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VIA FACSIMILE AND U.S. MAIL

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Re: Development Agreement between the Caddo Nation of Oklahoma and Onnam Native American Enterprises, LLC

Dear Mr. Grellner, Ms. Flipping and Ms. Williamson:

By letter received August 24, 2006, on behalf of the Caddo Nation of Oklahoma ("Nation"), you submitted for our review the Development Agreement ("Agreement") between the Nation and Onnam Native American Enterprises, LLC ("Onnam"). Additionally, on January 12, 2007, you provided via email two documents collateral to the Agreement, namely the Interim Promissory Note ("Note") and the Security Agreement ("Security Agreement"). The purpose of our review is to determine whether the Agreement, Note and Security Agreement, individually or collectively, constitute a management contract or collateral agreements to a management contract and therefore are subject to our review and approval under the Indian Gaming Regulatory Act ("IGRA"). As explained below, the Office of General Counsel is concerned that the Agreement, Note and Security Agreement constitute a management contract subject to review and approval by the Chairman of the National Indian Gaming Commission ("NIGC"). Further, we are concerned that these documents evidence a proprietary interest in the Nation's gaming activity, in violation of the "sole proprietary interest" clause of the IGRA, 25 U.S.C. § 2710(b)(2)(A), its implementing regulations and the Nation's gaming ordinance, Gaming Ordinance of the Caddo Nation of Oklahoma 2006, Section 104.

Background

The Agreement, Note and Security Agreement concern the development of a gaming facility and related resort facilities. Onnam, the developer, will furnish technical experience and expertise for the development and design of the gaming and resort facilities. Onnam will loan the Nation funds for the initial development of the facilities, the Transition Loan, in the amount of [redacted] The Transition Loan is evidenced in the Note and collateral securing the Note is detailed in the Security Agreement.

Onnam will arrange for a third party lender to loan the Nation funds for the actual costs of construction of the facilities, or Onnam may advance directly to the Nation all or any portion of the funds necessary for the actual costs of construction. The loans or advances for the actual costs of construction shall constitute the Facility Loan, to be evidenced in the Facility Note, the total amount of which is not to exceed [redacted]

Onnam shall be paid [redacted] Additionally, Onnam shall be paid [redacted] thus, Onnam's [redacted]

The term of the agreement is from [redacted] which is [redacted] years from the date on which the Nation signed a compact with the State of Oklahoma ("State").[1]

Authority

The authority of the NIGC to review and approve gaming related agreements 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

After reviewing the Agreement, Note and Security Agreement, we conclude that these documents constitute a management contract subject to our review and approval.

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[1] Section 2.15 of the Agreement states that the term of the Agreement "shall run for a period commencing upon the date of its execution and ending upon the date that is [redacted] years from the date on which the Nation signs a compact with the State." The date of execution is somewhat unclear from the agreement; however, the front page of the agreement lists a date of July 17, 2006, and this date has been used to evaluate its term. Additionally, the Nation signed a compact with the State on June 2, 2006.

Applicable Law

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.

Analysis

We are concerned that Section 2.5 of the Security Agreement allows Onnam potentially to assume management of the Nation's gaming operation. Specifically, Section 2.5 states:

> If [the Nation] at any time fails to perform or complete any of the foregoing agreements, [Onnam] shall have (and [the Nation] hereby grants to [Onnam]) the right, power and authority (but not the duty) to perform or complete such agreement on behalf and in the name, place and stead of [the Nation] (or, at [Onnam's] option, in [Onnam's] name) and **to take any and all other actions which [Onnam] may reasonably deem necessary to cure or correct such failure** . . .(emphasis added).

Under this provision, Onnam could step in and direct or control the gaming operation if Onnam deems it necessary to do so. Directing or controlling the gaming operation would constitute management, requiring NIGC approval of the contract.

Proprietary Interest

After reviewing the Agreement, Note and Security Agreement, we are concerned that these documents allow Onnam to gain a propriety interest in the Nation's proposed gaming operation, in violation of the IGRA.

Applicable Law

No agreement may give a proprietary interest in any Indian gaming activity to any entity other than the subject Indian tribe, except for certain individually-owned gaming operations not at issue here. Compare 25 U.S.C. § 2710(b)(2)(A) with 25 U.S.C. § 2710(b)(4). Specifically, the IGRA provides authority to the NIGC Chairman to approve any tribal gaming ordinance or resolution concerning the conduct or regulation of class II or class III gaming on Indian lands if the ordinance or resolution provides 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), 2710(d). The NIGC's regulations also require that all tribal gaming ordinances include such a provision. 25 C.F.R. § 522.4(b)(1). Under these requirements, if any entity other than the tribe possesses a proprietary interest in the gaming activities, the gaming would be in violation of the duly-approved tribal gaming ordinance and the intent of the IGRA.

"Proprietary interest" is not defined in the IGRA or the NIGC's implementing regulations. Black's Law Dictionary, 7th Edition (1999), defines "proprietary interest" 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.*

The legislative history of the IGRA with respect to "proprietary interest" is scant, offering only a statement 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. 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.

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:

> Furthermore, 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, 658 (5th Cir. 1965). In another tax case, 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 plaintiff have some proprietary interest. [citation omitted] <u>One would have a proprietary interest if he were sharing in or deriving profit from the</u>

> club as opposed to being a salaried employee merely performing clerical and ministerial duties.

Dondlinger v. United States, 1970 U.S. Dist. LEXIS 12693, *5 -*6 (D. Neb. 1970) (emphasis added).

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.

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

Finally, in regulatory preamble language, the NIGC provided a non-exhaustive list of arrangements that would violate the sole proprietary interest clause. According to this published guidance, sole proprietary interest violations would exist under:

- an agreement whereby a vendor pays the tribe for the right to place gambling devices that are controlled by the vendor on the gaming floor;
- a security agreement whereby a tribe grants a security interest in a gaming operation, if such an interest would give a party other than the tribe the right to control gaming in the event of default by the tribe; and
- stock ownership in a tribal gaming operation, even by tribal members.

58 Fed. Reg. 5802, 5804 (Jan. 22, 1993). Again, this list was not meant to be exhaustive, but does provide three types of scenarios that are not allowed under the IGRA's sole proprietary interest clause.

Analysis

We are concerned that provisions in the Agreement and Security Agreement may allow Onnam to have or acquire a proprietary interest in the Nation's gaming operation.

Section 1 of the Security Agreement states that the Nation assigns and grants to Onnam a security interest in all of the Nation's right, title and interest in and to all personal property of the Nation acquired after the date of the Security Agreement in connection with the operation or ownership of the gaming facilities. The Section 1 of the Security Agreement expands on the definition of the collateral by noting that it includes ". . . (e) All General Intangibles." Under Oklahoma law, general intangibles are defined as any personal property, including things in action. 12A Okl. St. § 1-9-102(a)(42). [2]

Although personal property is not further defined in the Security Agreement, or under UCC law as adopted in Oklahoma, Oklahoma case law has defined personal property as consisting of two categories: tangible personal property and intangible personal property. *Perkins v. Okla. Tax Comm'n*, 428 P.2d 328, 329 (Okla. 1967). And intangible personal property is defined as property which is representative or evidence of value, such as certificates of stocks, bonds, promissory notes and franchises. *Id.* at 330.

Thus, under the Security Agreement, Onnam has a security interest in the Nation's personal property – including intangible personal property – which includes an interest in any potential stocks or franchises of the Nation, acquired in connection with the operation or ownership of the gaming facilities. We are concerned about this provision in the event of a default, allowing Onnam to acquire the Nation's intangible personal property, which might include a percentage of the Nation's gaming operation or franchises associated with the Nation's gaming operation.

Additionally, Section 2.4(d) of the Agreement requires that the Nation, before the Note is repaid in full, refrain from encumbering any of the assets of the proposed gaming facilities without the consent of Onnam. This provision is echoed in Section 2.6(d) of the Agreement which also states that the Nation shall not encumber any of the assets of the facilities without the consent of Onnam and the third party lender of the Facility Loan. These provisions are an indication of an ownership interest.

Furthermore, Section 3.4(a) of the Agreement implies that Onnam has an ownership interest in the Nation's gaming operation because it states that upon termination of the Agreement, the Nation will retain full ownership of the facility and its assets, and Onnam will have not rights to the facility and its assets. Also, the Facility Loan is to be evidenced in the Facility Note – both referenced in the Agreement – and the Facility Note has not been submitted for our review.[3] The terms and provisions of the Facility Note may additionally affect our review and its absence prevents us from making a final determination with regard to proprietary interest.

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[2] The Security Agreement indicates that the specific collateral securing the Note, i.e. items (a) through (h) of the Security Agreement, are to be given the same meaning as defined in the UCC as adopted in Oklahoma. 12A Okl. St. § 1-9-101, *et seq.*, is the UCC as adopted in Oklahoma.

[3] It is our understanding that the Facility Note has not been drafted nor executed, so it is unavailable for our review at this time.

Additional Issues

Additionally, other provisions of these documents require some clarification or are being highlighted as a result of problems they present.

First, Section 2.1 of the Agreement provides that Onnam shall receive an [redacted] b4 b4 We request further explanation of the amount of the origination fee in light of the fact that Onnam is seeking in the first instance to arrange financing for the Nation and, at its option, may provide the funds for the Facility Loan. The fee may be justified with regard to the Transition Loan, since Onnam is financing it; however, another lender, in all likelihood, will provide the funds for the Facility Loan. Also, please explain if the Nation will be paying an origination fee [redacted] b4

Moreover, developers who do not provide financing for the development generally receive a [redacted] b4 b4 f Onnam is not providing financing, then [redacted]

Second, Section 6.1(c)(i) of the Agreement concerns damages Onnam can collect in the event of noncompliance with the terms or provisions of the Agreement, and addresses the property, assets or funds pledged and assigned to satisfy any judgment Onnam secures against the Nation. Specifically, this provision states:

> . . .the property, assets or funds specifically pledged and assigned to satisfy any judgment [Onnam] secures against the Nation [. . .] under this Development Agreement shall be limited to: (i) the undistributed or future Net Total Revenues of the Enterprise; **(ii) the assets and undistributed or future net profits of any other commercial venture owned by the Nation or the Enterprise**; . . .(emphasis added).

This provision gives Onnam the rights to assets of any other commercial venture owned by the Nation, which might include lands or fixtures (including buildings) located on Indian lands, but not associated with the gaming facility. This provision allows for Onnam potentially to gain possession and ownership of lands or fixtures within Indian lands, which violates the IGRA, 25 U.S.C. § 2711. As such, this provision is problematic.

Finally, Section 5.2 of the Agreement indicates that any communication regarding the Agreement should be sent to Jon Velie, Esq., attorney for Onnam. It is our understanding that Onnam's attorney for the Agreement has changed, and this provision should be amended to reflect the change in order to prevent communication errors.

Conclusion

We are concerned that the Agreement, Note and Security Agreement constitute a management contract and bestow a proprietary interest in the Nation's gaming activity on Onnam. This conclusion is based on Onnam's ability to step in and control the gaming operation and the numerous provisions which indicate an ownership interest by Onnam, which is contrary to the public policy underlying the IGRA that prohibits entities other than tribes from having a proprietary interest in Indian gaming activity.

Finally, we anticipate that this letter will be the subject of Freedom of Information Act ("FOIA") requests. Since we believe that some of the information contained herein falls within FOIA Exemption 4(c), which applies to confidential and proprietary information, the release of which could cause substantial harm, we ask that you provide us with your views regarding release within ten (10) days.

Thank you for your submission. If you have any questions, please contact Carrie Newton Lyons, Staff Attorney, at (202) 632-7003.

Sincerely,

Jo-Ann M. Shyloski
Acting Deputy General Counsel

cc: Elaine Trimble-Saiz, NIGC Director of Contracts Division