NOV 30 2004

Jim Gray
Principal Chief
Osage Tribal Council
P.O. Box 779
Pawhuska, OK 74056

Wilson Pipestem
Pipestem Law Firm, P.C.
Robert S. Strauss Building
1333 New Hampshire Avenue, NW
Washington, DC 20036
Fax: (202) 659-4931

Clifton Lind
President & CEO
Multimedia Games, Inc.
206 Wild Basin Road
Building B, 4th Floor
Austin, TX 78746
Fax: (512) 334-7695

Gary Loebig
Executive Vice President
MegaBingo, Inc.
8900 Shoal Creek Blvd, Ste 300
Austin, TX 78757
Fax: (512) 371-7114

Dear Mr. Gray, Mr. Pipestem, Mr. Lind, and Mr. Loebig:

In a letter dated December 15, 2003, you requested the National Indian Gaming Commission (NIGC) review a series of agreements between the Osage Tribe (Tribe) and K&D Gaming (K&D), Oklahoma Gaming Development, LLC (OGD), and Megabingo, Inc. (MBI). The submitted documents were as follows:

1. Memorandum of Understanding between the Tribe and K&D (MOU)
2. Construction Loan Agreement between the Tribe and OGD
3. Promissory Note from the Tribe to OGD
4. Security Agreement between the Tribe and OGD
5. Consulting Agreement between the Tribe and K&D
6. Development Agreement between the Tribe and K&D

NATIONAL HEADQUARTERS 1441 L St. NW, Suite 9100, Washington, DC 20005 Tel: 202.632.7003 Fax: 202.632.7066 WWW.NIGC.GOV

REGIONAL OFFICES Portland, OR; Sacramento, CA; Phoenix, AZ; St. Paul, MN; Tulsa, OK

7. Depository Control Agreement between the Tribe and OGD
8. Reel Time Bingo System Agreement (Rental) and Software License between the Tribe and MBI

The NIGC sent an informal letter listing the agency's concerns on May 13, 2004, following a meeting with the parties on May 11, 2004. On August 2, 2004, the following amended contracts were received:

1. Amended and Restated Construction Loan Agreement between the Tribe and MBI (Loan Agreement)
2. Amended and Restated Development Agreement between the Tribe and K&D
3. Amended and Restated Consulting Agreement between the Tribe and K&D
4. Resolution of the Osage Tribal Council
5. Certificate of Tribe
6. Amended and Restated Sand Springs Promissory Note between the Tribe and MBI
7. Amended and Restated Sand Springs Security Agreement between the Tribe and MBI
8. Amended and Restated North Tulsa Promissory Note between the Tribe and MBI
9. Amended and Restated North Tulsa Security Agreement between the Tribe and MBI
10. Amended and Restated Depository Control Agreement between the Tribe, MBI, K&D, and Bank of Oklahoma, N.A.
11. Termination and Release of Disbursement Agreement
12. Termination and Release of OGD/Osage Loan Documents
13. Termination and Release of MBI/OGD Loan Documents
14. Limited Liability Company Dissolution Agreement concerning OGD
15. Termination and Release of Participation Agreement
16. Amended and Restated Agreement (Sand Springs)
17. Amended and Restated Agreement (North Tulsa)

The purpose of our review is to determine whether the agreements constitute a management contract or collateral agreements to a management contract and are therefore subject to our review and approval under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701 *et seq.*

We are not prepared conclude that the agreements do not constitute a management contract subject to our review and approval. However, we are more concerned that the agreements evidence 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); The Class II Gaming Ordinance of the Osage Tribe of Indians, as amended, § 1.03.

Consequently, because of our concern, we request that the parties provide us with a justification for the fee obtained by the MBI 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 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 examination, we conclude that the new agreements of August 2 separate MBI and K&D for the purposes of management contract review. The entities are no longer contracting together with the Tribe and appear to have separated their roles. We therefore review the MBI and K&D contracts independently. For the MBI review, we examined the Amended and Restated Construction Loan Agreement between the Tribe and MBI (Loan); Amended and Restated Sand Springs Promissory Note between the Tribe and MBI (Sand Springs Note); Amended and Restated Sand Springs Security Agreement between the Tribe and MBI (Sand Springs Security Agreement); Amended and Restated North Tulsa Promissory Note between the Tribe and MBI (North Tulsa Promissory Note); the Amended and Restated North Tulsa Security Agreement between the Tribe and MBI (North Tulsa Security Agreement); the Amended and Restated Depository Control Agreement between the Tribe, MBI, K&D, and Bank of Oklahoma,

N.A.; the Amended and Restated Agreement (Sand Springs); and the Amended and Restated Agreement (North Tulsa).

We are in the process of reviewing whether implementation of the agreements constitutes management.

Sole Proprietary Interest

Another area of concern is the amount of compensation MBI will receive under the Development Agreement. One of the 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). Our determination process for defining "proprietary interest" is set forth below.

Using the rules of statutory construction, we investigate the plain language and the ordinary meaning of the words themselves. "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 the definitions together, a proprietary interest creates the right to possess, use and convey something.

Then we examine case law. 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]

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, offering only a statement 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.

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.

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 <u>and total operating expenses</u>, excluding management fees." *See* 25 U.S.C. § 2703(9) (emphasis added).

As noted above,.we are concerned that the agreements bestow 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 provided to MBI in proportion to the services rendered.

MBI is a lender as well as game lessor. MBI is lending the Tribe[ ]Sand Springs Note at para. 2; North Tulsa Note at para. 2. The loan requires the Tribe to[ ] Loan Agreement § 5.1 para. 2, Sched. 3.1(o).[ ]

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Although MBI does not provide any management services, the game lease agreements give MBI a fee equaling[ ]North Tulsa Lease Agreement § 4; Sand Springs Lease Agreement § 4[ ]

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Further monies are due to MBI under the Player Tracking Agreements.[1] The loan is to be repaid at[ ]Sand Springs Note at para. 2; North Tulsa Note at para. 2.

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[ ]

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[1] **A copy of the MBI Player Tracking License and Maintenance Agreement, Exhibit I to the lease agreements, was provided to us upon request. We were orally advised that the player tracking agreements were identical for both lease agreements. Despite several requests, the payment provisions of the player tracking agreement, Exhibit C, have not been provided.**

[ ]The rebate somewhat mitigates our concern, but does not appear to substantially lower the lease fee percentage under average Oklahoma game take.

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We are also concerned that the security agreements and loan appear to suggest that real estate might form part of the loan collateral. The Loan Agreement defines "Lien" to mean "any mortgage, deed of trust, lien, pledge, security interest or other charge or encumbrance, of any kind whatsoever, including but not limited to the interest of the lessor or titleholder under any capitalized lease, title retention contract or similar agreement." § 1.1. The security agreements include as collateral the disposition of all or any portion of any Casino Facilities. North Tulsa Security Agreement § 1(b); Sand Springs Security Agreement § 1(b). The IGRA prohibits, in most circumstances, the conveyance of any interest in land or other real property. *See* 25 U.S.C. § 2711(g).

Conclusion

We are not prepared to conclude that the Agreement does not constitute a management contract. Furthermore, we are concerned that it 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. Additionally, please submit Exhibit C to Exhibit I, the MBI Player Tracking License and Maintenance Agreement so that we may continue our review.

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

Sincerely,

Penny J. Coleman
Acting General Counsel