JUN 2 2005

Mike Hammond
Account Executive
Lieberman Gaming Company
2535 Greenbrier Road
Green Bay, WI 54311

Vicky Newland
Gaming Commission Administrator
Bay Mills Gaming Commission
12140 W Lakeshore Drive
Brimley, MI 49715

Robert Gravelle
Director of Slots
Bay Mills Indian Community
12140 W Lakeshore Drive
Brimley, MI 49715

Dear Mr. Hammond, Ms. Newland, and Mr. Gravelle:

In a letter dated November 24, 2004, Mr. Hammond requested the National Indian Gaming Commission (NIGC) review an unsigned class III game machine trial and purchase contract (Agreement) between the Bay Mills Indian Community (Tribe) and Lieberman Companies, Inc. (LCI). The NIGC reviews these agreements pursuant to the requirements of the Indian Gaming Regulatory Act (IGRA). The purpose of our review is to determine whether the documents constitute a management contract or collateral agreement to a management contract and therefore subject to our review and approval under the IGRA.

We conclude that the Agreement does not constitute a management contract and therefore does not require the approval of the NIGC's Chairman. The payment provisions if the machines are not purchased after the trial period do, however, run afoul of the requirement that the Tribe have the sole proprietary interest in the gaming operation.

Authority

The authority of the NIGC to review and approve gaming related contracts is limited by the IGRA to management contracts and collateral agreements to management contracts. 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 NIGC pursuant to the IGRA. 25 U.S.C. § 2711(h).

Management Contracts

The NIGC has defined 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 has defined "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. *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 whether an agreement for the performance of such activities is a management contract requiring NIGC approval.

Proprietary Interest

Among IGRA's requirements for approval of tribal gaming ordinances is that "the Indian tribe will have the sole proprietary interest and responsibility for the conduct of any gaming activity." 25 U.S.C. § 2710(b)(2)(A). Under this section, if any entity other than a tribe possesses a proprietary interest in the gaming activity, gaming may not take place. The NIGC, in its regulations, also requires that all tribal gaming ordinances include such a provision. 25 CFR § 522.4(b)(1).

"Proprietary interest" is defined in Black's Law Dictionary, 7th Edition (1999), as "the interest held by a property owner together with all appurtenant rights . . . ." An owner is defined as "one who has the right to possess, use and convey something." Id. "Appurtenant" is defined as "belonging to; accessory or incident to. . . ." Id. Reading these definitions together, proprietary interest creates the right to possess, use and convey something.

Although there are no cases directly on point, courts have defined proprietary interest in a number of contexts. In a criminal tax case, an appellate court discussed what the phrase proprietary interest meant, after the trial court had been criticized for not defining it for jurors, saying:

> It is assumed that the jury gave the phrase its common, ordinary meaning, such as 'one who has an interest in, control of, or present use of certain property.' Certainly, the phrase is not so technical, nor ambiguous, as to require a specific definition.

Evans v. United States, 349 F.2d 653 (5th Cir. 1965). In another tax case, Dondlinger v. United States, 1970 U.S. Dist. LEXIS 12693 (D. Neb. 1970), the issue was whether the plaintiff had a sufficient proprietary interest in a wagering establishment to be liable for taxes assessed against persons engaged in the business of accepting wagers. The court observed:

> It is not necessary that a partnership exist. It is only necessary that a plaintiff have some proprietary interest. . . One would have a proprietary interest if he were sharing in or deriving profit from the club as opposed to being a salaried employee merely performing clerical and ministerial duties. [emphasis added]

Id.

An additional aid to statutory interpretation includes the legislative history of the statute. The legislative history of the IGRA with respect to "proprietary interest" is scant, stating only that, "the tribe must be the sole owner of the gaming enterprise." S. Rep. 100-446, 1988 U.S.C.C.A.N. 3071-3106, 3078. "Enterprise" is defined as "a business venture or undertaking" in Black's Law Dictionary, 7th Edition (1999). Despite the brevity of this information, the drafters' concept of "proprietary interest" appears to be consistent with the ordinary definition of proprietary interest, while emphasizing the notion that entities other than tribes are not to share in the ownership of gaming enterprises.

Secondary sources also shed light on the definition of "proprietary interest." In a chapter on joint ventures in American Jurisprudence, 2nd Edition, the difference between having a proprietary interest and being compensated for services is discussed in the context of determining when a joint venture exists.

> Where a contract provides for the payment of a share of the profits of an enterprise, in consideration of services rendered in connection with it, the question is whether it is merely as a measure of compensation for such services or whether the agreement extends beyond that and provides for a proprietary interest in the subject matter out of which the profits arise and for an ownership in the profits themselves. If the payment constitutes merely compensation, the parties bear to each other, generally speaking, the relationship of principal and agent, or in some instances that of employer and employee [footnote omitted]. On the other hand, a proprietary interest or control may be evidence of a joint venture. [footnote omitted] [emphasis added]

46 Am. Jur. 2d *Contracts* § 57.

Consequently, if a joint venture is found to exist it would be further evidence that the Tribe did not hold the sole proprietary interest in the gaming operation.

Finally, the preamble to the NIGC's regulations provides some examples of what contracts may be inconsistent with the sole proprietary interest requirement, but then concludes that "[i]t is not possible for the Commission to further define the term in any meaningful way. The Commission will, however, provide guidance in specific circumstances." 58 Fed. Reg. 5802, 5804 (Jan. 22, 1993).

Determination

After careful review, we have determined that the Agreement is not a management contract and therefore does not require the approval of the Chairman.

The Agreement does raise sole proprietary interest concerns. The machines will undergo a 90 day trial period at Bay Mills Casino. Agreement § 1.1. If the machines meet or exceed a standard set by the parties, the Tribe will purchase the machines; if not, the Tribe will so notify LCI. §§ 1.5-1.6. [redacted] 64

[redacted]

[redacted] This is incompatible with the IGRA requirement that the Indian tribe have the sole proprietary interest in the gaming operation. 25 U.S.C. §§ 2710(b)(2)(A). We suggest the parties reconsider this provision before finalizing the contract. 64

We will forward a copy of this Agreement to the Bureau of Indian Affairs for its review.

If you have any questions or concerns, please call me or Staff Attorney Andrea Lord at (202) 632-7003.

Sincerely,

Penny J. Coleman

Penny J. Coleman
Acting General Counsel

cc: Office of Indian Gaming Management w/incoming Agreement