March 10, 2011

VIA FACSIMILE AND REGULAR MAIL

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Re: Wyandotte Nation Agreements with Canton Park Financial LLC, Kansas Gaming Ltd., and AHG Group LLC.

Dear Chiefs Bearskin and Friend and Messrs. Hitchcock, Sawruk, Ginsburg:

On January 22, 2008, National Indian Gaming Commission (NIGC) field investigators forwarded for review a package of six agreements between the Wyandotte

Nation of Oklahoma (Wyandotte), Kansas Gaming Ltd. (Kansas Gaming), and AHG Group LLC. By letter dated October 30, 2009, the former Acting General Counsel advised the parties of concerns that some of the terms constituted management and advised the parties to craft limiting language. Further, the letter stated that the development agreement evidenced Kansas Gaming's proprietary interest in Wyandotte's gaming activity contrary to IGRA.

In response, the parties modified the agreements to address the management concerns identified. The Wyandotte Nation also informed us that the loan agreement had been superseded by permanent financing with Canton Park Financial LLC and later refinanced with Great Western Bank. This letter, however, concerns only the agreements identified in the October 30, 2009 letter , and does not address any of the agreements with Great Western Bank.

The modifications to the agreements included the removal of all provisions setting out the appointment of a receiver as a specific remedy upon default. We note that the agreements still provide Kansas Gaming with the right to exercise and enforce any or all rights and remedies available upon default to a secured party under the UCC and any or all other rights or remedies available under law. Those rights and remedies may include the appointment of a receiver. However, by amending the agreements to specifically remove provisions allowing for the appointment of a receiver upon default, the parties' intent that a receiver not be an available remedy is clear.

Further, while the definition of *Pledged Revenues* includes the gross gaming revenue, the agreements make clear that the payment of operating expenses has priority over all other payments. Pre-Development Note Section 2.b, Temporary Facility Note Section 2.b, Development Agreement Section 5.5. As such, all of the concerns regarding management raised in the October 30, 2009 letter have been sufficiently addressed by the parties.

As to the sole proprietary interest issue, by letter dated September 15, 2010, Wyandotte stated that

> [o]n several occasions in the past, the Nation has explained that the revenues received by Kansas Gaming in the Development Agreement were based upon the historical relationship between the parties. As has previously been expressed by the Nation, Kansas Gaming has no managerial or ownership interest in the Wyandotte casino. The Nation would not knowingly enter into any agreement that it believed would violate any provision contained in IGRA.

Accordingly, the Wyandotte Nation stated that the parties would not be submitting any proposed changes to the development fee. Kansas Gaming agreed, stating that the development fee was based on the historical relationship of the parties and the level of risk compared to other projects. Consistent with Wyandotte's view, Kansas Gaming

stated that it "does not and cannot act in any management capacity on the project and does not and cannot have an ownership interest in the project."

By contrast, the Wyandotte Nation Gaming Commission stated that it believed that "Kansas Gaming's contractual interest in [redacted]% of monthly gross revenue from the facility continues to violate IGRA's and the Nation's ORDINANCE's" sole proprietary interest requirement and that the agreement threatens the economic stability and political integrity of the Wyandotte Nation. b4

Based on the amendments and our better understanding of the agreements, it is my opinion that the six agreements, as amended, do not constitute management contracts and do not grant Kansas Gaming a proprietary interest in Wyandotte's gaming activity.

As part of our analysis, we reviewed the audited financial statements from 2009 and 2010. Those statements show that the development fee for 2009 and 2010 comprises a significantly smaller amount of net revenue than described in the October 30, 2009 letter. Further, we closely examined the risk Kansas Gaming assumed relating to Wyandotte's efforts to lawfully game on the Shriner Tract, a parcel of land in trust for Wyandotte in downtown Kansas City where it currently conducts gaming.

Wyandotte purchased the parcel in 1995 and applied to the Department of the Interior in 1996 to have the land placed in trust for gaming. It then spent the next 13 years in litigation to establish its right to game there, all of which was funded by Kansas Gaming.

Shortly after DOI published its intent to take the land into trust, two Kansas tribes and the Governor of Kansas brought suit against the DOI Secretary challenging the fee-to-trust decision. Wyandotte intervened in the case. *Sac & Fox Nation v. Babbitt*, 92 F. Supp. 2d 1124, (D. Kan. 2000). Wyandotte argued that the parcel was contiguous to its reservation and was therefore Indian land upon which it could game under the IGRA. *Id.*; 25 U.S.C. § 2719(a)(1). The Tenth Circuit, however, determined that the land was not contiguous to reservation land. *See Sac and Fox v. Norton*, 240 F. 3d 1250 (10th Cir. 2001). The court remanded the case for consideration of whether settlement act funds were used to purchase the parcel such that it might qualify as land taken into trust as part of a settlement of a land claim and thus land upon which Wyandotte could game. *Id.*; *See* 25 U.S.C. § 2719(b)(1)(B)(i). This question led to many years of litigation in which the Kansas tribes and Governor challenged a Department of Interior decision finding that settlement act funds were used to purchase the parcel. That case was fully and finally resolved in Wyandotte's favor in 2010 by the Tenth Circuit. *See Sac and Fox v. Salazar*, 607 F.3d 1225 (10th Cir. 2010).

While the litigation was working its way through the courts, in 2004 NIGC Chairman Hogen disapproved Wyandotte's site-specific gaming ordinance because he determined that the parcel was not Indian land upon which it could lawfully game. State agents then raided the Wyandotte casino and shut it down. Wyandotte sued the state, and ultimately prevailed before the Tenth Circuit. *See Wyandotte Nation v. Sebelius*, 443

F.3d. 1247 (10th Cir. 2008). Meanwhile, Wyandotte administratively appealed the Chairman's ordinance decision to the full Commission, which upheld the Chairman's decision. *See In Re: Wyandotte Nation Amended Gaming* Ordinance, Final Decision and Order, National Indian Gaming Commission, September 10, 2004. Wyandotte then appealed that decision to federal court, and won. *See Wyandotte Nation v. NIGC*, 437 F. Supp. 2nd 1193 (D. Kan. 2006).

In summary, Kansas Gaming took on highly unusual, significant risks associated with this project. It funded over a decade of litigation in several forums, including three appeals to the Tenth Circuit, on behalf of Wyandotte. In doing so, it assumed substantial risk that the Wyandotte would not prevail in its effort to establish gaming on the Shriner Tract. If a court ultimately found that the parcel was not land lawful for gaming, Wyandotte was not obligated to repay the millions of dollars expended by Kansas Gaming. See Development Agreement §§ 2.2.4, 5.5, 6.2.1, 12.8.8.1, 12.8.8.2; Tribal Agreement Section 11; Security Agreement Section 25.

Based on the specific facts of this situation, the development fee is not excessive in light of the substantial amount of money Kansas Gaming advanced for development and the risk assumed that its loans and fees would only be repaid if the casino actually opened.

If have you any questions, please contact Staff Attorney Dawn Sturdevant Baum at (202) 632-7003.

Sincerely,

Lawrence S. Roberts
General Counsel