DEC 9 2005

VIA FACSIMILE

Jereldine Redcorn
Caddo Nation Tribal Council
Oklahoma City Representative
Fax: (405) 573-2912

Re: Letter Agreement between the Caddo Nation and Gaming Development Company, L.L.C.

Dear Ms. Redcorn:

On December 5, 2005, you submitted a Letter Agreement, dated June 17, 2004, between the Chairman of the Caddo Nation of Oklahoma ("the Nation") and Gaming Development Company, L.L.C. ("GDC") and requested our review. Your submission was not accompanied by a resolution of the appropriate tribal body authorizing the Nation's Chairman to enter into this agreement. Consequently, it is unclear whether this agreement is in fact binding upon the Nation. Further, the Nation's attorney, Mr. Rick Grellner, has represented that this agreement is not binding upon the Nation, as it lacks authorization from the Nation's Tribal Council.

Nonetheless, we will review the agreement and provide you with our conclusions. The purpose of our review is to determine whether the agreement constitutes a management contract or a collateral agreement to a management contract that is subject to the Chairman of the National Indian Gaming Commission's review and approval under the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq.*

The agreement states that GDC "proposes to develop, construct and equip a Gaming Facility of approximately [ ] for the Caddo Nation of Oklahoma." Letter Agreement at 1. GDC will provide financing for the facility, build the facility, and provide any additional assistance necessary. *Id.*

64

Because of the agreement fails to set forth in detail the services provided by GDC, we cannot ascertain at this time whether it constitutes a management contract or a collateral agreement to a management contract that requires the Chairman's approval. However, should the Nation consider and/or enter into further agreements with GDC, we recommend that the Nation submit them to us so that we may make such determinations. *See* NIGC Bulletin 93-3, Submission of Gaming-Related Contracts and Agreements for Review. In any event, for the reasons detailed herein, we are concerned the agreement

may evidence GDC's proprietary interest in the Nation's gaming activity. Such a proprietary interest would be contrary to IGRA and National Indian Gaming Commission (NIGC) regulations. *See* 25 U.S.C. § 2710 (b)(2)(A); 25 C.F.R. § 522.4(b)(1).

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.[1] 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).

1. Management Contracts

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. A "collateral agreement" is "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. *Id.*

The Supreme Court has held that 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 the specific job title of the position held by the employee. *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 – thus being a *de jure* manager – or recommends discretionary actions that are implemented by others possessing actual authority to control employer policy, thus being a *de facto* manager. *Id.* at 1399 (citing *N.L.R.B. v. Yeshiva*, 444 U.S. 672, 683 (1980)).

[1] However, certain gaming-related agreements, such as consulting agreements or leases or sales of gaming equipment, should be submitted to the NIGC for review. *See NIGC Bulletin No. 93-3.*

2. 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. NIGC regulations also require that all tribal gaming ordinances include such a provision. *See* 25 C.F.R. § 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. . . <u>One would have a proprietary interest if he were sharing in or deriving profit from the club</u> as opposed to being a salaried employee merely performing clerical and ministerial duties.

Id. (emphasis added).

The legislative history of IGRA is an additional aid for interpreting the statute's mandate that a tribe "have the sole proprietary interest and responsibility for the conduct of any gaming activity." 25 U.S.C. § 2710(b)(2)(A). 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 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]

46 Am. Jur. 2d *Contracts* § 57 (emphasis added).

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

Finally, the preamble to NIGC 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

As set forth above, due to the vague statements in the Letter Agreement regarding the services provided by GDC to the Nation, it is not possible to determine at this time whether the agreement constitutes a management contract. Therefore, as noted above, should the Nation consider and/or enter into further agreements with GDC or supplement the present agreement, please forward such agreements and supplements to us for our review and determination. In this regard, we note that the Letter Agreement references certain "transaction agreements" between the parties. *See* Letter Agreement at 3. For the purposes of determining whether the Letter Agreement and its collateral agreements

constitute a management agreement, please forward us all of the transaction agreements and all other related agreements at your earliest convenience.

Nevertheless, we are concerned that the Letter Agreement's fee arrangement may violate the sole proprietary interest mandate of IGRA or may be indicative of a management relationship. GDC commits to loaning the Nation[ ] *See* Letter Agreement at 2. Pursuant to the agreement, the Nation is obligated to repay this loan in monthly payments over[ ]years after the gaming facility opens to the public. *Id.* In addition to the repayment of project costs[ ] *See* Letter Agreement at 2. b4

[ ] potentially could provide GDC an ownership interest in the Nation's gaming operation, because[ ] Also, such a combined fee could indicate the existence of a management relationship. *See NIGC Bulletin No. 94-5; First American Kickapoo Operations, L.L.C. v. Multimedia Games, Inc.*, 412 F.3d 1116, 1173 (10th Cir. 2005) (finding that a equipment lease fee of 40% net revenue was a feature of a management contract); *Machal, Inc. v. Jena Band of Choctaw Indians*, 2005 WL 1711983 at *7 (W.D. La. July 21, 2005). Management contracts approved by the Chairman of the NIGC have a fee cap set at thirty percent (30%) of net revenues or forty percent (40%) of net revenues if the capital investment required and the gaming operation's income projections require the higher fee. *See* 25 U.S.C. §§ 2711(c)(1)-(2). IGRA defines net revenues as: "gross revenues of an Indian gaming activity less amounts paid out as, or paid for, prizes and total operating expenses, excluding management fees." *See* 25 U.S.C. § 2703(9) (emphasis added). b4

Here, the agreement gives GDC[ ] b4

[ ] The agreement fails to define "non-gaming revenue." Thus, we cannot determine what "non-gaming revenue" entails. Consequently, in light of such a combined fee, it appears that the majority of the benefit of the Nation's operation may be conveyed to GDC.

[2] The Letter Agreement references certain "transaction agreements," which were not provided to us for our review. Consequently, it is unclear what period of time GDC will receive[ ] Those referenced "transaction agreements" should be submitted to us for our determination whether the Letter Agreement and its related agreements constitute a management contract, requiring the NIGC Chairman's approval, and/or violate the sole proprietary interest mandate of IGRA. b4

Finally, the Letter Agreement references certain "transaction agreements," which were not provided to us for review. The agreement notes that such transaction agreements further detail the division of revenues between GDC and the Nation and each party's control over such revenues. *See* Letter Agreement at 3. For example, the transaction agreements allegedly specify an "account for Borrower's profit participation, and an account for the Tribe's share of profits." *Id.* Tribes, not developers or vendors, are supposed to be the primary beneficiaries of Indian gaming. *See* 25 U.S.C. §§ 2702(2) and 2710(b)(2)(A). Accordingly, references to the Nation's "profit participation" and "share of profits" cause us grave concern, as they indicate that the parties in this instance may be entering into a joint venture or partnership, which is an impermissible arrangement under IGRA.

If you have any questions, please contact Jo-Ann Shyloski, Senior Attorney, at (202) 632-7003.

Sincerely,

Penny J. Coleman

Penny J. Coleman
Acting General Counsel

cc via facsimile: Chairman LaRue Martin Parker
Fax: (405) 656-2892

Rick Grellner, Attorney for the Caddo Nation
Fax: (405) 602-0990