September 2, 2009

David K. Sprague, Tribal Chairman
Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians
Gun Lake Tribe
P.O. Box 218
Dorr, MI 49323

Dear Chairman Sprague:

This letter is written in response to your request to review the Third Amended and Restated Development Agreement between the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians ("Tribe") and MPM Enterprises L.L.C. ("Developer") dated May 21, 2009; the Second Amended Interim Promissory Note dated May 21, 2009, made by the Tribe, as maker, and payable to the Developer, as payee; and the Amendment and Ratification of Amended and Restated Security and Reimbursement Agreement, dated May 21, 2009, between the Tribe and Developer (hereinafter referred to collectively as "the Agreements"). The purpose of our review is to determine whether the Agreements constitute a management contract or collateral agreement to a management contract and therefore are subject to the Chairman's review and approval under the Indian Gaming Regulatory Act ("IGRA"). After careful review, it is my opinion that the Agreements do not constitute a management contract.

Authority

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." 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)." 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)." Accordingly, the definition of *primary management official* is "any person who has the authority to set up working policy for the gaming operation." 25 C.F.R. § 502.19(b)(2). Further, 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 an employee's job title. *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 – a *de jure* manager – or recommends discretionary actions that are implemented by others possessing actual authority to control employer policy – a *de facto* manager. *Id.* at 1399 *citing N.L.R.B. v. Yeshiva*, 444 U.S. 672, 683 (1980).

If a contract requires the performance of any management activity with respect to all or part of a gaming operation, the contract is a management contract within the meaning of 25 U.S.C. § 2711 and requires the NIGC Chairman's approval. Management contracts not approved by the Chairman are void. 25 C.F.R. § 533.7.

Previous Submissions

In conducting the review we looked at the Amended and Restated Development Agreement included with a previous submission. In doing so, I note, again, that the Third Amended and Restated Development Agreement defines "Furnishings and Equipment" to include fixtures and is the same definition used in the Amended and Restated Development Agreement submitted to us for review in 2003. The definition of "Furnishings and Equipment" still includes fixtures. I assume that you know that fixtures to real property that is held in trust for the benefit of an Indian tribe cannot be used as collateral for a lien or security interest and that there is no contrary intent to the section. Still, the definition could more clearly state this.

Other Concerns

I would like to note that the Third Amended and Restated Development Agreement Section 14.3(iii)(h) provides that the Developer will [ ] the establishment of a tribal court and that the tribal judge shall be mutually agreed upon by Developer and the Tribe. Although not indicative of management, the handing over or sharing of a tribe's sovereign authority to select and seat a tribal judge and [ ] is of concern. While I understand the Developer's concerns regarding the potential actions of a tribal court, [ ] and joint selection of a tribal judge casts doubt upon the independence of the tribal court and its ability to rule on matters concerning both the Tribe and the Developer. It seems to me that the Devleoper's concerns regarding the tribal court can be dealt with contractually without requiring the Tribe to compromise its sovereignty. The Chairman will consider this question further when reviewing any management contracts that are submitted.

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After careful review, it is my opinion that the Agreements do not constitute a management contract and therefore do not require the approval of the Chairman. We will forward a copy of the Agreements to the NIGC Contracts Department for its review in connection with any management contracts that are submitted for approval between the Tribe and Developer. In addition, we will forward a copy of the Agreements to Paula Hart of the Bureau of Indian Affairs Office of Indian Gaming for their review.

If you have any questions or concerns, please call Melissa Schlichting at (202) 632-7003.

Sincerely,

Penny J Coleman

Penny J. Coleman
Acting General Counsel

cc: Paula Hart, Office of Indian Gaming, Bureau of Indian Affairs (w/Enclosures)
Elaine Saiz, Director of Contracts, NIGC (w/Enclosures)