

SANTA YSABEL TRIBAL GAMING COMMISSION

SYGC 14-I012

Commission Regulation

Sole Proprietary Interest Determination Under Tribal Gaming Ordinance

Pursuant to Santa Ysabel Gaming Ordinance Section XI (F) & (G), regulation of gaming activity, the Santa Ysabel Gaming Commission hereby adopts the following regulations:

1.0 Purpose of Regulation

- (a) The Iipay Nation of Santa Ysabel (“Nation”) has adopted the Iipay Nation of Santa Ysabel Gaming Ordinance (“Gaming Ordinance”), and, effective as of April 30, 2010, the Gaming Ordinance has been approved by the Chairman of the National Indian Gaming Commission (“NIGC”) pursuant to the federal Indian Gaming Regulatory Act of 1988 (“IGRA”), P.L. 100-497, 25 U.S.C. § 2701, *et seq.*, as it may be amended from time to time, and the regulations of the NIGC promulgated thereunder.
- (b) Although the Gaming Ordinance requires under Section IV that the Nation shall have “sole proprietary interest in and responsibility for” the conduct of gaming activities authorized by the Gaming Ordinance, no provision in the Gaming Ordinance, IGRA or regulations promulgated by the NIGC defines what this phrase means nor indicates how any “sole proprietary interest” determination is to be made.
- (c) The Santa Ysabel Gaming Commission (“Gaming Commission”) was established under Section XI, Paragraph A of the Gaming Ordinance to exercise regulatory authority over all gaming activities conducted within the jurisdiction of the Nation and, pursuant to Section XI, Paragraph G, is empowered, subject to Executive Branch and Legislative Branch review and comment, to promulgate regulations to implement the provisions of the Gaming Ordinance, including those necessary to the interpretation and application of the Gaming Ordinance by the Gaming Commission in connection with exercising its regulatory powers.

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- (d) Pursuant to its rulemaking authority under the Gaming Ordinance, the Gaming Commission finds it necessary in connection with exercising its regulatory powers to promulgate a regulation related to the interpretation and application of the Gaming Ordinance defining what the phrase “sole proprietary interest” means under the Gaming Ordinance and providing standards as to how any “sole proprietary interest” determination is to be made.

2.0 Definitions

The terms used herein shall have the meanings described below (and any others not otherwise described shall have the meaning ascribed to them in the Gaming Ordinance).

- (a) “Net Revenues” means gross revenues of any gaming activity conducted by a tribal gaming operation under the Gaming Ordinance less amounts paid out as prizes and total gaming-related operating expenses, excluding management contractor fees.
- (b) “Operating Expenses” means total gaming-related operating expenses, including all those expenses of the tribal gaming operation commonly known as operating expenses and non-operating expenses consistent with professional accounting pronouncements, excluding management contractor fees.
- (c) “Sole Proprietary Interest” means the interest of the one who holds exclusive title to the subject property and who has the dominant equity interest in and management dominion over that property, even if others are compensated in some measure from the property’s revenues for services or value rendered to the property.

3.0 Generally Accepted Accounting Principles

The Gaming Commission shall rely upon generally accepted accounting principles, including publications of the American Institute of Certified Public Accountants regarding Gaming.

4.0 Review of Operating Expenses

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When reviewing whether the compensation paid pursuant to any contract, agreement or other arrangement or undertaking between the Nation or its tribal gaming operations and third parties violates the Gaming Ordinance and this Regulation, the Gaming Commission shall first make a determination whether the compensation paid thereto is an Operating Expense. If such compensation is properly classified as an Operating Expense in accordance with generally accepted accounting principles, the Gaming Commission shall make a determination that the contract, agreement or other arrangement or undertaking between the Nation or its tribal gaming operations and the third party, and the compensation provided thereto, does not violate the sole proprietary interest provision of the Gaming Ordinance or this Regulation. In such case, Section 5 of this Regulation shall not apply to such contract, agreement or other arrangement or undertaking.

5.0 Determination of Sole Proprietary Interest

- (a) The Gaming Commission shall have the exclusive authority under the Gaming Ordinance to make any determination as to whether any contract, agreement or other arrangement or undertaking between the Nation or its tribal gaming operations and third parties relating to gaming activities violates the sole proprietary interest requirement of the Gaming Ordinance.
- (b) In making its determination whether any contract, agreement or other arrangement or undertaking between the Nation or its tribal gaming operations and third parties violates the sole proprietary interest requirement of the Gaming Ordinance, the Gaming Commission shall be guided by: (1) in the past congressional leadership has expressed concern that the NIGC has unduly applied the sole proprietary interest requirement in such a broad way as to hinder Nations' ability to expand their Gaming activities, see February 1, 2005 Letter from NIGC Chairman Philip N. Hogen to Committee of Indian Affairs; and (2) the NIGC's repeated efforts to expand its regulatory oversight to include any "gaming-related" contract has been rejected by congressional leadership.
- (c) The Gaming Commission shall consider each of the factors set forth below when determining whether a contract, agreement or other arrangement or undertaking between the Nation or its tribal gaming operations and third parties relating to gaming activities gives a proprietary interest in the tribal gaming operation in any

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entity other than the Nation, unless a determination has been made pursuant to Section 4 of this Regulation with respect to such contract, agreement or other arrangement or undertaking.

- (1) The commercial reasonableness of the amount of compensation paid to a third party. In considering this factor, the Gaming Commission shall inquire as to whether there is a commercially reasonable relationship between the services provided or the risk assumed by the third party, and the quantity and way in which the third party is compensated. The Gaming Commission shall also consider whether the Nation or its tribal gaming operations have the ability to otherwise acquire the desired product or service offered by the third party on the open market.
- (2) The commercial reasonableness of the term of the agreement. In considering this factor, the Gaming Commission shall inquire as to the term for agreements regarding similar subject matter. For example, if similar agreements elsewhere generally have a term that is longer or the same as an agreement under consideration, then the Gaming Commission shall make a finding that such lesser or co-extensive term is commercially reasonable. Conversely, if agreements regarding the same subject matter elsewhere generally have terms that are only half as long as the term of an agreement under consideration, then the Gaming Commission shall make a finding of commercial unreasonableness with respect to the term of the subject agreement.
- (3) Whether the Nation receives the “primary” benefits of the gaming activities, meaning the Nation is the primary benefactor of the gaming activities under the agreement, arrangement or undertaking with the third party.

When making determinations as to commercial reasonableness, the Gaming Commission shall consider documentary evidence of commercial reasonableness submitted by the third parties to the contract, agreement or other arrangement or undertaking under consideration.

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- (d) Upon considering the foregoing factors in making its determination whether any contract, agreement or other arrangement or undertaking between the Nation or its tribal gaming operations and third parties violates the sole proprietary interest requirement of the Gaming Ordinance, the Gaming Commission shall not find a violation unless clear and convincing evidence demonstrates both:
- (1) The contract, agreement or other arrangement or undertaking between the Nation or its tribal gaming operations and third parties contains “egregious terms” benefiting the third party rather than the Nation or its tribal gaming operations, meaning the third party has not provided services or value or assumed appreciable risk that reasonably relates to the amount of compensation or benefits provided to the third party under the contract, agreement or other arrangement or undertaking; and
 - (2) The third party is receiving an ownership interest in the tribal gaming operations because it is certain that they are not providing services or value commensurate with any known measure of market rates for those services or value offered anywhere to any other party.

6.0 Timing of Sole Proprietary Interest Determination

Before issuing any gaming license to any persons in connection with any contract, agreement or other arrangement or undertaking between the Nation or its tribal gaming operations and third parties relating to gaming activities, the Gaming Commission shall first make an affirmative determination in writing that the contract, agreement or other arrangement or undertaking does not violate: (a) the Gaming Ordinance or IGRA and (b) the Gaming Ordinance’s sole proprietary interest requirement. The Gaming Commission shall also make a determination at such time as to whether the contract, agreement or other arrangement or undertaking constitutes or does not constitute a “management contract” as defined by the IGRA and the Gaming Ordinance.

7.0 Determinations by the Gaming Commission

Upon written request of a party to any contract, agreement or other arrangement or undertaking between the Nation or its tribal gaming operations

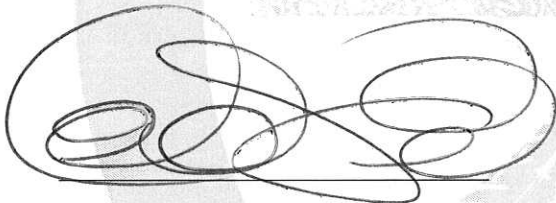
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and a third party, the Gaming Commission shall within thirty (30) days thereof issue in writing a determination of whether such contract, agreement or other arrangement or undertaking between the Nation or its tribal gaming operations and third parties does or does not violate the sole proprietary interest requirement of the Gaming Ordinance. Determinations made by the Gaming Commission under this Regulation shall be made in writing and are final and binding upon the Gaming Commission and the Nation. For purposes of clarity, a change in economic circumstances without a material change in terms of the contract, agreement, arrangement or undertaking shall have no effect upon a final and binding determination.

8.0 Appeal

Any party affected by a determination made by the Gaming Commission under this Regulation may appeal the determination pursuant to the appeal process found within the Gaming Ordinance and the Nation's Constitution.

Approved by:



Dave Vialpando, Chairman

September 4, 2014

Date

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