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Re: Electronic Gaming Services Agreement, dated January 24, 2000, between MegaBingo, Inc. and the Delaware Tribe of Western Oklahoma

Dear Mr. Gonzales, Ms. Hamilton, Mr. Lind, and Mr. Loebig:

On July 19, 2004, responding to a National Indian Gaming Commission (NIGC) request, an Electronic Gaming Services Agreement (Agreement), dated January 24, 2000, between MegaBingo, Inc. (MBI) and the Delaware Tribe of Western Oklahoma (Tribe) was provided to the NIGC for review. We were advised by the Tribe that this contract covers the operation's Big Cash machines and that the parties are still operating under this [ ] contract. The purpose of our review is to determine whether the Agreement, whether written or verbal, constitutes a management contract or collateral agreement to a management contract and is therefore subject to our review and approval under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701 *et seq.* 64

We conclude that the Agreement constitutes a management contract subject to our review and approval. Furthermore, we are concerned that the Agreement evidences a proprietary interest by MBI in the Tribe's gaming activity. Such a proprietary interest would be contrary to IGRA, NIGC regulations, and the Tribe's approved gaming ordinance. *See* 25 U.S.C. § 2710 (b)(2)(A); 25 C.F.R. § 522.4(b)(1); Gaming Ordinance of the Delaware Tribe of Western Oklahoma (July 14, 1995) § 3.1.

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. 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

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.

Determination

After careful review, we have determined that the Agreement is a management contract. This determination is based on the presence of provisions that give management control to MBI.

MBI performs the accounting and money management for the gaming facility. MBI is solely responsible for proposing, establishing, and modifying the financial arrangements. Agreement § 2.1.1. The parties must agree upon written financial accounting procedures including daily deposits of all revenues. Exh. A § 1. Moreover, MBI is solely responsible for allocating, disbursing, and distributing the gaming revenues under a Cash Management System established by MBI. Exh. A § 2. MBI shall perform daily audits and will hire an independent auditor for an annual audit with results available to the Tribe upon request. Exh. A § 4. Accounting equipment and personnel training shall be supplied by MBI. Exh. A § 6. The Tribe has the right to inspect the Cash Management System and books of account and MBI shall permit it to conduct its own independent audits. Exh. A § 4.

In fact, MBI has so much control over accounting and audits and possibly other aspects of the gaming operation that it dictates the terms of the Tribe's access to the facility and the books: "Appropriate officials of the Tribe shall be permitted access to the daily operations of the Electronic Games at the Facility and shall have the right to verify Electronic Games Revenues and the Tribe's Fee on a daily basis." Exh. A § 4. This is a required term for a management contract. *See* 25 U.S.C. § 2711(b)(2).

The game procedures are established exclusively by MBI. Agreement § 2.1.1; Exh. B. The game procedures are subject to approval by a joint Tribal-MBI committee chaired by an employee of MBI and, if MBI adopts the changes despite the Tribe's disapproval, the Tribe must either accept them or terminate the contract. Exh. B §§ 5(c), 1(c). The Tribe may have access to the non-confidential game procedures only upon request. Exh. B § 2.

MBI is to be the exclusive lessor of games to the Tribe, which agrees that it shall not conduct any electronic games except in conjunction with MBI. Agreement § 4.3.

There is clear control of marketing and promotions by MBI. MBI shall conduct market analyses and research and place advertising and promotions as it, in its sole discretion, deems necessary or advisable. § 2.4. General advertising must be approved by a joint Tribal-MBI committee which also handles public relations. *Id.*; Exh. B at §§ 3,4. The Tribe may provide its own marketing as well, though it must cooperate with MBI's advertising and promotional efforts. § 3.2. Indeed, the Tribe is to provide MBI with data on bingo conducted on Indian lands and on other possible markets for MBI's games as

well as share its facility and customer information to facilitate MBI's marketing research. § 3.4. Marketing is an indication of management. *See NIGC bulletin No. 94-5.*

MBI is also involved in obtaining licenses for the Tribe. The Tribe must cooperate in good faith with any efforts by MBI to obtain permits, licenses, approvals, or studies deemed by MBI to be necessary or desirable. § 3.3.

The duration of the Agreement also connotes the existence of a management relationship. The term of the Agreement is [ ] § 1.1. Such a lengthy term is an indication of a management contract, *see NIGC Bulletin No. 94-5,* [ ] 64

The combined effect of the financial, accounting, game control, and advertising provisions, combined with the length of the contract, leads us to conclude that the Agreement is a management contract.

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. The NIGC, in its regulations, also requires that all tribal gaming ordinances include such a provision. 25 CFR § 522.4(b)(1). Accordingly, the Tribe's gaming ordinance specifically requires that the Tribe shall have the sole proprietary interest in and responsibility for the conduct of all gaming operations. Gaming Ordinance § 3.1.

"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. [emphasis added]

Id.

An additional aid to statutory interpretation includes the legislative history of the statute. 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, 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] [emphasis added]

46 Am. Jur. 2d *Contracts* § 57.

Consequently, if a joint venture is found to exist it would be further evidence that the Tribe did not hold the sole proprietary interest in the gaming operation.

Finally, the preamble to the NIGC's 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

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.

As noted above, we are concerned that the Agreement bestows a proprietary interest in the gaming activity on MBI, in violation of IGRA, its implementing regulations and the Tribe's gaming ordinance because of the excessive compensation, in addition to the control, provided to MBI in proportion to the services rendered.

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). The 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 Agreement gives MBI a fee equaling[ ] 64

In light of MBI's fee, we are concerned with the amount of the Tribe's actual profit that is being paid to MBI is contrary to the IGRA. It is possible for[ ] 64]Therefore, we request that the parties provide us with a written justification for the fee.

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[1] 64

Conclusion

As the Agreement constitutes a management contract, it requires the approval of the NIGC's Chairman. Please be advised that an unapproved gaming management contract is void. Management of a gaming operation under an unapproved agreement could result in closure of the operation. *See* 25 C.F.R. § 573.6(a)(7); *NIGC Bulletin No. 94-5*. Please submit the contract and all other submission requirements as laid out in 25 C.F.R. § 533.3 for our approval.

We are also concerned that the Agreement bestows a proprietary interest in gaming activity on MBI in violation of IGRA, its implementing regulations, and the Tribe's gaming ordinance. Due to this concern, we request that the parties provide any explanation and information available that might establish that the contract terms do not violate the requirement that the Tribe maintain the sole proprietary interest in the gaming operation.

If you have any questions or concerns, please contact Staff Attorney Andrea Lord at (202) 632-7003.

Sincerely,

Penny J. Coleman
Acting General Counsel