



September 27, 2006

Robert L. Gips
Drummond, Woodsum & MacMahon
245 Commercial Street
Portland, Maine 04104-5081

Re: Draft of a Memorandum of Agreement between the Mashantucket Pequot Tribal Nation and MGM MIRAGE

Dear Mr. Gips:

The purpose of this letter is to respond to your letter, dated March 31, 2006, to the National Indian Gaming Commission ("NIGC"), requesting our review of a draft of a Memorandum of Agreement ("Draft MOA") between the Mashantucket Pequot Tribal Nation ("Tribe") and MGM MIRAGE ("MGM"). We note that, in your letter, you emphasize that the agreements embodied in the Draft MOA are merely proposed and not yet final. In your letter, you also mention that you intend to incorporate our views into the drafting of the final documents.

After careful review of the Draft MOA, particularly as it applies to Foxwoods, we find significant problems, both as to whether the Draft MOA constitutes a management agreement and whether the Draft MOA gives MGM a proprietary interest in the Tribe's existing gaming operation. We conclude that the Draft MOA would be, in essence, a management agreement requiring NIGC approval. We further conclude that the Draft MOA would deprive the Tribe of sole ownership of its gaming operation, in violation of Indian Gaming Regulatory Act ("IGRA") and the Tribe's own gaming ordinance. We have additional concerns that the Draft MOA would create the potential for depriving the Tribe of sole ownership of future gaming activity on its Indian lands.

Background

The Tribe currently owns and operates the Foxwoods Resort Casino ("Foxwoods") and Hotel, which is located on the Mashantucket Pequot Reservation in Ledyard, Connecticut. The Casino opened in 1992. Construction of a new, multimillion dollar Casino hotel is underway and is scheduled to be completed by the summer of 2008.

Summary of the Draft MOA

The Draft MOA contemplates a number of different arrangements between the Tribe and MGM, some of which will apply to gaming activities on the Tribe's Indian lands and others not. These arrangements include a grant by MGM to the Tribe to use its "MGM Grand" brand license; a technical services agreement between the Tribe and MGM for development and operational expertise; and the creation of a joint venture between the Tribe and MGM to develop gaming and resort business activities on Reservation lands, off-Reservation lands, in non-Tribal commercial settings, and with other tribes.

In exchange for the use of the MGM Grand Casino brand, the Tribe would be required to pay MGM [

] The Draft MOA also provides for a [] year renewal of this financial arrangement for an aggregate term of [] years. The Tribe would have the right to renew under the same terms and conditions as the first [] year term. [

] As to fees, in exchange for technical, advisory services, the Tribe would be required to pay MGM [

] The anticipated length of this arrangement, as it pertains to this fixed fee, is [] years, with renewal rights for an additional [] years. [

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Analysis

As noted above, the Draft MOA submitted to us applies to gaming on the Tribe's Reservation lands as well as gaming on off-Reservation, non-Tribal lands, although the regulatory jurisdiction of the NIGC extends only to gaming on Indian lands. Despite the commingling of gaming both on and off Indian lands, we conducted our review of the Draft MOA in its entirety.

Management contracts generally

We first examine the extent to which the Draft MOA gives control to MGM over the Tribe's gaming operation and creates a management relationship between the Tribe and MGM.

The NIGC, in its implementing regulations, 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. “Gaming operation” is defined as “each economic entity that is licensed by a tribe, operates the games, receives the revenues, issues the prizes, and pays the expenses.” 25 C.F.R. § 502.10. 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.

Management contract analysis

In its accompanying letter to the NIGC, dated March 31, 2006, the Tribe asserts that it will be able to maintain “complete managerial control” with the arrangements set out in the Draft MOA. (p. 4) It further asserts that “MGM has multiple duties to advise, but ultimately no control over any aspect of gaming operations.” (p. 4) Despite these strongly worded assurances, we are concerned that the Draft MOA gives extensive control to MGM over the Foxwoods gaming operation and ultimately creates a management relationship between the Tribe and MGM. We are also concerned that the Draft MOA may give extensive control to MGM over the Tribe’s future gaming operations, located on its Indian lands.

Under the terms of the Draft MOA, MGM would not merely be giving the Tribe the right to use its brand name or be advising and consulting on technical matters on a limited basis from outside the Foxwoods organization. Instead, MGM would be intimately involved in high-level management and operation of Foxwoods in a variety of ways. A summary of the most compelling examples found in the Draft MOA follows.

First, MGM will be allowed to designate a senior executive to “participate in an advisory or oversight board of the Tribe” that could be delegated the authority to oversee and advise the Mashantucket Pequot Gaming Enterprise (“MPGE”), the Tribal entity which owns and operates Foxwoods.¹ (MOA, p. 3) This MGM senior executive and board member would be (MOA, p. 3) This MGM representative would also be involved with the Tribal Council in a wide variety of ways, including consulting with and reporting to the Council, and] b6

¹ According to the Draft MOA, this has already happened. [has been designated to participate on the board overseeing and advising MPGE, the Tribal entity which owns and operates Foxwoods.] b6

giving “strategic advice.” (MOA, p. 3) In the Draft MOA, the designated MGM participant is referred to as the “primary representative,” implying that there is potential for additional, non-primary representatives of MGM to participate on the oversight board and reporting to Tribal Council.

Despite the express assurances in the Draft MOA that the MGM representative(s) would “lack any veto or similar power to control actions of any subordinate board . . .”, the oversight and advisory role given to MGM by the Draft MOA is significant and extensive, encompassing almost every operational aspect of the Tribe’s Foxwoods gaming operation. (MOA, p. 3) The Draft MOA appears to create another layer of management, which will include MGM and require it to provide assistance to MPGE regarding the Foxwoods’ operation. In addition, MGM will supervise, scrutinize, advise and manage MPGE, and will then be required to report back to the Tribal Council. The arrangement and duties are set out in detail in the Draft MOA:

- MGM will conduct periodic reviews of MPGE and, in close consultation with management of MPGE, develop quarterly and annual written reports to the Tribal Council of the Tribe and the management of MPGE regarding potential improvements in the operations and performance of MPGE . . .
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- MGM shall advise the Tribal Council at meetings conducted to review these plans and quarterly reviews conducted to monitor the implementation of these plans.
- MGM will provide MPGE management with advice on [

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(MOA, pp. 3-4)

As part of its expansive role, summarized in the preceding paragraph and set out in pages 3-4 of the Draft MOA, MGM will also be managing MPGE and its managers by overseeing and scrutinizing their performance, and then reporting to Tribal Council with advice and recommendations.

Executive services. The Tribe shall consult closely with MGM and MGM shall provide advice and recommendations to the Tribal Council of the Tribe regarding [

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(MOA, p.4)

The Draft MOA not only envisions a partnership between the Tribe and MGM for joint projects undertaken at off-Reservation sites and with other tribes, but it also directly addresses future joint ventures on the Tribe's Reservation.

Master resort planning . . . MGM and the Tribe will jointly undertake the development of a master plan for future development of an expanded gaming and resort program on the Reservation . . .

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(MOA, p. 5)

A key component of the Draft MOA is that the Tribe will be allowed to use the MGM Grand brand. Under the Draft MOA, in connection with the Tribe's use of the MGM brand, MGM will be involved with fundamental aspects of the Foxwoods gaming operation, far beyond the imposition of rules and conditions for the Tribe to follow in exchange for its use of the brand. MGM will have full access to information relating to Foxwoods; representation and input into the operation of Foxwoods; and consultation rights concerning material decisions involving Foxwoods. A sampling of relevant excerpts includes the following:

To the extent MGM is associated with the Expansion through branding, MGM would

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(emphasis added)

The license agreement shall contain adequate provision for MGM to have *meaningful representation and input into such operations and full access to information relating to Foxwoods* . . . MGM would have *reasonable consultation rights concerning material decisions involving Foxwoods* that may affect the regulatory obligations of MGM, including

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(emphasis added)

(MOA, p. 6)

There are other indicia of MGM's participation in the management and operation of Foxwoods. Under the Draft MOA, it is envisioned that MGM will be given full access to information relating to Foxwoods.

The license agreement shall contain adequate provision for MGM to have meaningful representation and input into such operations and full access to information relating to Foxwoods (except for proprietary information such as customer lists with respect to which could cause competitive harm to the Tribe). . .

(MOA, p. 6) The broad, full access and information is deemed necessary because "MGM will have made a substantial commitment and will have obligations to its regulators and as a publicly held company to assure that Foxwoods operations are conducted to meet the standards for gaming operations to which MGM is otherwise subject . . ." (MOA, pp. 6-7) This explanation, included in the Draft MOA, acknowledges that MGM will be involved in the management and operation of Foxwoods in ways consistent with a partnership.

The minimum [] year length of the arrangements, with [] of an additional [] years if certain conditions are met, is of concern to us, given the numerous indicia of management in the Draft MOA. A term of this length is well beyond the statutory limits mandated for management agreements approved in accordance with IGRA.²

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Proprietary interest generally

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). The NIGC, in its regulations, also requires that all tribal gaming ordinances include such a provision. 25 C.F.R. § 522.4(b)(1). Accordingly, the Tribe's Gaming Ordinance, approved by the NIGC, requires that:

In compliance with 25 U.S.C. § 2710(b)(2)(A), the Tribe shall have the sole proprietary interest and responsibility for the conduct of any gaming activity on the Reservation

...

Mashantucket Pequot Tribal Gaming Ordinance, Sec. 5(a), page 7.

² According to 25 U.S.C. § 2711(b)(5), the Chairman of the NIGC "may approve any management contract entered into pursuant to this section only if he determines that it provides at least . . . (5) a contract term not to exceed five years, except that, upon the request of an Indian tribe, the Chairman may authorize a contract term that exceeds *five* years but does not exceed *seven* years if the Chairman is satisfied that the capital investment required, and the income projections, for the particular gaming activity require the additional time . . ." (emphasis added)

We first address what constitutes a “proprietary interest.” The rules of statutory construction direct us to 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.

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 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.

Finally, and important for this analysis, in the preamble to IGRA’s implementing regulations, the NIGC provides specific examples of what sole proprietary interest violations might look like. One such example reads as follows:

An agreement whereby consideration is paid or payable to the gaming operation for the right to place gambling devices that are controlled by the vendor in such gaming operation is inconsistent with the requirement that a tribe have the sole proprietary interest.

58 Fed. Reg. 5802, 5804 (Jan. 22, 1993).

Proprietary Interest Analysis

The focus of our analysis is whether the Draft MOA would give MGM a proprietary interest in the Foxwoods gaming operation, in violation of IGRA, its implementing regulations and the Tribe's own gaming ordinance. We have also examined whether the Draft MOA gives MGM a proprietary interest in future gaming operations or expansions of Foxwoods on the Tribe's Indian lands.

We begin by looking at what services and/or tangible benefits the Tribe will receive in exchange for its long-term arrangements with MGM. We also examine the extent to which MGM will assume a management role in the Foxwoods gaming operation under the Draft MOA.

In exchange for use of the MGM Grand brand, the Tribe will be paying [] In exchange for technical advice and other services, the Tribe will be paying [] followed by [] year term if certain conditions are met.³ The Tribe will also be required to []

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In reviewing the financial arrangements contemplated by the Draft MOA, we are mindful that the Tribe's existing gaming operation, Foxwoods, is not a new business, nor is it struggling financially. Instead, it is one of the oldest and premier Class III tribal gaming operations, and it has, historically, enjoyed phenomenal financial success. Unlike many tribes, especially those new to gaming, it is not lacking in business experience or the necessary financial wherewithal to start a gaming operation without outside assistance. The Tribe's sustained growth and financial success is a testament to its considerable expertise at running a gaming operation on its own.

Thus, we examine the financial terms, the length of the arrangements and the considerable indicia of management responsibilities and control in the context of the Tribe's sustained success with Foxwoods. Of particular concern to us is the lengthy term

³ According to our calculations, the total fee would be approximately []

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[] years – and the extensive participation by MGM in the management and operation of Foxwoods. It appears that, in exchange for using the MGM brand, besides paying money for such use, the Tribe will be required to compromise its autonomy over its own gaming operation, giving MGM managerial, supervisory responsibilities, and, ultimately, significant control over the gaming operation. 64

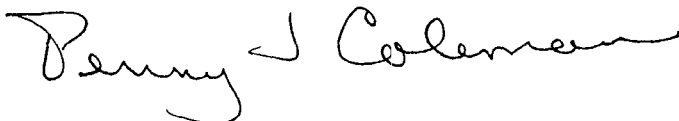
We conclude that, under the terms of the Draft MOA, the Tribe would no longer be the sole owner of Foxwoods. In our opinion, the Draft MOA contemplates a partnership between the Tribe and MGM for future gaming-related projects, both on and off the Tribe's Reservation. Despite numerous assertions by the Tribe to the contrary, the partnership created by the Draft MOA spills over into the Tribe's management, operation, and, ultimately, ownership of its existing gaming operation in ways that are inconsistent with IGRA.

Conclusion

While we applaud the Tribe's efforts to diversify and grow by entering into a partnership with MGM, the Draft MOA undermines the basic requirements of IGRA that all management contracts must be approved by the Chairman of the NIGC and that a tribe must retain the sole proprietary interest in its gaming operation. For many years, the Tribe has been the sole owner of Foxwoods, and has skillfully managed the gaming operation, with phenomenal success. The Draft MOA would radically change the relationship of the Tribe to its gaming operation by giving some management control, as well as a proprietary interest, to MGM. By trying to combine the ownership and operation of Foxwoods with a deal that establishes a far-reaching, bona fide partnership between the Tribe and MGM, the agreements would create something that is not workable under IGRA. The Tribe would no longer be the sole owner of Foxwoods. This is evidenced most significantly by the control that would be given to MGM over Foxwoods and the creation of a management relationship between the Tribe and MGM. In addition, the Tribe's sole ownership of future gaming projects on its Tribal lands may be compromised by the Draft MOA for similar reasons.

We thank you for submitting the Draft MOA to us for our review and hope that our comments are helpful. In your letter, you express an intention to submit the final documents contemplated by the Draft MOA to the NIGC for our review and approval. We strongly encourage you to do so. If you have any questions or wish to discuss this matter further, please feel free to contact Staff Attorney Katherine Zebell at (202) 632-7003.

Sincerely,



Penny J. Coleman
Acting General Counsel

cc: Chairman Michael Thomas, Mashantucket Pequot Tribe
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