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VIA FACSIMILE & REGULAR MAIL

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Re: Agreements between the Comanche Tribe of Oklahoma and 49, L.L.C.

Dear Sirs:

The Comanche Nation of Oklahoma submitted the following agreements, dated January 18, 2001, between it and 49, L.L.C. for our review: Equipment Lease Agreement; Construction Loan Agreement; Promissory Note; Security Agreement; and a Cash Management Agreement.

These agreements state that the Comanche Nation (Nation) requested that 49, L.L.C. make a loan of up to [ ] for the development, 64

construction and initial equipment of a tribal gaming facility and lease[ ] 64
gaming machines for such facility. *See* Construction Loan Agreement ¶¶ E, F, G, I; Equipment Lease Agreement ¶¶ 2, 7(a).

The purpose of our review is to determine whether these agreements, individually or collectively, constitute a management contract or collateral agreements to a management contract that are 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*. As is set forth fully below, these agreements constitute management contracts or collateral agreements to management contracts that require the Chairman's approval. Moreover, as is detailed herein, the agreements appear to evidence 49, L.L.C.'s proprietary interest in the Nation's gaming activity, which is 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

[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.*

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)).

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

Initially, it is important to note that the Equipment Lease and Construction Loan agreements are inextricably intertwined, as the Construction Loan incorporates certain provisions of the Equipment Lease and makes certain obligations of the lease agreement conditions of the Construction Loan Agreement. *See* Construction Loan Agreement §§ 3.1, 3.2, 3.3(P), 4.1, 5.2, 5.4, 5.6, 5.8, 5.11. After careful review of the aforementioned agreements, we have determined that they collectively establish a management relationship between 49, L.L.C. and the Nation. The basis of such conclusion is detailed herein.

A. Agreement Provisions

The Equipment Lease Agreement between the Nation and 49, L.L.C. is for the lease of [ ] gaming machines owned by 49, L.L.C. Certain provisions of the Equipment Lease Agreement are important to our analysis, including the following:

1. [ ]

2. [ ]

3. 49, L.L.C. will provide the Nation with information as to the best gaming machines to fulfill the Nation's needs, and the Nation will select the specific gaming machines to be installed from such information. *Id.* § 3;

4. 49, L.L.C.'s right to install its gaming machines exists for a minimum term of [ ]

5. [ ]

6. [ ]

7. 49, L.L.C. is entitled to a copy of the daily gaming receipts from the use of the gaming machines together with a copy of the Nation's own banking slips, to show that the daily receipts reported to 49 reconcile to the Nation's deposits of daily revenues. *Id.* § 9(a);

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8. 49, L.L.C. also has the right to access the books and records of the gaming facility and "to any other Gaming-related information 49 shall deem necessary or appropriate." *Id.* § 9(b); and

9. 49, L.L.C. may at any time and without advance notice to the Nation audit the Nation's receipts from the gaming machines. *Id.* § 9(c).

Likewise, specific provisions of the Construction Loan Agreement underlie our analysis and are listed below. The purpose of the Construction Loan agreement and its collateral agreements is to provide a loan of up to for the construction, development, and initial equipment of a tribal gaming facility in Cotton County, Oklahoma. *See* Construction Loan Agreement ¶¶ B, D, E, F. The provisions at issue are:

1. Without the prior written consent of 49, L.L.C., which is within the "sole and absolute discretion" of 49, the Nation cannot

2. Without the prior written consent of 49, L.L.C., which is within the "sole and absolute discretion" of 49, the Nation cannot

3. Without the prior written consent of 49, L.L.C., which is within the "sole and absolute discretion" of 49, the Nation cannot

4. Prior written consent of 49, L.L.C. is also required for

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5. The Nation must provide 49, L.L.C. with a list of all bank accounts it establishes or maintains in connection with the operation of the gaming facility. *Id.* at § 3.3(L);

6. Twenty days after the end of each month, the Nation must provide 49, L.L.C. financial statements of its gross revenue and net revenue for the preceding month. *Id.* at § 3.4(A);

7. The Nation must provide 49, L.L.C. with all reports to or from any governmental authority within 5 days of submission to or receipt from such agency.[5] *Id.* at § 3.4(E);

8. 49, L.L.C. is not only entitled to annual audited balance sheets, statements of income, and statements of cash flows of the gaming facility but also[ ] 64

9. Upon 1 day notice, 49, L.L.C. may examine or copy any and all books, records and documents in the Nation's possession or control relating to the gaming facility or the property (gaming site). *Id.* at § 3.3(K);

10. 49, L.L.C. approves the use of loan monies by the Nation by way of a "cost breakdown," which restricts disbursements to line items in cost categories. *Id.* at § 2.3. If the gaming facility cannot be completed in strict conformity with the approved cost breakdown, the Nation must immediately submit a revised cost breakdown to 49 for its approval along with reasons for the changes. *Id.* at § 2.3(A);

11. 49, L.L.C.'s also approves the Nation's cash flow needs for the construction, development, initial equipping, furnishing and decorating of the gaming facility. *Id.* § 2.3.

B. Analysis

Taken together, these agreements show that 49, L.L.C. seeks to use the Nation's gaming facilities as its "slot route" – a long term venue where 49, L.L.C. is the exclusive supplier of machines and derives a significant amount of profit therefrom. For the term of the agreement,[ ] 64

49, L.L.C., in its sole discretion, may[ ] 64

[5] Similarly, 49, L.L.C. is entitled to all reports required by law and applicable regulations the Nation submits to or receives from any federal, state, or tribal gaming authorities within 30 days of receipt thereof. *Id.* at § 3.4(B).

Such a lengthy term is an indication of a management contract, *see NIGC Bulletin No. 94-5*, and even management contracts cannot exceed five (5) years unless the capital investment and income projections require additional time. *See* 25 U.S.C. § 2711 (b)(5); *First American Kickapoo Operations, L.L.C. v. Multimedia Games, Inc.*, 412 F.3d 1116, 1173 (10th Cir. 2005).

The fee obtained by 49, L.L.C. also connotes the existence of a management relationship. *See NIGC Bulletin No. 94-5; First American*, 412 F.3d at 1173 (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). Here, the Equipment Lease agreement gives 49, L.L.C. a fee equaling

Another indication of management is the control exercised by 49, L.L.C. over certain aspects of the gaming operation. It will select the range of games for the Nation to choose from and also

49, L.L.C. also has access the books and records of the gaming facility and "to any other Gaming-related information 49 shall deem necessary or appropriate." *See* Equipment Lease Agreement § 9(b). In addition, 49, L.L.C. is entitled to copies of the daily gaming machine receipts;

[6]

[7] Tribes, not machine vendors, are supposed to be the primary beneficiaries of Indian gaming. *See* 25 U.S.C. § 2702(2). In light of 49, L.L.C.'s fee, we are concerned that the amount of the Nation's actual profit paid to 49, L.L.C. is contrary to the sole proprietary interest mandate of IGRA, as such a fee would possibly accord 49, L.L.C. an ownership interest in the profits of the Nation's gaming facilities. *See* 25 U.S.C. § 2710(b)(2)(A).

copies of the Nation's own banking slips; monthly and annual financial statements [ ] copies of all reports to and from any governmental authority; and [ ] *See* Equipment Lease Agreement §§ 9(a) and (c); Construction Loan Agreement §§ 3.4, 3.5. Finally, 49, L.L.C.'s review and approval of the Nation's use of the loan monies also demonstrates 49's involvement in the gaming facility beyond that of a lender or game machine lessor.

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Therefore, although the agreements explicitly deny that they are management agreements or that the parties have entered a joint venture or partnership, *see* Equipment Lease Agreement §§ 15, 19, Construction Loan Agreement §§ I, 5.10, a management relationship between the parties exists with respect to the gaming operation.[8]

Finally, the agreements appear to evidence 49, L.L.C.'s proprietary interest in the Nation's gaming operations, because, as outlined above, 49, L.L.C. maintains a level of control that is consistent with one possessing an ownership interest. *See* 25 U.S.C. § 2710(b)(2)(A). In that regard, the remedial default provisions of the Cash Management Agreement which provide for 49, L.L.C. to operate and regulate the facility or seek the judicial appointment of a receiver violate the proprietary interest mandate of IGRA because they usurp the Nation's ability to own, regulate and operate its gaming operations. *See* Cash Management Agreement § 5.2. And, such a provision essentially provides an avenue for another entity, either 49, L.L.C. or a receiver, to manage the Nation's gaming operations and is yet another indication of management.

Conclusion

Because the agreements collectively constitute a management contract, they require the approval of the NIGC's Chairman. Recently, the Tenth Circuit Court of Appeals reiterated that "[l]acking the formality of NIGC approval, an agreement to manage does not become a contract: it is void." *First American*, 412 F.3d at 1176 (citing *United States ex rel Bernard v. Casino Magic Corp.*, 293 F.3d 419, 421 (8th Cir. 2001)). In this instance, because these agreements constitute management contracts or collateral agreements to a management contract that have not been approved by the Chairman of NIGC, they are void. *See* 25 C.F.R. § 533.7.

[8] However, the plain language of the Construction Loan Agreement even concedes that 49, L.L.C. possesses certain authority and control, as it expressly states that 49 is not to have any management authority or right to possess or control the gaming facility "except in the course of exercising rights under the Loan Documents or the Equipment Lease." *See* Construction Loan Agreement ¶ I (emphasis added).

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

Sincerely,

Penny J. Coleman

Penny J. Coleman
Acting General Counsel