September 1, 2009

Via Facsimile and U.S. Mail

Brenda Shemayme Edwards, Chairperson
Caddo Nation of Oklahoma
P.O. Box 487
Binger, OK 73009
Fax: (405) 247-2005

Frank Shunock, Manager
Gaming Development Company LLC
25780 Liberty Hills Road
South Bloomingville, OH 43152

Re: First Amended Development Agreement and Addendum by and between the Caddo Nation and Gaming Development Company LLC and the Working Draft Management Agreement between the Caddo Nation of Oklahoma and Gaming Development Company LLC

Dear Chairperson Edwards and Mr. Shunock:

The Caddo Nation ("Nation") sent us the following documents for our review:

- Working Draft Management Agreement between the Caddo Nation of Oklahoma and Gaming Development Company LLC ("MA" or "contemplated management agreement") (May 22, 2006);
- First Amended Development Agreement by and between the Caddo Nation and Gaming Development Company LLC ("DA") (May 16, 2006); and
- Addendum and Amendment to First Amended Development Agreement by and between the Caddo Nation and Gaming Development Company LLC (March 28, 2008) ("Addendum"). (Collectively with the DA, the "Amended Development Agreement").

The Nation sent these documents to the National Indian Gaming Commission's ("NIGC") Office of General Counsel for an advisory opinion on the Amended Development Agreement with Gaming Development Company LLC ("GDC") to see if it constitutes a management contract and requires the NIGC Chairman's approval under the Indian Gaming Regulatory Act ("IGRA"). 25 U.S.C. § 2701 *et seq.*

After reviewing the Amended Development Agreement, it is my opinion that it constitutes a collateral agreement to the contemplated management agreement. Further, because the provisions in the Amended Development Agreement are intertwined with the contemplated management agreement, the Amended Development Agreement cannot be separated from it. Due to this interdependence, it appears that the parties intended for the Amended Development Agreement and the contemplated management agreement to operate as one integrated agreement. The integrated agreement includes management functions, and thus it is void without the Chairman's approval. 25 C.F.R. § 533.7.

Management Contracts under IGRA

The authority of the NIGC to review and approve gaming-related contracts is limited by IGRA to management 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-Millenium 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* as "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." *See* 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 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)." *See* 25 C.F.R. § 502.5.

Though NIGC regulations do not define *management*, the term has its ordinary meaning. Management encompasses activities such as planning, organizing, directing, coordinating, and controlling. *NIGC Bulletin No.* 94-5: "Approved Management Contracts v. Consulting Agreements (Unapproved Management Contracts are Void)."A management contract would be any contract that gives a contractor authority to control or direct part of the gaming activity irrespective of whether or not the contractor is named as a manager. *See* FELIX COHEN'S FEDERAL INDIAN LAW § 12.08[3] (Supp. 2005) (*citing First American Kickapoo Operations, LLC v. Multimedia Games, Inc.*, 412 F.3d 1166, 1172 (10th Cir. 2005)).

For example, a contract that allows a contractor "to set up working policy" for a casino or allows that contractor to make management decisions by default connotes a management contract. *See First American Kickapoo*, 412 F.3d at 1173. A tribe could also enter into a consulting agreement with a contractor at one point in time, and enter into a later agreement that binds the tribe to that contractor's decisions. *See United States ex rel. Bernard v. Casino Magic*, 293 F.3d 419, 422-25 (8th Cir. 2005). This scenario would create a management contract out of the consulting agreement. *Id.* Furthermore, agreements that *transfer the right to manage* an Indian gaming operation by virtue of a to-be-determined later agreement are management contracts. *See Machal, Inc. v. Jena Band of Choctaw Indians*, 387 F.Supp. 2d. 659, 668-69 (W.D. La. 2005). That is because such agreements limit a tribe's ability to consider other managers and vests management power outside of the tribe. *Id.*

From these examples we see that a management contract is not necessarily limited to one document. *See* FELIX COHEN'S FEDERAL INDIAN LAW § 12.08[3]. Rather, a management contract can be comprised of several collateral agreements that operate together.

Discussion

The Amended Development Agreement is collateral to a contemplated management contract because the agreements' terms indicate that they are related. But the real issue presented by these agreements is whether they are separable or irretrievably integrated. It is my opinion that these agreements cannot be separated or considered independently. Therefore, they must be considered as one integrated contract that lacks the Chairman's approval.

As evidence of its dealings with GDC, the Nation provided the NIGC with an unsigned, contemplated management agreement. Despite the fact that this document was not finalized, the DA refers to it repeatedly. As part of its duties under the contemplated management agreement, GDC promised to:

- Manage the Nation's gaming facilities to the exclusion of any other potential candidate (MA § 2.1);
- Exercise "the necessary power and exclusive authority to act, through the General Manager, in order to fulfill all of its responsibilities under this Agreement" (MA § 3.1);
- Conduct all gaming business on behalf of the Nation (MA § 3.2.5);
- Handle the hiring and firing of employees (MA § 3.6.1);
- Handle casino marketing (MA § 3.7.1);
- Manage the entire casino budget (MA § 3.9); and
- Handle casino bank accounts and banking (MA § 3.18).

Because the parties never executed, and the Chairman never approved, this contemplated management agreement, it is void. *See* MA § 22. Nevertheless, the parties incorporated the contemplated management agreement by reference into the DA.

The Amended Development Agreement references the contemplated management agreement throughout, and many of its central requirements remain tied to the contemplated management agreement:

- Its definitions of the Effective Date and the Legal Requirements (DA § 1.1, *see also* MA § 1);
- Its limitations of the Management Committee's powers under the DA (DA § 1.9, *see also* MA § 3));
- Its overall duration (DA § 6.1, *see also* MA §§ 2.2, 17);
- Its necessary conditions precedent for permanent financing (DA § 7.1, *see also* MA § 4.2);
- Its restrictions on any collateral casino development (DA § 9.2);
- Its required promises from the Nation that include a binding management agreement (DA § 10.2);
- Its list of potential default events by the Nation (DA § 11.1, *see also* MA § 10.1(iii));
- Its list of potential default events by GDC (DA § 11.3);
- Its allowance for GDC to terminate the Amended Agreement if the management agreement is not NIGC approved (DA § 12.3, *see also* MA § 10.1(vii));
- Its severability clause (DA § 14.15); and
- Its linkage of the Amended Agreement and the management agreement as the Entire Agreement (DA § 14.16, *see also* MA § 18).

Because the Amended Development Agreement's terms incorporate the contemplated management agreement so completely, one cannot exist without the other. It is, by nature, one management contract as the parties appear to have originally intended.

Ample evidence points to this intent. The greatest evidence comes from DA §§ 14.16 and 14.19. In DA § 14.16, the "Entire Agreement" between the parties is listed as including both the Amended Development Agreement and the contemplated management agreement. *Id.* In addition, according to the terms of the Amended Development Agreement, it will not be considered executed and binding until it is approved by the Chairman of the NIGC. *See* DA § 14.19. These provisions mirror the same sections found in the contemplated management agreement. *See* MA §§ 18 and 22.

These provisions are similar to those found in *Catskill Development LLC v. Park Place Entertainment Corp.* No. 06-5860-cv, slip op. at 25 (2nd Cir. Oct. 21, 2008). In that case, the court noted that the agreements "contemplated prior agency approval" and thereby indicated the parties' intent to see the agreements as one package. *Id.* at 25. The similarity in language between the DA and the contemplated management agreement, and the fact that they both state that they require agency approval, invites comparison to the contracts seen in *Catskill*. Based on this, it appears that the parties intended for the Amended Development Agreement and the contemplated management agreement to be viewed as one package needing NIGC approval. Had the parties intended otherwise, they

could have revised the Amended Development Agreement to remove all references to the contemplated management agreement.

Another example of the parties' intent to view the Amended Development Agreement and the contemplated management agreement as one package is the DA's definition for *Effective Date*:

> Five days following the date on which all of the following listed conditions are satisfied . . .
>
> (i) written approval of the Management Agreement is granted by the Chairman of the NIGC and/or the BIA; . . .

See DA § 1.1. Further, the "Legal Requirements" of the deal require:

> Any and all approvals . . . from any Governmental Authority pursuant to Applicable Law necessary for (i) this Agreement, the Management Agreement . . . to constitute a valid, binding obligation . . . and (ii) the design, development . . . construction . . . management and operation of the . . . Gaming Facility. *Id.*

These requirements indicate that approval of both the Amended Development Agreement and the contemplated management agreement were considered necessary to certain provisions and actions in the Amended Development Agreement. The provisions also indicate that the parties anticipated NIGC approval for both the Amended Development Agreement and the management agreement. *See also* DA § 14.16; MA § 18.

The Amended Development Agreement's construction document section provides further evidence of the parties' intent. Under this section, all construction documents must comply with the contemplated management agreement and must conform to insurance requirements laid out in the contemplated management agreement. *See* DA § 4.5; *see also* MA §§ 3.19, 8.15, and 8.26. Additionally, the construction documents section indicates that no building may occur until the Effective Date, which is dependent on the approval of the contemplated management agreement. DA § 4.7; *see also* MA § 1.

Finally, the Amended Development Agreement only requires GDC to assist with permanent financing after the Effective Date and after the satisfaction of all Legal Requirements. *See* DA § 7.1. This section is similar to a provision seen in *MBPI* where the Tribe was required to execute the management agreement in order to receive funding. *See MBPI*, 249 F. Supp. 2d at 906. In that case, the court found such a link to be indicia of interdependence that made the development agreement and management agreement inseparable. *Id.* at 907. The provision seen in the current Amended Development Agreement creates the same indicia of interdependence. Under this agreement, section 7.1(xi) mandates that all Legal Requirements shall be met and it shall require approval of the management contract before any action can occur. *Id.* Thus, it indicates that the

parties intended for the Amended Development Agreement and the management agreement to work together.

One provision regarding the parties' intent, however, suggests the opposite conclusion. Section 1.2 of the DA says:

> The objective of the Tribe and Developer in entering into and performing this Agreement is to provide a legally enforceable procedure and agreement pursuant to which Developer will pay certain fees to the Tribe and will make certain loans to the Tribe, and whereby the Tribe and Developer can proceed as far as reasonably possible with the development of the Gaming Facility prior to the satisfaction of all Legal Requirements so that the Gaming Facility can be opened to the public as soon as possible after the satisfaction of all Legal Requirements . . . . This is intended to be a legally enforceable agreement, independent of the Management Agreement, which shall become effective upon execution and delivery of the parties, and be enforceable between the parties regardless of whether or not this Agreement or the Management Agreement is approved by the Chairman of the NIGC or otherwise fails to satisfy any Legal Requirements.

But this language fails to persuade me of the Amended Development Agreement's independence.

The language presented here is similar to that in *MBPI*. In that case, Kean-Argovitz Resorts failed to have a development agreement honored separately from a voided management agreement. *See MBPI*, 249 F. Supp. 2d at 907. In fact, the court noted a similar independence clause and dismissed its effect on the agreement. *Id.* at 907. That independence clause stated:

> The objective of MBPI and KAR in entering into and performing this Agreement is to provide a legally enforceable procedure and agreement . . . whereby MBPI and KAR can proceed as far as possible with . . . the development of the . . . Gaming Facility . . . . This is intended to be a legally enforceable agreement, independent of the Management Agreement, which shall enter into effect when executed and delivered by the parties, and be enforceable . . . regardless of whether or not this Agreement or the Management Agreement is approved by the Chairperson of the NIGC. *Id.* at 905.

The judge rejected the argument that this clause made the development agreement independent, stating that the terms of the development agreement overall indicated interdependence. *Id.* at 907. The court pointed to numerous provisions that linked the management agreement and development agreement showing that the development agreement's overall contents made the two contracts inseparable. *Id.* at 905-06. Thus, it

concluded that the development agreement was collateral to an unapproved management contract. *Id.* at 907.

Additionally, the Court of Appeals for the Second Circuit dealt with a similar case in *Catskill*. *See* No. 06-5860-cv, slip op. at 24-26. In *Catskill*, the court was asked to treat a development agreement and a loan agreement separately from a voided management agreement. *Id.* at 25. The court declined to consider them separate and valid because the parties' actions indicated that they had always meant the agreements to be viewed together. *Id.* The Second Circuit found numerous provisions in the documents that linked the agreements and indicated that they were meant to be considered together. *Id.* Thus, the court considered the collateral agreements void along with the management contract. *Id.* at 26.

I see no reason to depart from the reasoning presented in *MBPI* and *Catskill*. Because the parties intended for the entire package to receive approval, and interwove the agreements tightly, the Amended Development Agreement cannot be separated from the contemplated management agreement. Together they constitute one package, and that package is a management contract package that has not received the Chairman's approval.

Conclusion

This Amended Development Agreement is void because it is legally inseparable from the unapproved management agreement. Management contracts are void without the Chairman's approval.

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

Sincerely,

Penny J Coleman

Penny Coleman
Acting General Counsel

cc: Richard Grellner, Attorney for the Caddo Nation