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Re: Agreement between Miami Tribe of Oklahoma Business Development Authority and the Western Delaware Tribe, dated June 15, 2004

Dear Sirs and Madam:

On July 20, 2004, Ms. Hamilton provided the Agreement between the Miami Tribe of Oklahoma Business Development Authority and the Western Delaware Tribe, dated June 15, 2004, for our review. The purpose of our review is to determine whether

the Agreement constitutes a management contract or a collateral agreement to a management contract and, therefore, is subject to our review and approval under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701 *et seq.*

We conclude that the Agreement does not constitute a management contract subject to our review and approval. However, we are concerned that the Agreement evidences a proprietary interest by the Miami Tribe of Oklahoma Business Development Authority in the Western Delaware Tribe's gaming activity. Such a proprietary interest would be contrary to IGRA, NIGC regulations, and the Western Delaware Tribe's 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.

Consequently, because of our concern, we request that the parties provide us with a justification for the fee obtained by the Miami Tribe of Oklahoma Business Development Authority in this instance. Please provide such justification in writing and submit it to us as soon as possible.

**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 U.S. Department 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, or 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.

The Agreement at issue here does not establish a management relationship and, consequently, does not require the Chairman's approval.

**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.

As noted above, we are concerned that the Agreement bestows a proprietary interest in the gaming activity on Miami Tribe of Oklahoma Business Development Authority ("Miami BDA"), in violation of IGRA, its implementing regulations and the Western Delaware Tribe's gaming ordinance, because of the excessive compensation provided to Miami BDA 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). 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, although Miami BDA does not provide any management services, the Agreement gives Miami BDA a fee equaling [redacted]

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In light of Miami BDA's fee, we are concerned that the amount of the Western Delaware Tribe's actual profit paid to the Miami BDA is contrary to IGRA. It is possible for [ ] to equal a far higher amount of net revenue because operating costs, such as electricity, building maintenance, and employee salaries, have not been deducted. Therefore, we request that the parties provide us with a written justification for the fee as soon as possible. 64

**Conclusion**

Although we conclude that the Agreement does not constitute a management contract, we are concerned that it bestows a proprietary interest in gaming activity on Miami BDA in violation of IGRA, its implementing regulations, and the Tribe's gaming ordinance. Due to this concern, we request that the parties provide a justification for the amount of Miami BDA's fee to us in writing.

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

Sincerely,

Penny J. Coleman

Penny J. Coleman
Acting General Counsel

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