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Dear Mr. Gray, Mr. Pipestem, Mr. Mimmick, and Ms. Hogen:

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
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 involved 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
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.* As described more fully below, we are not prepared to conclude that the contracts do not constitute a management contract at this time. Further, the contracts appear to violate the sole proprietary interest requirement of 25 U.S.C. § 2710(b)(2)(A).

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 K&D and MBI 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 K&D and MBI contracts independently. For the K&D review, we examined the Amended and Restated Development Agreement (Development Agreement), the Amended and Restated Consulting Agreement (Consulting Agreement), and the Amended and Restated Depository Control Agreement (to which MBI was also a party).

We are troubled by the way the Development Agreement compensates K&D through a percentage of gross revenues for [] years at each facility, the same term of each facility's consulting contract with K&D. Development Agreement § 1.1 "North Tulsa Development Fee", "Sand Springs Development Fee"; Amended and Restated Consulting Agreement (Consulting Agreement) § 6.1(a)-(b). It is unclear exactly what advice the K&D consultants will provide during this term. See Consulting Agreement §§ 3.1 ("K&D" shall provide such advice relevant to the operation of the Sand Springs Casino Facilities as the Tribe may in its sole discretion request"), 3.2 ("the Tribe may, from time to time identify and direct specific consulting assignments for specific tasks to be performed by K&D"). Although the consultants will be paid [] Id. at 9.1, the company's stake in the enterprise through the percentage fee provision of the Development Agreement will create an incentive for the K&D consultants to direct affairs at the facilities. The lack of specificity regarding the consultants' tasks adds to this concern, as does the fact that []

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Sole Proprietary Interest

Another area of concern is the amount of compensation K&D 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 laid out 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

As noted above, K&D will receive [

The approximately [] development contract compensation appears wholly out of proportion to any services provided by K&D. The

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company is not taking any financial risks as it is not lending money to the Tribe. In a typical development contract without a developer loan, the developer will receive a small percentage of the total construction costs. Here, we understand that the cost to create each facility is approximately [] It appears that K&D will be compensated with

[] This extraordinary compensation leads us to conclude that K&D has bargained for an equity interest in the operation as it appears that there is no rational relationship between the services provided and the compensation given. Thus, K&D is sharing in the profits as an owner or stakeholder in violation of 25 U.S.C. 2710(b)(2)(A).

Conclusion

As a result of the above provisions, we are unwilling to conclude that the K&D documents do not constitute a management contract due to K&D's pervasive presence in the Tribal gaming facilities along with an extended term and a percentage of the revenues. However, we are more concerned about the sole proprietary interest requirement of § 2710(b)(2)(A). K&D is assuming no risk, yet will make [] for the development and consulting services provided.

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

Sincerely,



Penny J. Coleman
Acting General Counsel