Supp. 2d 712, 723 (D. Minn. 2011), *aff'd in pertinent part*, 702 F.3d 1147 (8th Cir. 2013)(discussing NIGC adjudication of proprietary interest provision). Accordingly, final agency actions by NIGC and OGC legal opinions have found an improper proprietary interest in agreements under which a party, other than a tribe, receives a high level of compensation, for a long period of time, and possesses some aspect of control. *Id.* 723-724.

Analysis

The Development Agreement grants the Developer the exclusive right to the following:

> (i) carry out any and all activities that are necessary in order to Develop the Project, including without limitation, assisting the Tribe in the negotiation of the terms of the Compact with the State of California, and assisting the Tribe in connection with the Taking of the Property into Trust; and (ii) administer and oversee the planning, design, development, construction, furnishing, equipping and financing of the facilities.

See Development Agreement § 2.1(a). The Developer is required to advance the Tribe the sum of $(b) (4) to be used for tribal government expenses as well as expenses related to the casino project. *Id.* at § 5.2(e). This advance and any other advances made by the Developer are to constitute a loan that will be repaid upon the Developer securing senior financing for the project. *Id.* at § 5.2(a). Once senior financing is obtained, and with the approval of the lenders, a (b) (4) (b) (4) *Id.* at § 5.3(c). In exchange for the services provided the Developer will receive a development fee equal to (b) (4) of the total project costs with a maximum of (b) (4) *Id.* at § 6.1. The Development Agreement does not specifically provide the Developer with the right or responsibility to manage the Tribe's gaming activity. Since the development fee is tied to a percentage of the project costs and not gaming revenue, and is capped at a specific amount, it is my opinion that the Development Agreement does not grant the Developer a proprietary interest in nor does it deprive the tribe of sole responsibility for the gaming activity.

The Amended and Restated Development Agreement appears to only revise provisions related to defaults and termination of the agreement. See Amended and Restated Development Agreement § 8. None of the changes provide the Developer with any management rights or responsibilities not do they grant the Developer a proprietary interest in the gaming activity.

The Termination of Contracts Agreement ("Termination Agreement") serves to terminate three agreements entered between the Tribe and Global. Specifically, these agreements include a Promissory Note on December 7, 2007, and a Management Agreement and Development Agreement dated September 20, 2008, and modified on May 17, 2009. In exchange for terminating these agreements, Global will receive (b) (4) of the net gaming revenue for a period of (b) (4) years. Further, it provides that the Tribe will pay Global any sums advanced by Global for development of a casino up to (b) (4) The Termination Agreement does not grant Global any management rights or responsibilities. Additionally, the Termination Agreement the Release does not appear to grant Global a proprietary interest in the gaming activity and does not deprive the Tribe of sole responsibility for the gaming activity.

The Confidentiality and Non-Competition Agreement ("Confidentiality Agreement") restricts Global for a period of (b) (4) from releasing any confidential information regarding the Tribe's gaming project. Further, for that same period of time, Global has agreed not to enter any negotiations or agreements with any federally recognized tribe within a (b) (4) radius of the Tribe's proposed casino project. The Confidentiality and Non-Competition Agreement does not grant Global any right or responsibility in regards to the management of any tribal gaming facility nor does independently provide any compensation. Further, the Confidentiality Agreement does not appear to grant Global a proprietary interest in the gaming activity and does not deprive the Tribe of sole responsibility for the gaming activity.

The Promissory Installment Note ("Installment Note") memorializes the Tribe's promise to pay Global (b) (4) of the net gaming revenue for a period of (b) (4) years. The Installment Note does not include any grant of management rights or responsibilities to Global. Moreover, the Installment Note does not appear to grant Global a proprietary interest in the gaming activity and does not deprive the Tribe of sole responsibility for the gaming activity.

The Promissory Note ("Note") memorializes the Tribe's promise, under the Termination Agreement, to pay Global any monies advanced by Global in furtherance of the casino project up to the sum of (b) (4) The Note does not include any grant of management rights or responsibilities to Global. Additionally, the Note does not appear to grant Global a proprietary interest in the gaming activity and does not deprive the Tribe of sole responsibility for the gaming activity.

The Release of Obligations and Claims ("Release") is the Tribe's agreement to release all claims it may have against Global for any actions arising out of the actions of Global in furtherance of the Tribe's casino development. The release provides no

compensation to the Tribe or Global and it does not grant any management rights or responsibilities to Global. Further, the Release does not appear to grant Global a proprietary interest in the gaming activity and does not deprive the Tribe of sole responsibility for the gaming activity.

Conclusion

The Transaction Documents do not provide the Developer or Global with any management rights. Therefore, it is my opinion that the Transaction Documents are not a management contract requiring the approval of the Chairwoman. It is also my opinion that the Transaction Documents do not violate IGRA's sole proprietary interest requirement. However, since the Tribe and the Developer have submitted a management agreement for approval the Development Agreement is a collateral agreement that will be reviewed with the management agreement. Further, I am concerned by the distribution of (b) (4) provided by the Development Agreement. This action may be grounds for the disapproval of a management contract if the Chairwoman finds that it constitutes undue influence. *See* 25 C.F.R. § 533.6.

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, which applies to confidential or privileged financial or commercial information, the release of which could cause substantial harm, I ask that you provide me with your views regarding release within ten days.

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

Sincerely,

Eric Shepard
Acting General Counsel

cc: Mark A. Levitan, Esq. (mark@levitanlaw.net)