JUN 14 2007

VIA FACSIMILE & REGULAR MAIL

Mr. Kent E. Richey
Faegre & Benson
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-3901

Re: Advisory Opinion on Agreements between the Shingle Springs Band of Miwok Indians and Sharp Image Gaming, Inc.

Dear Mr. Richey:

The Shingle Springs Band of Miwok Indians ("Tribe") submitted the following agreements: 1) Gaming Machine Agreement dated March 24, 1996, and 2) Equipment Lease Agreement dated November 15, 1997, between it and Sharp Image Gaming, Inc. ("Vendor") for our review.[1] Though these agreements are ten years old, the Tribe has requested a review because the Vendor has recently filed litigation alleging breach of contract.

The purpose of our review is to determine whether these agreements, individually or collectively, constitute a management contract or collateral agreements to a management contract that are subject to the National Indian Gaming Commission (NIGC) Chairman's review and approval under the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2711. As is set forth fully below, it is our opinion that these agreements constitute management contracts that require the Chairman's approval. Additionally, the agreements appear to evidence the Vendor's proprietary interest in the Tribe's gaming activity, which is contrary to IGRA and NIGC regulations. 25 U.S.C. § 2710 (b)(2)(A); 25 C.F.R. § 522.4(b)(1). The NIGC is contemplating draft regulations on the subject of "sole proprietary interest." In the interim, the Office of General Counsel continues to issue advisory opinions such as this to provide some guidance to the regulated community.

[1] We note that this is not the first review of the Gaming Machine Agreement. On November 5, 1996, this office sent a letter to the Tribe opining that the agreement was null and void because it provided for the leasing of Class III machines without a tribal-state compact in violation of IGRA and the Johnson Act. That opinion, based upon information available to this office at the time the contract was reviewed, stands. This is, however, the first time we have reviewed the Equipment Lease Agreement. The Equipment Lease Agreement is ambiguous as to the type of gaming machines contemplated, and we have no evidence before us to be able to draw any conclusion as to the legality of their operation at the time the contract was signed.

Authority

The authority of the Chairman to review and approve gaming-related contracts is limited by the IGRA to management contracts and collateral agreements to management contracts to the extent that they implicate management.[2] 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 Chairman pursuant to IGRA. 25 U.S.C. § 2711(h).

1. Management Contracts

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, 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. *Id.*

Management employees are "those who formulate and effectuate management policies by expressing and making operative the decision of their employer." *N.L.R.B. v. Bell Aerospace Co.*, 416 U.S. 267, 288 (1974). Whether particular employees are "managerial" is not controlled by the specific job title of the position held by the employee. *Waldo v. M.S.P.B.*, 19 F.3d 1395 (Fed.Cir. 1994). Rather, the question must be answered in terms of the employee's actual job responsibilities, authority and relationship to management. *Id.* at 1399. In essence, an employee can qualify as management if the employee actually has authority to take discretionary actions – thus being a *de jure* manager – or recommends discretionary actions that are implemented by others possessing actual authority to control employer policy, thus being a *de facto* manager. *Id.* at 1399 (citing *N.L.R.B. v. Yeshiva*, 444 U.S. 672, 683 (1980)).

2. 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

[2] However, certain gaming-related agreements, such as consulting agreements or leases or sales of gaming equipment, should be submitted to the NIGC for review. *See NIGC Bulletin No. 93-3.*

than a tribe possesses a proprietary interest in the gaming activity, gaming may not take place. NIGC regulations also require that all tribal gaming ordinances include such a provision. 25 C.F.R. § 522.4(b)(1).

"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 these definitions together, 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. . . <u>One would have a proprietary interest if he were sharing in or deriving profit from the club</u> as opposed to being a salaried employee merely performing clerical and ministerial duties.

Id. (emphasis added).

The legislative history of IGRA is an additional aid for interpreting the statute's mandate that a tribe "have the sole proprietary interest and responsibility for the conduct of any gaming activity." 25 U.S.C. § 2710(b)(2)(A). The legislative history of the IGRA with respect to "proprietary interest" is scant, stating only 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 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]

46 Am. Jur. 2d *Contracts* § 57 (emphasis added).

Consequently, if a joint venture is found to exist it would be further evidence that the Nation did not hold the sole proprietary interest in the gaming operation.

Finally, the preamble to NIGC 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

Many of the terms of the agreements are identical; others have slight variations. However, certain provisions are important to our determination.

A. Gaming Machine Agreement Provisions

The Gaming Machine Agreement between the Tribe and Vendor is for the lease of, at minimum, [ ] gaming machines owned by Vendor. Certain provisions of the Gaming Machine Agreement are important to our analysis:

b4

b4

1. Vendor initially has the right to install up to [ ] gaming machines in the gaming facility. The machines will remain the property of Vendor. Gaming Machine Agreement § 1.

2. *Id.*

b4

3. Vendor receives b4

Id. § 2.

4. *Id.* § 3. b4

5. Tribe may purchase the machines at the end of [ ] years; however, if it does not to exercise this option, then the agreement is b4 b4 *Id.* § 4.

6. Tribe is responsible for all operating expenses of the casino. *Id.* § 5.

7. Vendor will [ ] The Vendor shall maintain responsibility for the promotions and provide direction to the General Manager. *Id.* § 6. b4

8. The Vendor will have a representative on-sight during the initial start-up to assist in the implementation of "Operating, Maintenance, and Accounting Procedures." *Id.* § 7. And

9. The Vendor has the right to inspect and copy the casino's books and records. *Id.* § 10.

B. Equipment Lease Agreement Provisions

The Equipment Lease Agreement provides for the leasing of: (1) [ ] video gaming devices; (2) progressive hardware, software, and signage for the video gaming devices; and (3) fiber optic signs. Certain provisions of the Equipment Lease Agreement are important to our analysis: b4

1. The term of the lease is for [ ] years from the date [ ] machines are installed and are put in operation. See Equipment Lease Agreement § 1. b4 b4

2. b4

3. Tribe is required to pay [ ] of net gaming revenues defined as gross gaming revenues from all gaming activities less prizes, jackpots, and payouts. *Id.* § 3(a). b4

4. The Vendor has the right to inspect and copy the casino's books and records. *Id.* § 7.

5. Vendor agrees to reimburse the tribe [b4] of the costs incurred for casino promotions. *Id.* § 9.

6. [b4] . *Id.* § 17. And

7. Tribe may purchase the machines at the end of [b4] years; however if it does not to exercise this option, the agreement is [b4] *Id.* § 19.

C. Analysis

The agreements show that Vendor seeks to use the Tribe's gaming facilities as a long term venue where [b4] For the term of the agreement, a period of [b4] potentially [b4] years,

Management contracts approved by the Chairman have a fee cap set at thirty percent (30%) of net revenues or forty percent (40%) of net revenues if the Chairman determines that the capital investment required and the gaming operation's income projections warrant the higher fee. 25 U.S.C. §§ 2711(c)(1)-(2). 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." 25 U.S.C. § 2703(9) (emphasis added).

[b4]

As a practical matter, it is possible for [b4] of adjusted gross revenue to [b4] have not been deducted. Consequently, the majority of the benefit of Tribe's gaming would be conveyed to the Vendor. From past experiences, we would have expected Vendor, therefore, to receive [b4] While Congress did not provide a statutory cap on compensation for non-management gaming agreements, the provisions concerning management contract compensation are instructive. Management involves the day-to-day operation of the gaming facility. It is therefore logical that contracts for the management of a tribal gaming facility would command a higher level of compensation than other contracts such as consulting, developing, or leasing of equipment.

The original structure contemplated in 1996 by the agreements with Vendor pales in comparison to the gaming facility that the Tribe now plans. In the Tribe's estimation, the total cost of developing, designing, constructing, and equipping the new facility will exceed [b4] As a result, the cost of building and operating the new facility

vastly exceed the cost of any tent. It is the Tribe's intention to open the facility with b4 class II machines unless the Tribe is able to successfully negotiate an amendment to its compact.

Despite the fact that the project as contemplated now is on a grander scale, our concern about of the Agreements between then and now do not change but rather become more pronounced.

The compensation under the Agreements and term of years are not the only factors that indicate a management relationship. The Agreements demonstrate a level of control that indicates management. Under the Gaming Machine Agreement, the Vendor maintains responsibility for the promotions and provides direction to the casino general manager. This alone is sufficient to find management.

Under both agreements,
and that, under the circumstances here, provides Vendor with de facto management ability. By example, b4

Additionally, the Equipment Lease Agreement specifically lists the events triggering a default by the Tribe and the remedies available to the Vendor.

This level of control coupled with the term and compensation provided is indicative of a management agreement.

Control, along with a high level of compensation over a long period of time, is likewise an indicator that the Vendor is the holder of a proprietary interest in the gaming activity. Tribes, not machine vendors, are supposed to be the primary beneficiaries of Indian gaming. 25 U.S.C. § 2702(2). Under the Agreements, Vendor would have a significant level of control over the Tribe's gaming activity while receiving the majority of the benefit from the operation over a [ ]erm. Not only would the Vendor be b4 receiving a share of the compensation from the gaming machines it is leasing[ ]Under the Agreements the Vendor would have an interest in all aspects of the gaming and in essence an ownership interest in the profits of the Tribe's gaming facilities. This type of arrangement is contrary to the sole proprietary interest mandate in IGRA. 25 U.S.C. § 2710(b)(2)(A).

Conclusion

After careful review, we have determined that there are sufficient indicia of control to conclude that the Agreements are management agreements that would require the approval of the Chairman. Under IGRA, a management contract is void if it has not been reviewed and approved by the Chairman of the NIGC pursuant to 25 U.S.C. §2711. We further conclude that the agreements give a proprietary interest to Sharp Image Gaming in violation of IGRA, the implementing regulations and the Tribe's own gaming ordinance.

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

Sincerely,

Penny J Coleman

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Acting General Counsel

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