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Via U.S. Post and facsimile

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RE: Sac & Fox Casino Lease Agreement for Gaming Equipment, Loan Agreement by and between American Gaming Systems LLC and Sac & Fox Nation Business Enterprises Inc, Pledge and Security Agreement, and Promissory Note.

Dear Ms. Noble and Messrs. Norman and Louden:

On September 11, 2007, Ms. Noble, on behalf of the Sac & Fox Nation of Oklahoma, forwarded documents including the Sac & Fox Casino Lease Agreement for Gaming Equipment (MA), Loan Agreement by and between American Gaming Systems LLC and Sac & Fox Nation Business Enterprises Inc (LA), Pledge and Security Agreement (SA), Promissory Note between the Sac & Fox Nation Casino (Casino) and American Gaming Systems (AGS) for review by this office. These documents are collectively referred to here as "the Agreements." Under these Agreements, AGS promises to lease [ ] machines to the Casino and loan it [ ] to begin construction of a new facility in Stroud, Oklahoma.

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After reviewing the Agreements, it is my opinion that the Agreements collectively constitute a management contract under the Indian Gaming Regulatory Act (IGRA). 25

U.S.C. § 2701 *et seq*. Thus, I recommend that the parties revise certain language to avoid this problem. Specifically, the parties need to revise the SA because absent certain changes, the document provides AGS with management duties in the event of a default.

Authority

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 to the extent that they implicate management. 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).

Management Contracts

A "management contract" is "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. A "collateral agreement" is "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 activities such as planning, organizing, directing, coordinating, and controlling. *See* NIGC Bulletin No. 94-5. 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 for the performance of such activities is a management contract requiring NIGC approval. *Id*.

The Supreme Court has held that 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 the specific job title or the position held by the employee. *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 – thus being a *de jure* manager – or recommends discretionary actions that are implemented by others possessing actual authority to control employer policy, thus being a *de facto* manager. *Id*. at 1399 (*citing N.L.R.B. v. Yeshiva*, 444 U.S. 672, 683 (1980)).

De facto management is also found where a developer provides supervisors to train and instruct employees during the operation of a casino. *See First American Kickapoo Operations, L.L.C. v. Multimedia Games, Inc.*, 412 F.3d 1166, 1173 (10th Cir.

2005). Instructing employees once a gaming operation begins its business is a management function. *Id.*

Determination

I review these Agreements collectively because they are necessarily related and interdependent. To that end, an indication of management in one document necessarily constitutes an indication of management that applies collectively to the Agreements as a whole. Because the SA contains indicia of management, that indicia applies to the Agreements collectively, and thus the Agreements together constitute a management contract.

The default provisions in the SA provide AGS with management duties in the event of default. The SA pledges all revenues for collection in default, SA § 2.1, but the operating expenses are not separated from this portion of the collateral. Further, the SA allows AGS to collect and handle all pledged revenues in default. SA § 4.3. The result is that in the event of default, AGS would have the authority to decide which operating expenses to pay at any given time. The power to decide operational expenditures is a function that constitutes management. Thus, AGS would act as a manager in that they would control the expenditure of gaming revenue without an approved contract in violation of IGRA.

In addition to the pledged revenues, the collateral for the agreements includes fixtures, a term left undefined. SA § 2.2. A management agreement must not attempt to convey any interest in real property. 25 U.S.C. § 2711(g). Furthermore, such a conveyance could be subject to 25 U.S.C. § 177 which states:

> No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty.

Under most legal jurisdictions, "fixtures" are attached to real property and thus constitute real property. While "trade fixtures" may be removable, and thus may not connote real property, the agreements fail to make a distinction. Under these agreements, the casino

could inadvertently convey a property interest to AGS in contravention of IGRA and 25 U.S.C. § 177. The NIGC advises the parties to revise this part of the agreements.

I know that the parties are acting in good faith under these Agreements, do not intend any management by AGS, and are making the arrangement a success. As the parties continue to benefit from the arrangement, I advise you to make the necessary revisions to these Agreements. Absent such revisions, the Agreements would constitute a management contract that requires the Chairman's approval to be valid.

If you have any questions, please contact Staff Attorney Rebecca Chapman at (202) 632-7003.

Sincerely,

Penny Coleman

Penny Coleman
Acting General Counsel