



July 3, 2008

Via facsimile: 202.842.8465  
and First Class mail

Kevin Wadzinski, Esq.  
Drinker, Biddle, & Reath LLP  
1500 K St. NW  
Washington, DC 20005

Re: Off-track pari-mutuel wagering agreement between the Quapaw Tribe of Oklahoma (O-Gah-Pah) and RPDC LLC

Dear Mr. Wadzinski:

This is in response to yours of June 12, 2008, seeking review of the June 4, 2008 contract entitled "Agreement Regarding Broadcast and Pari-Mutuel Wagering Rights for Horse Racing" (OTB Agreement) between the Quapaw Tribe of Oklahoma (O-Gah-Pah) (Tribe) and RPDC LLC for off-track betting at the Tribe's new Downstream Casino Resort. You requested an opinion that the OTB Agreement is not a management contract subject to the NIGC Chairman's review and approval under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2711. After careful review, it is my opinion that the OTB Agreement is not a management contract or an agreement collateral to a management contract requiring the Chairman's approval. It is also my opinion that the OTB Agreement does not provide RPDC with a proprietary interest in the Tribe's OTB operation.

#### Authority

The authority of the NIGC Chairman 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. 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 Chairman by 25 U.S.C. § 2711(h).

#### Management Contracts

The NIGC defines 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 defines "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. *NIGC Bulletin* No. 94-5. The performance of any of these activities with respect to all or part of a gaming operation constitutes management for the purpose of determining whether an agreement is a management contract requiring the Chairman's approval.

#### Analysis

Reduced to its essentials, the OTB Agreement requires RPDC to provide the Tribe with the ability to accept off-track pari-mutuel wagers on horse races from established race tracks around the country. Thus, RPDC is obligated to provide:

1. satellite dishes sufficient to allow the Tribe to receive broadcasts of horse races from race tracks nationwide;
2. decoders that will allow the Tribe to receive and display these scrambled broadcasts;
3. tote equipment sufficient to allow the Tribe to accept pari-mutuel wagers on the broadcast races from its customers;
4. technical support and service necessary to keep the equipment in working order; and
5. the settlement of payments with applicable host tracks, horsemen's associations, racing associations, etc.

b4

OTB Agreement ¶¶ 1-2 and Appendices A, B. Nothing in the OTB Agreement, however, gives RPDC any planning, organizing, directing, coordinating or controlling authority over, or responsibility for, the Tribe's off-track betting operation. That authority and responsibility belongs solely to the Tribe.

The Tribe's OTB operation, which you represent will be staffed by employees of the Tribe and not of RPDC, is "solely and fully responsible" for accepting, paying or refunding wagers, notwithstanding any technical or communications errors or race cancellations that may occur. OTB Agreement ¶ 3(b), (d)-(f). Likewise, it is the Tribe that must account for all wagering done at its OTB operation. OTB Agreement, ¶ 3(g). The Tribe's responsibility for managing the OTB operation is shown most clearly by the terms of the 2008 off-track wagering compact between the Tribe and the State of Oklahoma, which the OTB Agreement incorporates by reference and makes applicable to the parties. OTB Agreement, ¶ 10.

Indeed, the OTB agreement only becomes effective the day after the 2008 compact does. OTB Agreement, ¶ 4(a). While the Tribe and the State have both signed the compact, it is awaiting approval at the Department of Interior. But for authorizing off-track wagering at the Downstream Casino Resort, the 2008 compact is all but identical to an OTB compact approved by the Secretary in 2002, which authorizes off-track wagering at the Tribe's Quapaw Casino in Quapaw, Oklahoma. 2002 compact, § 6 and Appendix B. The 2008 amendment authorizes off-track wagering at the Downstream Casino Resort as well. 2008 compact, § 6 and Appendix B; May 8, 2008, Resolution No. 050808-A, approving the off-track wagering compact between the Quapaw Tribe of Oklahoma (O-Gah-Pah) and the State of Oklahoma. As such, I assume for the purpose of this opinion that the 2008 compact will become effective in its present form, either by signature or by operation of law, which I understand will occur on July 22, 2008, in the absence of any action by the Secretary. 25 U.S.C. § 2710(d)(8)(C).

The 2008 compact places upon the Tribe a series of detailed obligations for the operation, not to mention the regulation, of its OTB facility. For example, the compact requires to Tribe to have a key employee present at the OTB operation at all times during wagering hours, and the Tribe must give the names of all such responsible employees to the tribal gaming commission. 2008 compact, Appendix A, ¶ B2. The compact requires the Tribe to decide who is and is not eligible to wager at the operation by maintaining and enforcing a list of barred individuals. 2008 compact, § 9, ¶ b. The compact also specifies detailed procedures for operating, including opening and closing of terminals for clerks to accept wagers, 2008 compact, Appendix A, ¶ D; for filling out W-2G forms, which requires the participation of both a clerk and a supervisor, 2008 compact, Appendix A, ¶ G, and for producing detailed reports on daily reconciliation, activity at each terminal, wagers, etc. 2008 compact, Appendix A, ¶ L.

Given all of this, it is my opinion that the OTB Agreement is not a management contract or an agreement collateral to a management contract that requires the Chairman's approval under IGRA. I understand this to be consistent with the intent of the parties as the OTB Agreement states:

Both Parties agree that neither the rights granted nor the services offered hereunder are such as to, and are not intended to, give the Disseminator [RPDC] a proprietary interest in the gaming operations of the Resort, and the Parties further agree that this Agreement is not intended as a management agreement for purposes of the IGRA.

OTB Agreement, ¶ 6.

That the odds and payouts the Tribe is obligated to give and pay its patrons, OTB Agreement, ¶ 3(d), are not calculated at the OTB operation does not change this result, for RPDC does not control odds and payouts either. These are, rather, controlled at the host track, and the arrangement is simply a reflection of the nature of off-track pari-mutuel wagering.

In pari-mutuel wagering generally, all of the wagers of a particular kind – *e.g.* to win, to place, etc. – are aggregated into a pool at the host track. After applicable taxes and fees are deducted, odds and payout amounts for each horse are calculated simply by dividing the amount in the pool by the amount wagered on the horse. For example, assume there is \$10,000 in the win pool for a particular race, after deductions. If bettors wagered a total of \$5,000 on horse #1, the odds on the horse are 2 – 1. If the horse wins, it would pay \$2 for every \$1 wagered. If bettors wagered a total of \$2,000 on horse #1, its odds would be 5 – 1.

With off-track pari-mutuel wagering, all wagers are aggregated at the host track from all participating remote locations – the more than \$5 million wagered on Big Brown at the most recent Belmont Stakes, for example, did not all come from fans in attendance. Thus, when the OTB Agreement says that odds and payouts “will be computed off-site in accordance with the data available for computation at the applicable host track,” OTB Agreement, ¶ 3(d), I understand it to refer to this basic arrangement. In short, the OTB Agreement does not mean that RPDC determines, controls or calculates the odds offered to the Tribe's patrons. Those are controlled by the totalizator at the track where a particular

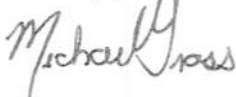
race occurs, and RPDC effectively serves as the conduit through which bets at the Tribe's OTB operation, and all other participating RPDC locations, flow.

It is likewise my opinion that the OTB Agreement does not give RPDC any proprietary interest in the Tribe's OTB operation. The OTB Agreement provides that RPDC will receive as compensation [redacted] out of which it is obligated to pay [redacted] to the Thoroughbred Racing Association of Oklahoma OTB Agreement, ¶ 5. After that payment, the Tribe and RPDC will receive roughly equal percentages of the [redacted] depending on the amount of handle, well within what this office understands to be the usual range of fees for providing OTB hub services. OTB Agreement, Appendix B. There is nothing about its compensation that suggests the OTB Agreement gives RPDC an ownership interest in the Tribe's gaming operation. b4

In sum, it is my opinion that the OTB Agreement is not a management contract or a collateral agreement to a management contract within the meaning of 25 U.S.C. 2711 and that the OTB Agreement does not give RPDC a proprietary interest in the Tribe's gaming operation. This opinion is valid only if the 2008 compact between the Tribe and the State of Oklahoma goes into effect in its current form and OTB Agreement remains in its current form.

As is our practice, I will forward this agreement to the Office of Indian Gaming for its review under 25 U.S.C. § 81. If you have any questions, please feel free to call Staff Attorney Rebecca Chapman at (202) 632-7003. I wish the Tribe every success in its new venture.

Very truly yours,



Michael Gross  
Associate General Counsel, General Law  
Office of the General Counsel

cc: John Berrey, Chairman, Quapaw Tribe of Oklahoma (O-Gah-Pah)  
(via First Class mail and fax: 918.542.4694)  
George Skibine, Director, Office of Indian Gaming (w/ encl.)