



May 24, 2005

Mr. Lester J. Marsten
Law Offices of Rapport and Marston
P.O. Box 488
Ukiah, CA 95482

Dear Mr. Marsten:

On November 30, 2004, on behalf of Sweetwater Gaming, Inc. ("Sweetwater"), you requested that the National Indian Gaming Commission (NIGC) review certain agreements between Sweetwater and the Hannahville Indian Community (Tribe) to determine whether or not the agreements constitute a management agreement subject to approval of the Chairman. These documents included: (1) a Consulting Agreement; (2) a Loan Agreement; (3) an Indemnification and Legal Representation Agreement; (4) a Promissory Note; (5) a Gaming Equipment Lease; and (6) a Security Agreement. Collectively, the Loan Documents and Gaming Device Lease Documents are referred to herein as "Transaction Documents." According to your letter, the Tribe and the Developer have negotiated and executed a Management Agreement that will be submitted to the NIGC at a later date.

The purpose of our review is to determine whether these documents, individually or collectively, constitute a management contract or collateral agreements to a management contract and therefore subject to our review and approval under the Indian Gaming Regulatory Act. We have determined that the "Transaction Documents" constitute a management agreement and therefore is subject to approval by the Chairman. Additionally, we are concerned that the Gaming Equipment Lease Agreement runs afoul of IGRA's requirement that the Tribe hold the sole proprietary interest in the gaming operation.

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.

After careful review we have determined that the Transaction Documents constitute a management agreement requiring the approval of the Chairman.

Proprietary Interest

Another area of concern is the amount of compensation the Developer will receive under the Gaming Equipment Lease 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).

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).

Determination

Pursuant to *NIGC Bulletin No. 94-5*, the presence of certain management activities in a contract between a tribe and an outside party indicate that the contract is a management contract. Several of the provisions within the agreements between the Tribes and Sweetwater indicate that the Transaction Documents are in fact management contracts, including:

(1) *Payments* – The Consulting Agreement provides that consulting services are being provided as consideration for the Tribe entering a Gaming Equipment Lease Agreement. [

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(2) *Terms* - The lease agreement provides that the lease between Sweetwater and the Tribes is for a period of [] years, with a possible extension to [] years. This is a standard term for a management contract.

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(3) *Exclusivity* – The Lease agreement provides that []

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(4) *Accounting Procedures* – The Loan Agreement requires that the Tribe will keep and maintain full and accurate accounts and records for the Project and each of its

components and will permit Sweetwater to have access and make examinations, audits, and copies at all reasonable times.

Additionally, the Consulting Agreement appears to very broad encompassing development, finance, design, construction, and operation. Many of these duties are broadly defined and will occur on an ongoing basis. More specifically, Sweetwater is retained to perform duties including the following:

- (1) Consult with the Tribe in the development of an operational plan for the Facility, including hours of operation, rules of play, types, number and variety of games, food and beverage services, and other retail operations;
- (2) Perform such services as are directed by Tribe in connection with recruiting, hiring and training necessary personnel for the operation of the casino and assist the Tribe in the conduct of required background investigations and licensing of key employees and primary management officials;
- (3) Perform such services as are directed by Tribe in the development of a promotion and advertising plan for the Facility, including the development and coordination of busing;
- (4) Assist the Tribe in the development of adequate cash control and accounting systems, such that the security of cash is assured and records and accounting systems are maintained which are susceptible of audit in accordance with generally accepted accounting principles;

Although the agreement provides that all plans shall be subject to the approval of the Tribe and that the agreement is not intended to provide for the management of the gaming operation, the broad scope of Sweetwater's duties exemplifies a management contract.

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 Lease grants the Developer{

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In this case, the Developer would be receiving similar and/or greater percentages of the net revenues than is allowed for a management contractor who would be providing full time management services rather than simply consulting. *See* 25 U.S.C. § 2711 (c). As a consequence, the level of compensation extends far beyond what is reasonable for the services provided.

We request that the Tribe of Developer submit information related to

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Finally, we are concerned about the arbitration provisions of the Transaction Documents which prevent the Tribe from regulating the gaming operation. The agreement should make clear that governmental actions such as licensing determinations cannot be subject to arbitration.

If you have any questions, contact John Hay, Staff Attorney, at (202) 632-7003.

Sincerely,



Penny J. Coleman
Acting General Counsel

cc: Director, Indian Gaming Management Staff