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VIA FACSIMILE & REGULAR MAIL

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Dear Sirs:

On June 15, 2004, Native American Land Group, L.L.C. requested that the National Indian Gaming Commission ("NIGC") review the Development Agreement, dated October 4, 2003, between the Cheyenne-Arapaho Tribes of Oklahoma ("Tribes") and Native American Land Group, L.L.C ("NALG"). Specifically, NALG seeks a determination that the Agreement does not constitute a management contract, as defined in the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq.*

The Development Agreement was entered into to primarily provide for the following in regard to a Class II and/or Class III gaming facility in the State of Colorado: acquiring land; devising and implementing a development plan; managing construction; conducting a public relations effort; and creating a plan to improve tribal infrastructure,

including public health, safety and welfare. *See* Development Agreement ("DA") (Oct. 4, 2003) § 3.2.

We conclude that the Agreement does not constitute a management agreement subject to our review and approval. However, as is detailed fully below, the Agreement evidences NALG's proprietary interest in the Tribes' gaming activity, which is contrary to IGRA, NIGC regulations, and the Tribes' gaming ordinance. *See* 25 U.S.C. § 2710 (b)(2)(A); 25 C.F.R. § 522.4(b)(1); Cheyenne-Arapaho Tribes of Oklahoma Gaming Ordinance (February 17, 1994) § 501.

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 Development Agreement between the Tribes and NALG at issue here does not establish a management relationship and, consequently, does not require the Chairman's approval.

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

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[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.*

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. . . 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.

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, 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, <u>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.</u> 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]. <u>On the other hand, a proprietary interest or control may be evidence of a joint venture</u>. [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 Tribes 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).

<u>Determination</u>

In this instance, the Development Agreement accords NALG a proprietary interest in the gaming operation and related operations of the Tribes. Essentially, NALG's proprietary interest in the Tribes' gaming activity derives from the excessive amount of revenue it will obtain from the Tribes' gaming facility and other operations relative to the services provided by NALG. Generally, agreement provisions that provide a large percentage of the gaming revenues over a long period of time are evidence that a developer has been granted an equity interest rather than merely compensation for services provided.

Pursuant to the Development Agreement, the Tribes are required to pay NALG [

] *See* DA §§ 3.3.1 ("Development Fee"); 1.1 (definition of "Facility"). In addition, the Tribes will pay a "Pre-Opening Fee" of [

] *See* DA § 3.3.2.

64

This compensation is paid to NALG for being the "exclusive development consultant" to the Tribes. *See* DA § 2.5.1. The primary responsibilities of NALG are to: find and acquire land for the gaming site; prepare and coordinate the implementation of the development plan for the facility; manage construction of the facility; undertake a public relations effort to promote the benefits of the facility; and prepare a plan for improving tribal infrastructure (public safety, health, and welfare) to comply with NIGC guidelines. *See* DA §§ 3.2.1; 3.2.3. Also, under the Agreement, NALG will assist the Tribes with: preparing a petition to have the land taken into trust; negotiating and obtaining financing for development, design, and construction of the facility; negotiating a compact; obtaining NIGC approval of the gaming ordinance; and establishing a training program to facilitate tribal members becoming employees at the facility. *Id.* Nonetheless, NALG will not finance or fund the development of the facility, but will provide [

] *See* DA § 3.2.1 (d)(i).

64

Although, it appears that NALG will provide several services, NALG will be reimbursed by the Tribes for the costs and expenses associated with its efforts within [ ] of gaming commencing on the site. *See* DA § 3.3.3. Specifically, the Development Agreement provides that:

64

> In addition to the fees [. . ., upon commencement of any gaming activities on the Site . . ., the Tribes shall pay to Developer, in [ ] installments . . ., an aggregate amount equal to [
>
>] . . .).

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DA § 3.3.3.

Further, throughout the Development Agreement, NALG's costs are limited. In acquiring land for the gaming site, NALG is not required to spend more than [ ] in the aggregate. *See* DA § 3.2.1 (a). In addition to any amount

64

paid to acquire the land, NALG's costs and expenses shall not exceed *Id.* § 3.2.8. NALG also commits to spending up to

to perform its obligations under the Agreement. *Id.* Thus, under the Agreement, NALG will expend, at maximum, approximately

Although NALG will be fully reimbursed for its costs and expenses within of gaming commencing on the site, the Tribes will still be obligated to pay NALG a "Pre-Opening Fee" of

a "Development Fee" of

See DA §§ 3.3.1; 3.3.2. This amount of the net revenues of the gaming operation and all its ancillary operations for such a long period of time is excessive compensation in light of the fact that NALG's costs and expenses will be reimbursed by the Tribes within of the inception of gaming. Such a payment structure does not provide NALG a fee for its services, but accords it an ownership interest in the profits of the gaming facility and its related operations for [2] Therefore, the Development Agreement enables NALG to collect large amounts of money, over a potentially lengthy period of time, for doing nothing – performing no ongoing services for the Tribes, and, once NALG's original costs are paid within after gaming begins, giving the Tribes nothing in return. In this case, NALG would be receiving

As a consequence, the level of compensation extends far beyond what is reasonable for the services provided.

Finally, we examine the risks to NALG in expending possibly as the Tribes' "exclusive development consultant." Admittedly, the Tribe does not have land in trust for this development nor a compact with the State of Colorado, and, in fact, NALG has been retained to assist in procuring both. However, the Agreement provides that NALG may acquire title to land for the gaming site or an option to acquire such title. *See* DA § 3.2.1 (a). Consequently, NALG does not have to spend on such land, but can purchase an option to acquire the land. Furthermore, NALG must fund the purchase of such land and transfer title of such land to the United States to be held in trust for the Tribes, only upon the U.S. Department of the Interior's decision to take the land into

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[2] It is quite troubling that after the Tribes have paid back all of the money provided by NALG, they are required

Although these payments are called "Development" fees, this label mischaracterizes what is essentially a profit-sharing arrangement. This large share of the net revenues indicates an ownership interest in the profits.

trust. *Id.* at (c). Under these provisions, since NALG will not spend funds until the status of the land as trust lands is guaranteed, the risk of such process is low.

Additionally, although the political challenges to negotiating a compact with the State on behalf of the Tribes are great and may require substantial time, effort, and costs, the fact that NALG has explicitly limited its costs and expenses in this regard cannot be overlooked. Specifically, beyond the purchase of land or an option to purchase land, NALG's costs and expenses shall not exceed[ ] *See* DA § 3.2.8.[3] Moreover, NALG will be fully reimbursed for its costs and expenses within[ ] of gaming commencing on the site. *See* DA § 3.3.3. Thus, because NALG has explicitly limited its costs and expenses in regard to negotiating a compact, it has sufficiently limited the financial risk involved in such a process.

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And, if successful, a tribal gaming facility in Colorado is not a high-risk venture, as the tribes with gaming facilities in Colorado are profitable Class III gaming facilities. Further, the Denver metropolitan area, where the Tribes are seeking a gaming site, will in all likelihood be extremely profitable in comparison to the other tribal facilities in the state which are not located near Denver. We, therefore, without further information, conclude that the risk involved in this project does not justify the high level of compensation or the long term of the agreement.

Other provisions in the Development Agreement further evidence the fact that NALG maintains a level of control that is more consistent with one possessing a proprietary interest than simply providing a service. Section 2.5.6 directs that NALG "shall have access, upon reasonable notice and during normal business hours, to [the facility's] books, records and supporting documentation and shall have the right to make copies thereof." Additionally, the Tribes must provide NALG the facility's profit and loss statements; statements of cash flows; and balance sheets after the end of each month and calendar year. *See* DA § 2.5.7. These provisions evidence a level of control consistent with an ownership interest.

Conclusion

We conclude that the Development Agreement bestows a proprietary interest in the gaming operation on NALG, in violation of the IGRA, its implementing regulations and the Tribe's gaming ordinance. This conclusion is based upon the excessive compensation provided to NALG over an extensive period of time that is not commensurate with NALG's services. Thus, in this case, the Development Agreement memorializes an ownership interest for NALG rather than establishing terms for the receipt of ongoing services or goods by the Tribes. Accordingly, the Development Agreement is contrary to the public policy underlying the IGRA that prohibits entities other than tribes from having a proprietary interest in a gaming operation.

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[3] The Agreement states that "in no instance shall the amount of funding exceed[ ] in addition to any amount necessary to acquire the land . . .. Developer may at its option expend funds exceeding the aforementioned limit." *See* DA § 3.2.8.

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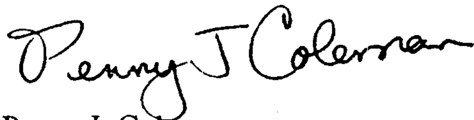
A copy of this letter and the Development Agreement will be forwarded to the Office of Indian Gaming Management of the U.S. Department of the Interior for its review. If you have any questions, please contact Jo-Ann Shyloski, Staff Attorney.

Sincerely,



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