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VIA FACSIMILE & REGULAR MAIL

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RE: Amended and Restated Development Agreement between the Kiowa Tribe of Oklahoma, KCOA and Casino Development Group-Kiowa I LLC

Dear Sirs:

By letter dated May 10, 2005, Mr. Rivas, on behalf of the Kiowa Tribe, requested that the National Indian Gaming Commission ("NIGC") review the Amended and Restated Development Agreement ("Development Agreement" or "DA") and Amended and Restated Senior Secured Credit Agreement ("Credit Agreement" or"SSCA"), both dated April 12, 2005, between the Kiowa Tribe of Oklahoma ("Tribe"), the Kiowa Casino Operations Authority ("KCOA"), and Casino Development Group-Kiowa I, L.L.C ("CDG") and collateral agreements (together "Agreements").[1] Specifically, the Tribe seeks a determination that these agreements do not constitute a management contract, as defined in the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq.*

Following careful examination, we conclude that the Agreements, taken together, constitute a management contract. This determination is based on the presence of several key provisions in a number of the documents that bestow management control on Casino Development Group (CDG). In addition, we find that the Amended and Restated Senior Secured Credit Agreement (SSCA) bestows a proprietary interest in the gaming activity upon TS Ventures in violation of the IGRA.

[1] On December 19, 2005, the Kiowa Tribe passed Tribal Resolution No. CY_2005-205, which requested that the NIGC stay, for a period of 90 days, any decisions related to the documents submitted by the Kiowa Tribe for review. Upon receipt of this resolution, NIGC staff suspended review of the documents. On April 12, 2006, the NIGC received Tribal Resolution No. CY-2006-515 which, among other things, authorized tribal action to obtain necessary approvals from the NIGC. The Tribe requested the NIGC review other agreements submitted by it prior to review of the agreements at issue here.

Agreements Submitted

The following agreements were submitted by Mr. Rivas on behalf of the Tribe:

1) Amended and Restated Development Agreement between KCOA, the Tribe, and CDG;

2) Amended and Restated Senior Secured Credit Agreement between KCOA, the Tribe (and additional obligor with respect to certain provisions), TS Ventures, L.L.C. (Lender), and Red River Gaming, L.L.C. (Lender's Agent);

3) Deposit Account Security, Pledge and Control Agreement between KCOA, TS Ventures, L.L.C., and the Depository;

4) Letter Agreement, dated September 1, 2004, between TS Ventures, L.L.C., CDG, KCOA, and the Tribe;

5) Promissory Note, dated February 15, 2004, between KCOA and Greg Wilson;

6) Letter Agreement, dated November 5, 2004, between KCOA and Asher Financial, Inc.

7) Amendment to Letter Agreement, dated August 5, 2005, between KCOA and Asher Financial, Inc.

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 subcontract or (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

[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.*

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.*

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).

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).

Financing

Pursuant to the Development Agreement, the Tribe will pay CDG [ ] of the Project costs and any future projects. Project costs are not defined in the Development Agreement. Pursuant to the Credit Agreement, TS Ventures will loan KCOA [ ] Beyond the payment of interest, KCOA will also pay TS Ventures [ ] Moreover, as an additional fee, KCOA will pay TS Ventures [ ]

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Determination

1. **Amended and Restated Development Agreement between KCOA, the Tribe, and CDG**

Management Control

The Development Agreement contains several indicia of management. Most obvious are the following two provisions: "The Tribe and the KCOA will execute any and all further documents, agreements, instruments, and take all such further actions, which...Developer may reasonably

request, to effectuate the financing, construction and operation of the Initial Project as requested, in the sole judgment of Developer" (DA §8.01(f)) and "The Kiowa Business Committee shall adopt such ordinances as deemed necessary by the Developer to facilitate the financing and operation of the Initial Project..." (DA §2.01(h)). The first phase of the Initial Project includes a tribal gaming casino and the second phase of the Initial Project includes a second casino and resort hotel. Development Agreement Preamble, Section E.

These provisions grant CDG unfettered control over the Tribe's gaming operations. Pursuant to these provisions, the Tribe *must* enter into any agreement that CDG requests for the operation of the casinos. Furthermore, the Kiowa Business Committee *must* pass any tribal laws that CDG deems necessary for the operation of the casinos. We can think of no stronger management control language than that which is contained in these two provisions.

In addition to the management control inherent in these provisions, they also are an improper infringement on tribal sovereignty. Third parties cannot unduly interfere with or influence any decision or process of the tribal government relating to gaming activity. *See* 25 U.S.C. § 2711(e)(2). Consequently, CDG, in its sole judgment, cannot dictate whether the Tribe will execute agreements or adopt ordinances.

Other provisions in the Agreements also indicate management of the gaming operations. For instance, the term of the Development Agreement suggest management. The Development Agreement discusses services to be provided by the Developer prior to opening of the casino, yet the term extends [ ] years from the initial opening date. DA § 10.01. If the arrangement were solely for the development of the gaming operation, there would be no need for the Developer to continue to be involved for [ ] more years. Furthermore, such a lengthy term is an indication of a management contract, *See NIGC Bulletin No. 94-5*, and, in fact, [ ] 64

Another provision deals squarely with management functions. Section 2.04 provides that the "Developer shall identify, recruit, interview and screen, and present to the KCOA for approval and hiring . . . a general manager and such other executive management reasonably necessary for the successful opening and operation of the [gaming operation]." DA §2.04. We rarely see in a development agreement such intimate involvement with the selection of management. Essentially, this provision allows CDG to hand-pick its own manager for the Tribe's operation. Furthermore, pursuant to the Development Agreement at §8.01(f), discussed above, the Tribe would be required to enter into any employment or management agreement CDG reasonably requested.

The Development Agreement further provides that CDG shall provide consulting services with respect to staffing, training, marketing and other "pre-opening" activities as reasonably requested by the KCOA. DA §2.05. Staffing, training, and marketing are management functions. We understand that these functions must be accomplished pre-opening to facilitate the smooth opening and operation of the casino. However, these are management functions and should be

performed by management. While it is acceptable for a developer to provide some consulting services in these areas, because we find that, here, the arrangement constitutes a management contract, we believe that CDG would not merely "consult" in these areas. Furthermore, a consulting agreement is one that identifies a finite task, specifies a date for its completion, and provides compensation based on an hourly or daily rate or fixed fee. NIGC Bulletin 94-5 at 3; *First American Kickapoo Operations, L.L.C. v. Multimedia Games*, 412 F.3 1166, 1170 (10th Cir. 2005). The Development Agreement does not satisfy this definition.

Management functions are also provided for in the following sections which the Development Agreement indicates relate to "pre-opening": "[a]ssist in the development and implementation of internal controls . . ."; and "[a]ssist in developing and implementing a compliance program to assure compliance of the Gaming Operations. . .". DA §§2.05 (d) and (e). The implementation of internal controls and a compliance program occurs on a daily basis during the operation of gaming. While development of these programs may be a pre-opening function, the implementation is not. Implementation is a management function.

Yet another provision grants CDG the power to negotiate contracts relating to gaming machines and equipment with persons selected and approved by CDG. DA §3.01. The selection of gaming machines and machine vendors is a management function. (A similar provision exists at §5.01(a) of the Credit Agreement).

Furthermore, two other provisions require changes. First, the Secretary of the U.S. Department of the Interior approves tribal-state compacts, not the NIGC. *See* 25 U.S.C. § 2710(d)(8)(A). Thus, §2.01(l) of the Development Agreement requires revision. Second, IGRA prohibits any transfer or conveyance of any interest in land or other real property. *See* 25 U.S.C. § 2711(g). Therefore, Section 3.02 violates IGRA, as the parties cannot expressly agree to allow one party to become a lien holder of the initial project site. This prohibition applies to fixtures on such land as well.

Finally, §5.01(a) notes that the Gaming Commission is involved in negotiating and approving contracts. Because the Gaming Commission is charged with the regulation of gaming facilities, it should not also be involved in the operation of the facility. Negotiating and approving contracts is an operational function best left to casino management. *See* NIGC Bulletin No. 94-3, *Functions of a Tribal Gaming Commission*; NIGC Bulletin No. 99-3, *Independence of Tribal Gaming Commissions*.

2. Amended and Restated Senior Secured Credit Agreement between KCOA, the Tribe, TS Ventures, and Red River Gaming

Proprietary Interest

The Credit Agreement between the KCOA, the Tribe, TS Ventures, L.L.C., and Red River Gaming, L.L.C. accords TS Ventures a proprietary interest in the Tribe's gaming activity. TS Ventures' proprietary interest in the Tribe's gaming activity derives from the excessive amount of revenue it will obtain from the Tribe's gaming facility and other operations relative

to the loan amount it provided. In short, the Credit Agreement provides TS Ventures an equity interest in the Tribe's gaming activity rather than merely interest on the loan.

Pursuant to the SSCA, TS Ventures will loan KCOA[ ]Beyond the payment of interest, KCOA will also pay TS Ventures[ ]Moreover, as an additional fee, KCOA will pay TS Ventures[ ]Financial projections provided by the Tribe show that, over the course of[ ]years,[ ] 64

All of this compensation is paid to TS Ventures for loaning the Tribe[ ]This is excessive compensation in light of the loan amount. Such a payment structure does not provide TS Ventures a fee for its loan, but accords it a fractional ownership interest in the Tribe's gaming activity and its related operations for[ ]years. Surely an interest rate of[ ]is repayment enough for the loan. 64

Conclusion

As the Development 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*. 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)).

Furthermore, the Credit Agreement between the KCOA, the Tribe, TS Ventures, L.L.C., and Red River Gaming, L.L.C. accords TS Ventures a proprietary interest in the Tribe's gaming activity. Accordingly, the agreement is contrary to the public policy underlying the IGRA that prohibits entities other than tribes from having a proprietary interest in gaming activity and no gaming may take place under it unless and until revisions are made to those provisions that grant a proprietary interest.

If you have any questions, please contact Maria Getoff, Staff Attorney, at 202-632-7003.

Sincerely,

Jo-Ann Shyloski
Senior Attorney

cc: Todd Araujo, Esq., Akin Gump