February 22, 2005

VIA FACSIMILE & REGULAR MAIL

Chief Charles A. Todd
Ottawa Tribe of Oklahoma
P.O. Box 110
Miami OK 74355
Fax: 918.542.3214

Re: Ottawa Tribe - C&S development agreement, Ottawa Tribe - Stinksi bridge loan and note.

Dear Chief Todd:

This letter is in response to yours of July 29, 2004, seeking review of a casino development agreement between the Ottawa Tribe of Oklahoma and C&S Gaming, as well as a bridge loan agreement and note between the Tribe and [ ] all three dated July 14, 2004. In particular, you requested a finding that none of these agreements, individually or in combination, constitute a management contract subject to the Chairman's review and approval under 25 U.S.C. § 2711. We find no management contract. 56

In reviewing the agreements, however, we became concerned that their structure, primarily that of the development agreement, gave to C&S a proprietary interest in the proposed gaming operation. That would be contrary to the requirements of IGRA, 25 U.S.C. § 2710(b)(2)(A); this Commission's regulations, 25 C.F.R. § 522.4(b)(1); and the Tribe's own gaming ordinance, Art. III, Ownership of Gaming, all of which require that the Tribe have the sole proprietary interest in any gaming activity. After careful consideration, we find nothing contrary to that requirement. This proved to be a difficult question, and we sincerely apologize for any difficulties that our lengthy review has caused.

Management Contracts

IGRA requires the Chairman's review and approval of all gaming-related management contracts and collateral agreements to management contracts. 25 U.S.C. § 2711. The former 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 Chairman pursuant to IGRA. 25 U.S.C. § 2711(h).

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, 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 Commission's view, 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 the Chairman's approval.

The agreements here require C&S, in essence, to provide the Tribe with a completed gaming operation, at which point its responsibilities end. As spelled out in Article 3 of the development agreement, C&S, having submitted to a background investigation and licensing by the Tribe, will perform various evaluations preliminary to construction, will assist the Tribe in producing a development budget and selecting a general contractor, will advise the Tribe in the selection of gaming equipment, and will provide construction management services. C&S's responsibilities terminate with the opening of the facility, and it is thereafter not involved, nor does an event of default make it involved, with any decision-making for the operation. Indeed C&S expressly disavows any such authority:

> C&S EXPRESSLY ACKNOWLEDGES AND AGREES THAT C&S HAS NO RIGHT UNDER THIS DEVELOPMENT AGREEMENT TO MANAGE ANY ACTIVITY OR PROPERTY OF THE TRIBE (OR ANY AFFILIATE OF THE TRIBE) THAT CONSTITUTES OR IS USED IN GAMING REGULATED BY IGRA.
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> *See* development agreement, Section 10.16.

Given the terms of the agreements, that is a correct statement. The agreements establish no management relationship between C&S or [ ] and the Tribe. Consequently, the agreements do not require the Chairman's approval. 66

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.

IGRA does not define "proprietary interest," but case law and secondary legal authorities suggest that it is to be taken in its straightforward, ordinary sense, *i.e.* as an ownership interest. Courts have defined proprietary interest in a number of contexts. In a criminal tax case, for example, the Court of Appeals for the fifth Circuit discussed the phrase "proprietary interest," 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.
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> *Evans v. United States*, 349 F.2d 653 (5th Cir. 1965).

Similarly, in *Dondlinger v. United States*, the issue was whether the plaintiff had a proprietary interest in a wagering establishment sufficient to make him 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.
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> 1970 U.S. Dist. LEXIS 12693 (D. Neb. 1970)(emphasis added).

To the same effect, a leading legal encyclopedia draws a distinction, in circumstances where one is entitled to a percentage of profits as compensation, between having a proprietary or ownership interest in an enterprise and merely drawing a salary from it, one that is proportionate to services provided:

> 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. On the other hand, a proprietary interest or control may be evidence of a joint venture.
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> 46 Am. Jur. 2d *Contracts* § 57 (emphasis added).

That is the question the agreements raise here.

Under the development agreement, C&S will receive [ ][1] *See* development agreement, Section 4.1(a). That figure is equivalent to [ ] Moreover, this compensation is all to be paid after C&S has ceased providing services. Thus: does the compensation to C&S reasonably reflect the value of what it will provide, or has C&S, in effect, bought itself a fractional ownership interest in the Tribe's gaming operation? b4

The distinction is not a simple one to make. Nonetheless, after careful consideration, we find that C&S's compensation appears commensurate with the services it will provide and the risks it will assume and, therefore, that it has not purchased a proprietary interest in the proposed casino. The following significant facts led us to this conclusion.

First, in addition to all of the development services that C&S will provide, C&S will guarantee the Tribe's [ ] construction loan. The Tribe intends to borrow that amount at [ ] The proposed summary of terms provided to us states that the loan will be used to finance the construction of the casino; fund the purchase of its furniture, fixtures, and equipment; provide working capital and start-up expenses; and finance any necessary transaction costs. *See* September 2, 2004, summary of terms. b4

C&S will guarantee repayment of that obligation.[2] *See* September 2, 2004, summary of terms. This represents a significant risk, particularly as C&S's own projections show it earning roughly [ ] b4

Second, as a practical matter, your letter of January 31, 2005, notes that C&S's guarantee made financing possible and that the Tribe had great difficulty securing investors for a casino project that will face competition from many neighboring tribes while drawing from a predominantly rural, four-state area.

Third, C&S will have no interest in the gaming operation's building, fixtures, or gaming equipment.

In short, exchange for [ ] C&S, at significant risk to itself, will provide the Tribe with a package unavailable but for C&S participation - a complete, and financed, gaming operation owned by the Tribe free and clear after repayment of loans. While the high percentage of revenues given to the C&S still troubles b4

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[1] The development agreement defines gross revenue as "all revenues derived from all sources permitted under GAAP [Generally Accepted Accounting Principles] to be included in... total revenues, but excluding" money borrowed or proceeds from insurance or condemnation. See development agreement, Section 1.1.

[2] C&S's guarantee will only be discharged if [ ] *See* September 2, 2004, summary of terms. b4

us, the compensation appears to be commensurate with the services provided and the risk assumed. C&S has thus not acquired a proprietary interest in the Ottawa Tribe's gaming operation.

Conclusion

The three agreements at issue neither constitute a management contract nor do they convey a proprietary interest in the proposed gaming operation to C&S.

We will, therefore, forward the agreements to the Department of the Interior for their review. If you have any questions or concerns, please do not hesitate to contact Michael Gross, Staff Attorney, at (202) 632-7003.

Sincerely,

Penny J. Coleman

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Acting General Counsel

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