October 30, 2009

Kent Richey
Faegre & Benson LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402

Re: Machine lease agreement between the Otoe-Missouria Development Authority and TW Gaming LLC (December 16, 2006); development agreement between the Otoe-Missouria Development Authority and TW Gaming LLC (December 16, 2006)

Dear Mr. Richey:

This letter memorializes our conversation on September 4, 2009, regarding necessary changes to two agreements made between the Otoe-Missouria Development Authority ("Tribe") and TW Gaming LLC ("TW"). In that phone call, you agreed to revise the following agreements that TW submitted and are under review:

(1) A ,machine lease agreement between the Otoe-Missouria Development Authority and TW Gaming LLC (December 16, 2006) ("MLA"), and

(2) A development agreement between the Otoe-Missouria Development Authority and TW Gaming LLC (December 16, 2006) ("DA").

As you are aware, the Office of General Counsel opines on these sorts of agreements to determine if they are management contracts under the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq*., or if they violate IGRA's sole proprietary interest mandate, 25 U.S.C. § 2710(b)(2)(A).

As part of our conversation, I mentioned three areas that require revision to avoid potential IGRA violations: MLA § 2.3; DA § 6.3; and DA § 13.1(b). These areas permit TW to manage parts of the Tribe's gaming operation.

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. *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

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whether an agreement for the performance of such activities is a management contract requiring NIGC approval. *Id.*

Though NIGC regulations do not define *management*, the term has its ordinary meaning. 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)).

Section 2.3 thus transforms the MLA into a management contract because it allows TW to "stand in the Tribe's shoes" if it fails to perform certain obligations. MLA § 2.3 states:

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The Tribe's obligations under the MLA are listed in sections 3-9 as follows:

- Selecting machines (MLA § 3);
- Signing for, and certifying that, received equipment is satisfactory (MLA § 3);
- Use of leased machines (MLA § 5.1);
- Maintain server and accounting system (MLA §§ 5.1, 5.3);
- Maintain machines (MLA § 5.1);
- Prevent liens on machines (MLA § 6.2);
- Forego alterations on machines or risk them becoming property of the manufacturer (MLA § 6.3);
- Return machines when done (MLA § 7.1);
- Bear risk of loss on machines (MLA § 8.1);
- Insure the machines (MLA § 8.3);
- Pay taxes and fees when needed (MLA § 9.1).

Under MLA § 2.3, TW could perform any of the obligations listed in sections 3-9. These obligations are managerial functions of the gaming operation, and MLA § 2.3 grants TW the power to execute them. Thus, MLA § 2.3 transforms the contract into a management contract. Absent approval of a management contract by the Chairman of the National

Indian Gaming Commission, the contract is void. 25 C.F.R. § 533.7. Therefore, the parties should remove MLA § 2.3.

Further, the DA contains two areas that require revision for the same reason, DA §§ 6.3, 13.1(b). These sections also permit TW to control certain management functions.

Section 6.3 of the DA grants TW a security interest in Gross Revenues "to secure payment of the Development Fee." The DA defines *Gross Revenues* as: "all revenue of the Gaming Business other than proceeds of borrowing and proceeds from insurance . . . less all amounts paid out as prizes." DA, Art. 1. This definition does not segregate operating expenses from gross revenues. Thus TW, by exercising its rights in the security interest, can decide how and when operating expenses are paid. A party that controls gross revenue this way can potentially control everything about the gaming facility by allocating or putting conditions on the payment of operating expenses. In sum, controlling payments and operating expenses permits TW to generally control the flow of the gaming operation funds. This action would constitute management and would violate IGRA without the approval of the Chairman of the National Indian Gaming Commission. Therefore, the parties must revise this language.

Section 13.1(b), part of the dispute resolution section of the DA, permits TW to manage parts of the gaming operation and lacks protection for operating expenses in default. This section states:

> *Limitation on Recourse*. Any award or judgment against the Tribe or a Tribal Party for money with respect to a Claim may be enforced and collected only as against the assets and revenues of the Authority that are used in connection with or derived from the Casino Facility.

The description "assets and revenues" fails to protect operating expenses and could allow TW or another party to encumber operating expenses. Such an encumbrance allows someone outside the Tribe to potentially decide how and when operating expenses are paid and generally control the flow of casino funds. Because the ambiguity of this section allows someone outside the Tribe to potentially control part of the gaming operation, it constitutes management. Therefore, the parties must revise this language.

Please revise these sections by November 30, 2009, and submit the new MLA and DA for our review. If you have any questions, please contact the Office of General Counsel at (202) 632-7003.

Sincerely,

Rebecca Chapman
Staff Attorney

cc: John Shotton, Chairman
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