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Via Electronic and U.S. Mail

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RE: Development Agreement with the Cowlitz Indian Tribe

Dear Mr. Fleisher and Mr. Richey:

This is in response to your letters dated March 15, 2005, and September 14, 2006, regarding the Development Agreement between the Cowlitz Indian Tribe ("Cowlitz Tribe" or "Tribe") and Salishan-Mohegan, LLC ("the Company"), as amended and restated on February 5, 2005 ("the Development Agreement"). As explained below, it is the opinion of the Office of General Counsel that the Development Agreement is not a management contract requiring prior approval by the Chairman of the National Indian Gaming Commission ("NIGC"), and will not violate the "sole proprietary interest" clause of the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2710(b)(2)(A).

Background

On March 15, 2005, the Cowlitz Tribe and the Company submitted the Development Agreement to the NIGC's Office of General Counsel, requesting concurrence that (a) the Development Agreement does not constitute a management contract under IGRA and the NIGC's regulations; and (b) the Development Agreement does not grant to the Company a proprietary interest in any gaming operation of the Tribe. Letter from Ed Fleisher, representing the Cowlitz Tribe, to Penny Coleman, NIGC Acting General Counsel (March 15, 2005).

Also on March 15, 2005, the Tribe and the Company submitted a Class II and Class III gaming management contract to the Chairman of the NIGC, requesting approval under IGRA, 25 U.S.C. § 2711. Review of the proposed management contract is ongoing.

On August 15, 2006, the NIGC Office of General Counsel received a letter from the Confederated Tribes of the Grand Ronde Community of Oregon ("Grand Ronde Tribe") regarding the Cowlitz Tribe's Development Agreement. Letter from Rob Greene, Grand Ronde Tribe Attorney, to Penny Coleman, NIGC Acting General Counsel (Aug. 14, 2006). According to this letter, the Grand Ronde Tribe obtained a copy of the Development Agreement from the Mohegan Tribal Gaming Authority's 2004 Form 10-K filing. The Grand Ronde Tribe's letter takes the position that the Development Agreement is a management contract or a related collateral agreement requiring NIGC approval under IGRA. However, the document analyzed in the Grand Ronde Tribe's letter is not the version of the Development Agreement that the Cowlitz Tribe and the Company submitted for our review. Specifically, the Grand Ronde Tribe's letter concerned the original version of the Development Agreement, dated September 21, 2004, whereas the document provided for our review is the amended and restated Development Agreement, dated February 5, 2005. There are several significant differences between the two versions of the Development Agreement that relate directly to the issues presented for our review.

Nevertheless, on August 16, 2006, the NIGC Office of General Counsel provided you with an opportunity to respond to the Grand Ronde Tribe's letter. A response was received on September 19, 2006. Letter from Kent E. Richey, representing Salishan-Mohegan, LLC, to Penny Coleman, NIGC Acting General Counsel (Sept. 14, 2006).

Terms of the Development Agreement

The Development Agreement relates to the Tribe's plans to construct a casino on a multi-parcel tract of land in Clark County, Washington, consisting of about 150 acres. According to the Development Agreement and other information supplied by the Parties, the Company owns, or has the right to acquire through binding option contracts, all of the parcels of this tract of land (*see* DA ¶ 2.8(a)). In the Development Agreement, the Company agrees to assign its interest in the land to the Tribe when the Tribe obtains financing for the Project (DA ¶ 2.8(a)). The Tribe has submitted a fee-to-trust application for this entire tract of land with the Department of the Interior, and intends to acquire the land from the Company in order to transfer title to the United States in trust for the benefit of the Cowlitz Tribe. In conjunction with this fee-to-trust application, the Cowlitz Tribe has requested the Department of the Interior to proclaim this land as the Tribe's initial reservation. The Tribe's fee-to-trust application and request for an initial reservation proclamation currently are pending with the Department of the Interior.

If the Department of the Interior accepts this land into trust for the benefit of the Cowlitz Tribe, then the Tribe intends to negotiate with the State of Washington for a Class III tribal-state compact and seek approval of such compact from the Secretary of the Interior. In connection with these plans, the Development Agreement sets forth how the Tribe intends to improve the subject land by building a gaming facility or facilities, together with restaurants, entertainment venues, retail establishments, parking facilities, and other amenities (DA Recitals ¶ B).

The primary terms of the Development Agreement extend from the Effective Date (*i.e.*, September 21, 2004) until Commencement of Operations at the gaming facility (DA ¶ 2.1). The Tribe appoints the Company as its agent during the term of the Development Agreement, and grants the Company the exclusive right to develop the project, which includes facilitating the Tribe's acquisition of the land; placing the land into trust status; obtaining permits and approvals for development; and administering contracts and activities for the planning, design, development, construction, furnishing, equipping and financing of any improvements to the land between the Effective Date and the Commencement of Operations, unless the Development Agreement is earlier terminated (DA ¶¶ 2.1(a), (j), 3.3(a)). The Tribe also grants the Company the right of first refusal to administer any subsequent material expansion of the improvements from the Effective Date until the [ ] anniversary of the Commencement of Operations (DA ¶ 2.1(a)(ii)). 4

The Tribe agrees to negotiate with the State of Washington for a tribal-state compact; agrees to keep the Company apprised of such negotiations; and agrees to seek the Company's input and assistance in all compact negotiations that relate to the Project (DA ¶ 2.1(e)). The Company acknowledges that any decision by the Tribe with respect to the compact must and shall be subject to the Tribe's sole discretion, but if the Company determines that any such decision will have a material adverse effect on the Company's interests under the Development Agreement, then the Development Fee shall be equitably adjusted as agreed by the Parties or under the Development Agreement's arbitration provisions (DA ¶ 2.1(e)). Similar provisions are provided with respect to any Intergovernmental Agreement or Memorandum of Understanding that the Tribe may enter with local, county, or state governmental entities (DA ¶ 2.1(f)).

The Tribe and the Company agree to establish a Development Board comprised of six members, two of whom are appointed by the Company, and four of whom are appointed by the Tribe, with only two of the tribal representatives designated as voting members (DA ¶ 2.2(a)). Any action of the Development Board must be made pursuant to a unanimous vote of all four voting members (DA ¶ 2.2(b)). Actions that do not receive a unanimous vote of all four voting members shall be decided under the Development Agreement's dispute resolution provisions (DA ¶ 2.2(b)). The Development Board's duties include selecting and approving an architect, general contractor (or a design-build contractor), and other professionals such as interior designers and consulting engineers (DA ¶ 2.3), and approving budgets as proposed by the Company for design, construction, and furnishing/equipping the facilities (DA ¶ 2.5(a)). The Company shall negotiate contracts with all such professionals to be entered with the Tribe, and the Tribe shall assign the responsibility to administer the contracts to the Company (DA ¶ 2.3).

The Company shall establish a Facility Budget that includes an estimate for acquiring the property, designing the facility, constructing the facility, and furnishing/equipping the facility (DA ¶ 2.5(a)). The Facility Budget must be approved by the Development Board by a vote of its members (DA ¶ 2.5(a)). The Company shall also cause the selected architect to create plans and specifications to be approved by the Development Board (DA ¶ 2.6(b)).

The Company shall arrange for the procurement of furniture, trade fixtures, equipment and furnishings according to the Facility Budget (DA ¶ 4.1). In so doing, the Company shall obtain the Tribe's prior written approval before procuring any gaming-related equipment or entering a purchase or lease transaction with a vendor that must be licensed by the Tribe (DA ¶ 4.1).

In order for development to proceed while financing for the project is being arranged, the Company shall advance up to [ ] (DA ¶ 5.1(a)). The Tribe shall reimburse the Company for these advances, with interest [ ] at an interest rate of [ ] (DA ¶ 5.1(a)). The Tribe shall make such reimbursement and interest payments from the proceeds of financing that the Tribe will seek with the assistance of the Company, to the extent that such proceeds become available (DA ¶ 5.1(h)). To the extent that financing proceeds are not available to cover such payments, the Tribe shall make reimbursement and interest payments as a priority payment from the operation's cash flow (DA ¶ 5.1(h)). [ ] (DA ¶ 5.1(g)).

64

In addition to the project advances, the Company agrees to provide the Tribe with a loan of [ ] to be used in the Tribe's discretion for economic development and diversification (DA ¶ 5.2). This loan shall accrue interest, [ ] (DA ¶ 5.2). The total amount of money that has been, and will be, loaned to the Tribe by the Company under the terms of this Development Agreement is approximately [ ]

64

The Tribe agrees to pay the Company a development fee equal to [ ] exclusive of the development fee (DA ¶ 5.4). The development fee is to be paid in [ ] installments, commencing after closing on the financing (DA ¶ 5.4). The amount of the [ ] installment is to be calculated so that the payments are spread as evenly as possible over the course of the development period, to be completed by the twentieth day of the month following the month in which the project is completed (DA ¶ 5.4). Any development fee that is not paid when due shall accrue interest at [ ] (DA ¶ 5.5(b)).

64

The Tribe grants the Company a security interest in the operation's cash flow to secure payment of the advances made by the Company to the Tribe (DA ¶ 5.5(a)). The Company agrees that at the request of the project financing lender, this security interest will be made subordinate to the security interest of the project financing lender (DA ¶ 5.5(a)). The Development Agreement contemplates that there will be a deposit control agreement, either with the project financing lender, or if not, then to be executed between the Tribe and the Company, which will provide the Company with a security interest and control over the operation's deposit accounts, as is reasonably acceptable to the Company (DA ¶ 5.5(a)).

Analysis

A. Management Contract

In our opinion, the Development Agreement is not a management contract, because the agreement relates to pre-operational development, and does not give the Company any role with respect to the actual gaming operations to be conducted at the facility. 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. "Management encompasses many activities (e.g., planning, organizing, directing, coordinating, and controlling). The performance of any one of such activities with respect to all or part of a gaming operation constitutes management for the purpose of determining whether any contract or agreement for the performance of such activities is a management contract that requires approval." *NIGC Bulletin No. 94-5.*

Central to the NIGC's definition of "management contract" and the NIGC bulletin quoted above is the concept that the "management" at issue must be over a gaming operation. "Gaming operation" is defined in the NIGC regulations as "each economic entity that is licensed by a tribe, operates the games, receives the revenues, issues the prizes, and pays the expenses." 25 C.F.R. § 502.10. Before gaming operations commence, there is no gaming operation to be managed. In this case, the Development Agreement provides no management role for the Company after the commencement of gaming operations. Therefore, although the Development Agreement may be said to authorize the Company to manage development of the Cowlitz Tribe's planned facility, our opinion is that it does not constitute a "management contract" for a gaming operation.

A related issue is whether the Development Agreement constitutes a "collateral agreement" to a management contract. 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. In this case, the Cowlitz Tribe and the Company have submitted a management contract for the NIGC Chairman's approval. Because both contracts involve the same parties, the Development Agreement is at least indirectly related to the management contract. Therefore, our opinion is that the Development Agreement is a "collateral agreement" to a management contract. Therefore, the Development Agreement is subject to NIGC review with the management contract, and may require revision before the management contract can be approved.

However, not all collateral agreements themselves require the NIGC Chairman's approval before they are effective. According to the language in IGRA related to Class II management contracts, "management contracts" include all collateral agreements "that relate to the gaming activity." 25 U.S.C. § 2711(a)(3). The NIGC has applied this

concept to Class III management contracts as well. *See United States ex rel. Saint Regis Mohawk Tribe v. President R.C.-St. Regis Management Co.*, 451 F.3d 44, 48 n.2 (2nd Cir. 2006); *Catskill Development, L.L.C. v. Park Place Entertainment Corp.*, 217 F. Supp. 2d 423, 432-33 (S.D.N.Y. 2002). Specifically, the NIGC's regulatory definition of "management contract," which applies to both Class II and Class III management contracts, includes any collateral agreement if "such . . . agreement provides for the management of all or part of a gaming operation." 25 C.F.R. § 502.15. Therefore, only collateral agreements that provide for the management of all or part of a gaming operation are "management contracts" requiring the NIGC Chairman's approval. *Jena Band of Choctaw Indians v. Tri-Millennium Corp., Inc.*, 387 F. Supp. 2d 671, 677-78 (W.D. La. 2005); *United States ex rel. Saint Regis Mohawk Tribe v. President R.C.-St. Regis Management Co.*, No. 7:02-CV-845, 2005 U.S. Dist. LEXIS 12456, at *9-10 (N.D.N.Y. June 13, 2005), *aff'd on other grounds*, 451 F.3d 44 (2nd Cir. 2006).

In this case, as stated above, the Development Agreement provides no management role for the Company after the commencement of gaming operations. Therefore, it is our opinion that the Development Agreement is a collateral agreement, but that it is not the type of collateral agreement that requires the NIGC Chairman's approval as a management contract.

B. Sole Proprietary Interest

In our opinion, the Development Agreement does not violate IGRA or the Cowlitz Tribe's gaming ordinance by giving the Company a proprietary interest in the Tribe's planned gaming operation. Under IGRA, in order to receive the NIGC Chairman's approval, a tribe's gaming ordinance must provide 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). NIGC regulations also require that all tribal gaming ordinances include such a provision. *See* 25 C.F.R. § 522.4(b)(1). The Cowlitz Tribe's gaming ordinance was approved by the NIGC Chairman on November 23, 2005. As required by IGRA, the tribal gaming ordinance provides: "The Tribe shall have the sole proprietary interest in and responsibility for the conduct of any gaming operation authorized by this ordinance." Cowlitz Indian Tribe, Tribal Council Ordinance No. 05-2, Section 4 (Aug. 22, 2005).

Under this section of the tribal gaming ordinance, if any entity other than the Cowlitz Tribe possesses a proprietary interest in the gaming activity, gaming may not take place. "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).

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).

In this case, the Development Agreement provides two means for the Company to make money. First, the Company is to advance certain funds to the Tribe, which the Tribe will repay with interest. The interest rate in the Development Agreement is set at [redacted] Such an interest rate on a casino development loan is reasonable within the industry, and therefore offers no cause for "sole proprietary interest" concern. Second, the Company is to receive a development fee of [redacted] exclusive of the development fee. A development fee tied to the total project cost is not uncommon for casino construction, and [redacted] is not an unreasonable rate of compensation for a company that is to administer nearly every aspect of the project development.

64

Finally, the Development Agreement provides a security interest in the operation's future cash flow. The exact terms of this security interest are not specified in the Development Agreement, but rather are left to a future deposit account control agreement to be entered "in such form as is reasonably acceptable to [the Company] at such time as the Financing is closed." DA ¶ 5.5(a). We note that an entity's rights pursuant to a security interest in gaming revenue can be written so broadly as to provide control over the gaming operation, either before or after default, and as such would violate IGRA's sole proprietary interest clause. But if the deposit account control agreement is narrowly tailored to ensure that the Company's financial interests are protected in the event of default, while maintaining ownership control of the operation with the Tribe, then such a security interest would be acceptable. In this case, we understand that the terms of the deposit account control agreement have yet to be negotiated, and have not been presented for our review. Therefore, it is enough to say that the language in the Development Agreement does not violate IGRA's sole proprietary interest provision. We assume that the deposit account control agreement, when available, will be provided to the NIGC as a collateral agreement for review with the management contract, and the issue of sole proprietary interest with regard to that agreement will then be addressed.

Conclusion

It is the opinion of the NIGC's Office of General Counsel that the Development Agreement is not a management contract requiring the NIGC Chairman's approval. However, because the Development Agreement is a collateral agreement, it is subject to review with the pending management contract. Furthermore, our opinion is that the Development Agreement does not violate the sole proprietary interest clause of IGRA or the Cowlitz Tribe's approved tribal gaming ordinance.

As you know, the Grand Ronde Tribe submitted a letter to the Department of the Interior expressing the position that if the Development Agreement is not determined to require the NIGC Chairman's approval under IGRA, then it should require the Department of the Interior's approval under 25 U.S.C. § 81. Letter from Rob Greene, Grand Ronde Tribal Attorney, to James Cason and George Skibine, U.S. Department of the Interior (Oct. 12, 2006). We are forwarding a copy of our opinion letter to the Department of the Interior. You may wish to contact the Department of the Interior's Office of Indian Gaming Management with regard to Section 81 compliance.

Because of the Grand Ronde Tribe's demonstrated interest in this issue, we intend to provide the Grand Ronde Tribe with a copy of this opinion letter. In addition, this opinion letter may be requested by other parties under the Freedom of Information Act ("FOIA"). However, the contents of this opinion letter may contain material that your clients' consider to be confidential commercial information. Therefore, please respond within ten (10) days to inform us what information in this opinion letter, if any, you deem to be protected from disclosure under Exemption 4 of FOIA because disclosure could reasonably be expected to cause substantial competitive harm. Please be as specific as possible and suggest redaction only of those terms which are still confidential and which are necessary to protect your clients' competitive interests.

Thank you for your submission. If you have any questions, please feel free to contact Staff Attorney Jeffrey Nelson at (202) 632-7003.

Sincerely,

Penny J. Coleman

Penny J. Coleman
Acting General Counsel

cc: George Skibine, Office of Indian Gaming Management,
U.S. Department of the Interior, w/incoming