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VIA FACSIMILE & REGULAR MAIL

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

Dear Sirs and Madam:

The Comanche Nation of Oklahoma submitted the following agreements, dated February 4, 2002, between it and CDST-Comanche, L.L.C. for our review: Lease Agreement; Loan Agreement; Secured Promissory Note; and a Security Agreement.

Pursuant to these agreements, the Comanche Nation (Nation) sought from CDST-Comanche, L.L.C. (CDST)[1] a loan of[ ] for the purpose of providing financing for the construction of certain improvements on real property located in or near Randlett, Oklahoma. *See* Loan Agreement § 1.1. The improvements consist of a permanent casino building of approximately 22,500 square feet. *Id.*

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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 evidence CDST'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.[2] 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

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[2] 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.*

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)).

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. . . 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 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 agreements are inextricably intertwined, as they reference and incorporate one another. *See, e.g.*, Loan Agreement § 4.1; Lease Agreement § D. After careful review of the aforementioned agreements, we have determined that they collectively establish a management relationship between CDST and the Nation. The basis of such conclusion is detailed herein.

A. Agreement Provisions

The Lease Agreement between the Nation and CDST is for the lease of [ ] gaming machines owned by CDST. Specific provisions of the Lease Agreement are important to our analysis, including: b4

1. CDST has the right to install [ ] gaming machines in the gaming facility, which remain the property of CDST. *See* Lease Agreement §§ C, 2(c); b4
2. CDST's right to install its gaming machines exists for [ ] beginning on the date the casino is opened to the public for business. *Id.* § 1; b4
3. The term may be extended for [ ] upon mutual consent of the parties, for a total term of [ ] *Id.* § 1; b4
4. Throughout the term of the agreement, [ ] b4 *Id.*; *see also* Loan Agreement §§ 6.16, 7.6;
5. CDST's fee is [ ] of adjusted gross revenue generated by its gaming machines. *See* Lease Agreement §§ 4 (a) and (b); b4

6. CDST may place its employees at the facility to properly commence operations of the gaming machines, upon the consent of the Nation, which cannot be unreasonably withheld. *Id.* § 3(d);

7. CDST may provide additional security "as it deems necessary and appropriate for the areas where the Gaming Equipment is located," upon the consent of the Nation, which cannot be unreasonably withheld. *Id.* § 3(h);

8. CDST and the Nation shall establish a revenue collection system which will provide that gaming revenue will, on a daily basis, be properly accounted for, collected, and deposited into a bank account established solely for use by the gaming facility. *Id.* § 4(c);

9. CDST will receive from the Nation a weekly financial report, setting forth all gaming revenues. *Id.*;

10. CDST has approval authority over the Nation's selection of an independent certified public accountant, who will perform an annual audit of the facility's books and records. *Id.* § 4(e);

11. CDST will receive the aforementioned annual audits, and may conduct additional audits at any time for any reason. *Id.*;

12. CDST also has the right, upon reasonable notice to the Nation, to observe the Nation's procedures for compiling gaming revenues and to inspect and copy the Nation's books and records related such revenues. *Id.* § 4(f); *see also* Loan Agreement § 6.11 (CDST has the right upon 72-hours notice and during normal business hours to examine and copy the Nation's books and records with respect to the real property and the casino);

13. CDST is named as a loss payee on all insurance maintained by the Nation covering any loss of or damage to the gaming machines, the gaming facility or any other equipment, machines, devices or personal property maintained at the gaming facility or other casualty, including commercial general liability, fire, and other casualty insurance. *See* Lease Agreement §§ 7(a) and (b); *see also* Loan Agreement § 6.6 and Security Agreement § 6; and

14. The Nation cannot assign, sublet, transfer, pledge, grant a security interest in or mortgage any of its rights under the Lease Agreement or any of the gaming equipment or gaming revenues or other revenues or profits of the gaming facility, without the prior written consent of CDST. *See* Lease Agreement § 14.

Additional provisions of the Loan and Security Agreements also underlie our analysis. The parties entered into such agreements for the purposes of loaning the Nation

[ ] for the construction of a permanent casino. *See* Loan Agreement § 1.1. These additional provisions are as follows:

1. CDST must approve the plans and specifications for the construction. *See* Loan Agreement §§ 1.1, 4.2(a), 7.3;

2. To receive advances of such funds, the Nation must submit a disbursement request to CDST. *Id.* §§ 2.4, 2.5;

3. As security for the loan, CDST has a security interest in: (1) all gross revenues from all gaming machines owned, operated, or leased by the Nation or operated at the gaming facility; (2) all gaming, commercial, and other revenue derived from the facility; (3) all accounts, deposit accounts and other general intangibles of the Nation used in connection with operating the gaming facility. *Id.* § 3.1(a); *see also* Security Agreement § 2;

4. CDST is entitled to the name and address of every financial institution in which the Nation deposits the collateral, together with all account information of the Nation at such financial institution. *See* Security Agreement § 3.2;

5. The Nation must also provide CDST with copies of all account statements from such financial institutions within 5 days of the Nation's receipt thereof. *Id.*

6. Also as security for the loan, CDST possesses an assignment of the Nation's interest in several agreements, including all operating, management and supervision agreements and all other documents relating to the ownership, management and operation of the real property and the casino. *See* Loan Agreement § 3.1(b);

7. CDST must approve all the Nation's commercial general liability policies, and all insurance policies shall be issued by companies approved in writing by CDST. *Id.* §§ 4.2(e), 4.6;

8. CDST must also approve all existing agreements between the Nation and any managers or supervisors related to the management and operation of the real property and the casino. *Id.* § 4.2(k);

9. Further, CDST must obtain from the Nation and approve written agreements from any managers or supervisors, referenced in #6, pledging that they will perform for CDST the services contracted to the Nation and the consent of such persons or entities to the collateral assignment by the Nation to CDST of their respective contracts. *Id.*

10. CDST has the right to demand from the Nation any other information and documents that it may reasonably require. *Id.* § 4.2(n);

11. The Nation shall provide to CDST all annual and quarterly cash basis financial statements of the Nation, including balance sheets,

statements of income and expenses and statements of cash flows, all prepared according to GAAP or such other manner satisfactory to CDST. *Id.* § 6.12. Moreover, the Nation must promptly deliver in writing any further information as CDST may reasonably request relating to any such financial statements. *Id.*;

12. The Nation shall execute and deliver such additional documents and do such other acts as CDST may reasonably require in connection with the agreements. *Id.* § 6.13;

13. Written consent from CDST must also be obtained for the Nation to merge with any other entity, or turn over the management or operation of the real property or casino to any other person, corporation, tribal entity or other entity. *Id.* § 7.1;

14. Without CDST's written consent, the Nation cannot change the times of its fiscal year or other accounting periods or change its methods of accounting. *Id.* § 7.4; and

15. CDST has the right to apply for and have a receiver appointed by a court or by an arbitration panel to manage, protect, and preserve the collateral, continue the Nation's business and collect all revenues and profits of the Nation's business. *See* Security Agreement § 11.1.

B. Analysis

First, these agreements demonstrate that CDST seeks to use the Nation's gaming facility as its "slot route," [ ] Second, and most importantly, the agreements reflect CDST's management role and ownership interest in the Nation's gaming facility.

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For the term of the agreements, at CDST's option, it may [ ] *See* Lease Agreement §§ C, 2(c) and (i); Loan Agreement §§ 6.16, 7.6. The term of the agreements is [ ] *See* Lease Agreement § 1. However, it may be extended by the parties to [ ] *Id.* A term of [ ] 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).

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CDST's fee is also indicative of the existence of a management relationship between the parties. *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 Lease agreement gives CDST a fee equaling of adjusted gross revenue. *See* Lease Agreement §§ 4 (a) and (b) (defining gaming revenue as all gross revenues derived from the gaming equipment minus the sum of cash payouts).

Therefore, CDST, not the Nation, receives the majority benefit gaming revenue generated from its machines, which

Further, CDST's control over the gaming facility is yet another indication of a management relationship. In conjunction with the Nation, CDST will establish a gaming revenue collection system to ensure that on a daily basis gaming revenue will be properly accounted for, collected, and deposited into a bank account. *See* Lease Agreement § 4(c). In so doing, CDST is establishing the policy for revenue collection at the Nation's facility. *See, e.g., First American*, 412 F.3d at 1172. Not only does CDST possess a role in establishing the revenue collection process for the gaming facility, it may monitor its implementation. *See* Lease Agreement § 4(f). Likewise, CDST must approve the Nation's selection of an independent certified public accountant to perform an annual audit of the facility's books and records, is entitled to copies of these audits, and may conduct additional audits at any time for any reason. *See* Lease Agreement § 4(e). Moreover, the Nation cannot changes the times of its fiscal year or other accounting periods or change its methods of accounting without CDST's written consent. *See* Loan Agreement § 7.4. Also, CDST must approve all insurance companies used by the Nation and all of the Nation's commercial general liability policies. *See* Loan Agreement §§ 4.2(e), 4.6. Most significantly, CDST has approval authority over all existing agreements between the Nation and any managers or supervisors related to the management and operation of the real property and the casino. *Id.* § 4.2(k). Similarly, the Nation must obtain written consent from CDST to turn over the management or operation of the real property or casino to any other person, corporation, tribal entity or other entity. *Id.* § 7.1. In addition, at its option, CDST may place its employees at the Nation's gaming facility to commence operations of the gaming machines, *see* Lease Agreement § 3(d)[4], and may provide more security for the areas where its gaming equipment is located. *Id.* § 3(h).[5]

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[3] Tribes, not machine vendors, are supposed to be the primary beneficiaries of Indian gaming. *See* 25 U.S.C. § 2702(2). Thus, the amount of the Nation's actual profit paid to CDST is contrary to the sole proprietary interest mandate of IGRA and such a fee gives CDST an ownership interest in the profits of the Nation's gaming facility. *See* 25 U.S.C. § 2710(b)(2)(A).

[4] CDST may do so upon the consent of the Nation. However, such consent cannot be unreasonably withheld. *See* Lease Agreement § 3(d).

[5] CDST may do so upon the consent of the Nation. However, such consent cannot be unreasonably withheld. *See* Lease Agreement § 3(h).

Finally, CDST's review and approval of the Nation's plan for constructing the casino and further use of the loan monies also demonstrates CDST's involvement in the gaming facility beyond that of a lender or game machine lessor. *See* Loan Agreement §§ 1.1, 2.4, 2.5, 4.2(a), 7.3.[6]

Under the agreements, CDST is also entitled to a plethora of information and documentation customarily reserved to managers or owners of a gaming facility. CDST will receive from the Nation: weekly financial reports, setting forth all gaming revenues; copies of all account statements from financial institutions where gaming revenues are deposited; all annual and quarterly cash basis financial statements of the Nation, including balance sheets, statements of income and expenses, and statements of cash flows, all prepared in a manner satisfactory to CDST; copies of all annual audits; any further information related to the aforementioned financial statements; and any other information and documents that CDST may reasonably require. *See* Lease Agreement §§ 4(c) and (e); Security Agreement § 3.2; Loan Agreement §§ 4.2(n), 6.12. CDST also has the right to copy the Nation's books and records related to the Nation's real property / gaming site and the facility's gaming revenues. *See* Lease Agreement § 4(f); Loan Agreement § 6.11.

Moreover, the agreements evidence CDST's proprietary interest in the Nation's gaming facility, because, as detailed above, CDST exercises a level of control that is consistent with one possessing an ownership interest. *See* 25 U.S.C. § 2710(b)(2)(A). In this regard, CDST has been assigned the Nation's interest in all operating, management and supervision agreements and all other documents relating to the ownership, management and operation of the real property and the casino. *See* Loan Agreement § 3.1(b). Not only does this assignment provide CDST an ownership interest in the casino and real property, but also is contrary to IGRA, which prohibits the conveyance of any interest in land or other real property. *See* 25 U.S.C. § 2711(g). Furthermore, any existing managers or supervisors of the casino must pledge that they will perform for CDST the services contracted to the Nation and consent to the collateral assignment by the Nation to CDST of their respective contracts. *See* Loan Agreement § 4.2(k). Written consent from CDST must also be obtained for the Nation to merge with any other entity, or turn over the management or operation of the real property or casino to any other person, corporation, tribal entity or other entity. *Id.* § 7.1. Most importantly, CDST may have a receiver appointed by a court or by an arbitration panel to continue the Nation's business and collect all revenues and profits. *See* Security Agreement § 11.1. These provisions, allowing CDST to operate 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. Not to mention that such provisions essentially provide means for other entities, either CDST or a receiver, to manage the Nation's gaming facility and, therefore, serve as further indicators of management.

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[6] Furthermore, the Nation must do such other acts as CDST may reasonably require in connection with the agreements. *See* Loan Agreement § 6.13.

Consequently, although the agreements explicitly deny that the parties have entered a joint venture or partnership, *see* Loan Agreement § 11.4, CDST has an ownership interest in the gaming facility.

Other Considerations

Additionally, we cannot overlook the fact that on August 4, 2003, the NIGC issued a potential notice of violation (PNOV) to the Comanche Nation regarding the operation of several hundred class III Cyberdyne Systems, Inc. video gaming devices because such machines were being operated in the absence of a Tribal-State compact, in violation of 25 U.S.C. § 2710(d)(1)(c) and 25 C.F.R.§ 573.6(a)(11). The gaming machines at issue in the PNOV were supplied by CDST and are the subject of the agreements before us at this time. That being the case, we must conclude that the agreements were intended for an illegal purpose–the provision of class III gaming machines without an approved compact. With respect to the PNOV and the play of CDST games, in early 2004, the NIGC Chairman advised the Comanche Nation that he would issue a notice of violation (NOV) and order of temporary closure if the Nation did not immediately cease the play of such machines.

As to the agreements at issue here, it is noted that in the Fall of 2004 the Nation approached Alan Fedman, NIGC Director of Enforcement, requesting an informal evaluation of one or all of the agreements. In response, Mr. Fedman provided his view of the agreement(s). Unfortunately, Mr. Fedman does not serve as an attorney for the NIGC. As noted above, he is the Director of Enforcement and, therefore, is not counsel to the NIGC Chairman or Commission regarding the status of contracts. Accordingly, Mr. Fedman's informal views cannot be considered a determination from the Office of General Counsel which is tasked with providing advisory opinions on the status of these contracts.

Finally, CDST contends that "[i]t was incumbent upon the Tribe to submit the Agreements to the NIGC for review when they were executed in February 2002." *See* Letter to Jo-Ann M. Shyloski, NIGC, from Kevin E. O'Malley, Gallagher & Kennedy, P.A., dated Dec. 16, 2005 at 2. NIGC regulations clearly direct that "[a] tribe <u>or a management contractor</u> shall submit a management contract to the Chairman for review . . . upon execution." *See* 25 C.F.R. § 533.2(b). Moreover, even if parties are uncertain whether certain agreements constitute management contracts, NIGC guidance provides:

> In order to provide timely and uniform advice to tribes and their contractors, the NIGC and the BIA have determined that certain gaming-related agreements, such as consulting agreements or leases or sales of gaming equipment, should be submitted to the NIGC for review. In addition, if a tribe or contractor is uncertain whether a gaming-related agreement requires approval of either the NIGC or the BIA, they should submit those agreements to the NIGC.

See NIGC Bulletin, Submission of Gaming-Related Contracts and Agreements For Review, 93-3 (July 1, 1993). Additionally, the NIGC has explicitly cautioned that "[t]he consequences are severe for a manager who mistakes his management agreement for a consulting agreement" and reiterated that the agency "stands ready to make a decision as to whether or not a particular contract or agreement is a 'management contract' under Commission regulations." *See* NIGC Bulletin, Approved Management Contracts v. Consulting Agreements (Unapproved Management Contracts are Void), 94-5 (Oct. 14, 1994).

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. Furthermore, the agreements demonstrate CDST's proprietary interest in the Nation's gaming facility, which is contrary to IGRA.

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

Sincerely,

Penny J. Coleman
Acting General Counsel