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Via facsimile & U.S. mail

Chief LeRoy Howard
Seneca-Cayuga Tribe of Oklahoma
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Thomas C. Wilmot Sr.
Caywil New York LLC
1265 Scottsville Road
Rochester, New York 14624

Re: Amended Master Lease Agreement, Development Agreement, Promissory Note, and Interim Loan and Security Agreement between the Seneca-Cayuga Tribe and Caywil New York LLC

Dear Chief Howard and Mr. Wilmot,

On June 21, 2006, the National Indian Gaming Commission (NIGC) Office of General Counsel (OGC) issued a letter reviewing a consulting and training agreement (Consulting Agreement), exclusivity agreement, machine placement agreement and promissory note, all dated January 30, 2006, between the Seneca-Cayuga Tribe of Oklahoma (Tribe) and Caywil New York LLC (Caywil). In the letter, I addressed whether the agreements were management contracts or collateral agreements to a management contract and therefore subject to the NIGC Chairman's review and approval under the Indian Gaming Regulatory Act (IGRA).

I opined that the Consulting Agreement constituted a management contract and, therefore, required approval. I further opined that other agreements were collateral agreements to the Consulting Agreement and also required approval by the Chairman. Finally, I expressed concern that the agreements evidenced a proprietary interest by Caywil in the Tribe's gaming activity. Such a proprietary interest is contrary to IGRA, NIGC regulations, and the Tribe's approved gaming ordinance. *See* Letter from Penny J. Coleman, NIGC Acting General Counsel, to Chief Paul Spicer, Seneca-Cayuga Tribe of Oklahoma, and Thomas C. Wilmot Sr., Caywil New York LLC (June 21, 2006).

On July 7, 2006, Caywil informed the NIGC that the Tribe and Caywil have ceased operating under those agreements. See Letter from Vanya S. Hogen, Faegre & Benson LLP, to Penny Coleman, NIGC Acting General Counsel (July 7, 2006). On February 28,

2007, Caywil submitted agreements terminating the Consulting Agreement and exclusivity agreement, both effective June 30, 2006.

On January 31, 2007, Caywil submitted three new agreements: an amended master lease agreement and a development agreement, both dated September 9, 2006, and a promissory note, dated January 30, 2006. On April 4, 2007, Caywil submitted an interim loan and security agreement, dated September 23, 2005. On September 15, 2008, the Tribe submitted an addendum to the amended master lease agreement, dated May 23, 2007.

After review of these agreements it is my opinion that several provisions contained within the amended master lease agreement, addendum to the master lease agreement, development agreement, and interim loan and security agreement vest management authority in Caywil. Furthermore, as explained below, Caywil represents that a development budget has not been finalized, and as such I am unable to determine whether the development fee to be paid to Caywil is an indication of a proprietary interest in the Tribe's gaming activity.

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 IGRA. 25 U.S.C. § 2711(h).

Management Contracts

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. The NIGC has 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 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 the Chairman's approval.

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 of 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)).

Discussion

The amended master lease agreement and the addendum to the master lease agreement provide for the placement of gaming machines at the Tribe's existing gaming facility and the gaming facility that will be constructed pursuant to the development agreement. Addendum to Amended Master Lease Agreement, § 1. These two agreements constitute management agreements because they establish Caywil's control over a part of the Tribe's gaming operation. The amended master lease agreement provides, "Lessee shall keep and use the Equipment on the Premises and shall not relocate or remove any Unit unless Owner consents, in writing, prior to its relocation or removal, which approval shall not be unreasonably withheld." Amended Master Lease Agreement, § 5.1. Thus, Caywil as opposed to the Tribe, ultimately controls the placement of gaming machines at the Tribe's gaming operation, and this constitutes management. While I appreciate that Caywil wishes to safeguard its investment, it cannot do so by usurping management control over part of the gaming operation.

Furthermore, the Tribe is not able terminate the agreement. The agreement provides:

> The rental term of the Equipment listed in a Lease Schedule shall commence upon the date of acceptance of the Equipment by Lessee (the "Commencement Date") and shall continue for[ ]unless otherwise set forth in such Lease Schedule (the "Rental Term"). The obligations under this Lease shall commence as of the date hereof [ ]and shall end on the later of (a)[ ]after the date hereof and (b) the date when all Lessee's obligations and under all Lease Schedules have been satisfied (the "Term").

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Amended Master Lease Agreement, § 2.1. It appears that the parties can enter into a new lease schedules for[ ]and that the rental term for each lease schedule is[ ]Therefore, the amended master lease agreement establishes a relationship that may endure for up to[ ]While the agreement provides, "[t]his Lease cannot be cancelled or terminated by Lessee except as expressly provided herein" it fails to expressly provide any circumstances under which the Tribe is free to terminate the agreement. *Id.*

The amended master lease agreement and the addendum to the master lease agreement constitute management because Caywil controls placement of the gaming machines at the Tribe's gaming facility and the Tribe is not able to terminate the relationship. Caywil's control, therefore, extends through the useful life of each machine and thus through as much of the floor as Caywil's leased machines occupy.

Beyond this, certain provisions regarding Caywil's recourse in the event of the Tribe's default in the development agreement and the interim loan and security agreement also constitute management. Upon default, Caywil will control the use of gross gaming revenue and determine what operating expenses of the gaming operation, if any, to pay. The development agreement provides:

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Development Agreement, § 6.3. *Gross Revenues* is defined in the development agreement as, "all revenues of the Gaming Business other than proceeds of borrowing and proceeds from insurance (other than proceeds of business interruption insurance), less all amounts paid out as prizes." Development Agreement Article 1, Definition of "Gross Revenues." The development agreement does not identify the specific revenues the gaming facility is entitled to retain and does not appear to insulate the Tribe's operating funds from Caywil's control in the event of default.

Similarly, the interim loan and security agreement "[ ]" Interim Loan and b4
Security Agreement, § 3.1. Collateral, as defined, includes all *Gaming Assets*, which incorporates *Gaming Revenues*, defined to mean "all revenues, receipts, income and gain of any nature arising from the Gaming Business or the use or ownership of Gaming Assets by or on behalf of the Tribe or any other Tribal Party, whether the same consists of money, instruments, accounts or otherwise." *See* Interim Loan and Security Agreement, Article 1. If the Tribe defaults, Caywil will control the funds necessary to operate the Tribe's gaming facility.

Thus, *Gross Revenues* as used within the development agreement, and *Gaming Revenues*, as used within the interim loan and security agreement, give Caywil a security interest in gross gaming revenues, including the revenue necessary to pay the operating expenses of the operation.[1] In the event of a default, Caywil will control the revenue

[1]

necessary to operate the Tribe's gaming facility. Directing the use of revenue in this manner constitutes management. *See NIGC Bulletin No. 94-5.*

I recognize that the intent of §6.3 of the development agreement and § 3.1 of the interim loan and security agreement is to reduce the level of risk associated with these types of transactions. However, the Tribe and Caywil must revise these sections if they wish to act under these agreements without the Chairman's approval. As an alternative, the parties might consider designating net revenues as security. Net revenue, as defined in IGRA, means "gross revenue of an Indian gaming activity less amounts paid out as, or paid for, prizes and total operating expenses, excluding management fees." 25 U.S.C. § 2703(9). The designation of net revenues ensures that the Tribe maintains control of operating expenses, while providing Caywil with a source of revenue to secure its interest.

Additionally, the default provision contained in the interim loan and security agreement appears to be problematic because it affords a security interest in real property on Indian lands in violation of IGRA. 25 U.S.C. § 2711(g). *See* Interim Loan and Security Agreement, Article 1, Definition of *Gaming Assets* ("all property, now or hereafter constituting a part of or to be incorporated into…the New Facility or any other casino facilities . . ."; Definition of *Property* ("any interest (legal, beneficial or otherwise, in any kind of property or assets, whether real, personal or mixed, or tangible or intangible."))

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.

I understand that the intention here may be to place a security interest in FF&E (furniture, fixtures, and equipment) and not in real property. If that is the case, a simple clarification explicitly removing real property from the reach of the security interest would eliminate the concern.

I am also concerned about certain provisions contained in the development agreement. Under its terms, Caywil is to develop a "turn-key" gaming facility for the Tribe in Oklahoma. *See* Development Agreement, § 9.2(b). "In consideration of the services to

be performed by Developer under this Agreement, the Tribe will pay Developer [ ] (the "Development Fee")." *See* Development Agreement, § 6.1(a). The development agreement does not require Caywil to advance funds for the development of the new facility. The development agreement provides that Caywil "shall assist the Tribe in locating one or more sources of Permanent Financing for amounts required for timely completion of the Project and payment of all Project Costs." *See* Development Agreement, § 5.1. Developers who do not provide financing for the development, generally receive a development fee of [ ] of the total development costs unless the development presents extraordinary risk. 64

I understand that, the "Pre-Development Budget," "Preliminary Budget," and "Approved Budget" referenced in the development agreement have not been prepared and/or approved. *See* Development Agreement § 4.8; Letter from Kent Richey, Faegre & Benson LLP, to Esther Dittler, NIGC Staff Attorney (March 29, 2007). As the development budget has not been submitted, I am unable to determine whether or not the development fee to Caywil is an indication of a proprietary interest in the Tribe's gaming activity. Please submit the preliminary or approved budget as soon as possible so I can complete my review of the agreements.

Conclusion

Several provisions contained within the amended master lease agreement, addendum to the amended master lease agreement, and the interim loan and security agreement vest management authority in Caywil in the Tribe's gaming facilities. Furthermore, as Caywil has not submitted a development budget I have not yet determined whether Caywil's fee provides an additional concern regarding proprietary interest in the Tribe's gaming activity. Please submit an approved development budget as soon as possible. While our opinion is only advisory, we recommend that the parties immediately reassess their relationship and advise us of what actions they will be taking to alleviate our concerns.

Please be advised that an unapproved gaming management contract is void. As noted in NIGC Bulletin No. 94-5, management of a gaming operation under an unapproved agreement could result in closure of the operation.

If you have any questions or concerns, please contact Staff Attorney Esther Dittler at (202) 632-7003.

Sincerely,

Penny J Coleman

Penny J. Coleman
Acting General Counsel

cc: Tim Harper, NIGC Region V Director
Kent Richey, Faegre & Benson, LLP