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Dear, Mr. Froman, Mr. Morrow, Mr. Lind, and Mr. Heinen:

On May 11, 2004, responding to a National Indian Gaming Commission (NIGC) request, a Development Agreement (Agreement) between Multimedia Games, Inc. (MGAM) and the Peoria Tribe of Indians of Oklahoma (Tribe), dated November 10, 2003, was provided to the NIGC for review. The Agreement referenced a Player Station Agreement (PSA), which was forwarded upon our request. The Player Station Agreement's official

title is Reel Time Bingo System Agreement (Rental) and Software License and is dated November 13, 2003. The purpose of our review is to determine whether the agreements constitute a management contract or collateral agreement 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 to 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 MGAM 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 Peoria Tribe of Indians of Oklahoma Gaming Ordinance enacted November 14, 2003 § 4.1.

Consequently, because of our concern, we request that the parties provide us with a justification for the fee obtained by the MGAM 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

MGAM is extensively involved with the Tribe's gaming operation because it serves as lender and developer and controls [] of the gaming machines. The Development Agreement states that the Tribe will meet with MGAM regularly once the facility has opened to review operations and marketing programs and for MGAM to provide operational, player tracking, accounting, and marketing support. § 3.8. Although we are not prepared to conclude whether a management relationship has been established at this time, we will continue to monitor the situation. 64

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. 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, we are concerned that the Agreement bestows a proprietary interest in the gaming activity on MGAM, in violation of IGRA, its implementing regulations and the Tribe's gaming ordinance, because of the excessive compensation provided to MGAM in proportion to the services rendered.

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).

The contract provides that MGAM is a lender, a developer, and a game lessor. The development project involves two phases: a temporary structure to house the interim gaming facility in phase I, and a permanent structure to replace the temporary facility in phase II. Development Agreement § 2.1 [] b4

Further, MGAM will [] b4

Finally, MGAM will be a game lessor for both facilities. A minimum of [] of the electronic gaming machines in the phase I facility will be MGAM games, and a minimum of [] of the games in the phase II facility will be MGAM games. Development Agreement § 3.3. The minimum MGAM percentage will remain in effect for [] and will be extended [] b4
[] if performance thresholds are met. *Id.* at § 3.3 para. 2. []

MGAM will obtain [

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§ 3. [The Player Station Agreement has a [] term. PSA

Summarizing the payment provisions, MGAM will receive [

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[In light of MGAM's fee, we are extremely concerned that the amount of the Tribe's actual profit paid to the MGAM is contrary to the requirement that tribes retain the sole proprietary interest in the gaming operation.

Moreover, [

[is further evidence of a proprietary interest in the gaming operation. Despite the parties' assertion in Development Agreement § 8.1 that they are not engaging in a joint venture and that MGAM will not have any proprietary interest in the gaming operation, we harbor grave concerns as to whether this is true.

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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 MGAM 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.

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

Sincerely,



Penny J. Coleman
Acting General Counsel