November 19, 2012

Rodney A. Butler, Chairman
Mashantucket Pequot Tribal Nation
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Re: Review Of Proposed Economic Terms for Restructuring of the Mashantucket Pequot Gaming Enterprise's Debt

Dear Chairman Butler,

This letter responds to the Mashantucket Pequot Tribal Nation's (Tribe) request for the National Indian Gaming Commission's Office of General Counsel (OGC) to review the economic terms proposed in the submitted documents that set forth the Mashantucket Pequot Gaming Enterprise's (MPGE's) plan to restructure its debt to various creditors. Specifically, you have asked for my opinion regarding whether the economic terms proposed in the submitted documents violate IGRA's requirement that the Tribe have the sole proprietary interest in its gaming operations. After careful review, it is my opinion that they do not violate IGRA's sole proprietary interest requirement.

Documents Reviewed

The following documents (collectively "the financial documents") were submitted as exhibits to the letter sent by Mr. Gips on October 15, 2012, on behalf of the Tribe:

1) Exhibit A, a one-page chart detailing the MPGE's existing debt structure, entitled "Detailed Debt Capitalization ($MM);

2) Exhibit B, entitled "Restructuring Support Agreement," executed on August 2, 2012, and marked at the bottom left as "US_ACTIVE:\43999482\18\61925.0003" (the RSA);

3) Exhibit C, consisting of several term sheets containing the core economic terms of the restructuring, each attached as exhibits to the RSA:

a. Term sheet for the "Global Foxwoods Restructuring Kien Huat Loans" marked at top right as "RSA Exhibit A";
b. "Bank Term Sheet" marked at top right as "RSA Exhibit B," and at bottom left as "US_ACTIVE:\43802100\21\61925.0003" (the Bank Term Sheet);
c. Intercreditor and subordination agreement attached as "ANNEX A" to the Bank Term Sheet and marked on the bottom left as "(NY) 02826/164/RESTRUCTURING.DOCS/Subordination.Annex.doc";
d. "SRO Term Sheet" marked at top right as "RSA Exhibit C" and at bottom left as "US_ACTIVE:\43707628\31\61925.0003";
e. "SSRO Term Sheet" marked at top right as "RSA Exhibit D" and at bottom left as "US_ACTIVE:\43710231\33\61925.0003";
f. "8.50% Notes Term Sheet" marked at top right as "RSA Exhibit E" and at bottom left as "US_ACTIVE:\43710238\26\61925.0003".

4) Exhibit D, a one-page chart summarizing the MPGE's pre-restructuring and post-restructuring debt, entitled "Indicative Restructuring Transaction"; and,

5) Exhibit E, a one-page chart summarizing the allocation of excess cash flow between the MPGE, the Tribe, and various creditors, entitled "Summary of Waterfall Excess Cash Flow Splits".

Sole Proprietary Interest

IGRA requires 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); *see also* 25 C.F.R. § 522.4(b)(1). "Proprietary interest" is not defined in the IGRA or NIGC regulations and the NIGC's application of the sole proprietary interest requirement developed over time. As discussed in Notice of Violation # 11-02, OGC legal opinions concerning the sole proprietary interest requirement have focused primarily on three criteria in its analysis of the requirement: 1) the term of the relationship; 2) the amount of revenue paid to the third party in relation to the value provided; and 3) right of control over the gaming activity provided to the third party. These criteria are consistent with the commonly understood definition of "proprietary interest." The Agency's interpretation is supported by legislative history, case law, and secondary sources.

IGRA's legislative history supports the Agency's application of "proprietary interest," stating 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. Congress' intent appears to be consistent with the commonly understood meaning of proprietary interest, while emphasizing the notion that entities other than tribes are not to share in the ownership of gaming enterprises.

Courts have defined "proprietary interest" as "one who has an interest in, control of, or present use of certain property." *Evans v. United States*, 349 F.2d 653 (5th Cir. 1965). As one court explained:

> 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.

Dondlinger v. United States, 1970 U.S. Dist. LEXIS 12693 (D. Neb. 1970) (emphasis added). "Proprietary interest" must be construed in favor of tribal interests and consistent with IGRA's purpose that tribes are to be the primary beneficiaries of the gaming activity. *Rincon Band of Luiseno Mission Indians v. Schwarzenegger*, 602 F.3d 1019, 1029 n.9 (9th Cir. 2010).

Secondary sources also shed light on the meaning of "proprietary interest." American Jurisprudence explains the difference between having a proprietary interest and being compensated for services 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.

46 Am. Jur. 2d *Contracts* § 57 (footnote omitted and emphasis added). A joint venture is "an association of persons with the intent . . . to engage in and carry out a single business venture for joint profit for which such persons combine their property, money, efforts, skill, and knowledge without creating a partnership or a corporation." 46 Am. Jur. 2d Joint *Ventures* § 1.

Black's Law Dictionary defines "proprietary interest" as "the interest held by a property owner together with all appurtenant rights . . ." Black's Law Dictionary, 7th Edition (1999). "*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.*

Based on this reading of the sole proprietary interest requirement, OGC legal opinions and final agency actions by NIGC have found an improper proprietary interest in agreements where a non-tribal entity receives a high level of compensation, disproportionate to the value provided for a long term, and possesses some aspect of control. *See* Notice of Violation #07-02 (May 16, 2007), Notice of Violation # 11-02 (July 12, 2011). The compensation in these instances was typically based on a significant percentage of net gaming revenue[1] and terms beyond 5 years.

Analysis

I have reviewed the term of the relationship, the amount of revenue paid to the third party, and the third party control over the gaming activity as set forth in the financing documents and I do not see elements we have found problematic in the past. The economic terms as proposed in the financial documents do not purport to provide the creditors with any control over the gaming activity, nor do they appear to grant "an interest held by the property owner" in the gaming operation. With the exception of the contingent interest aspect discussed below, the economic terms proposed in the financial documents are similar to those OGC has previously reviewed and opined are permissible.

The restructured debt is designed to avoid future events of default through a reduction of interest rates, extension of the repayment terms, and reduction of principal. The economic terms outlined in the financial documents include contingent interest.

(b) (4) [redacted]

(b) (4) [redacted]

(b) (4) [redacted]

[1] 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).
[2] While Excess Cash Flow, as described in the financing documents, is not gross gaming revenue, it is also not "net revenue" as defined by IGRA. *See* 25 U.S.C. § 2703(9).

(b) (4) [redacted]

Conclusion

It is my opinion that the economic terms of the restructuring proposed in the financial documents do not grant a proprietary interest in the Tribe's gaming activity to the creditors. However, this opinion is based upon, and thus is limited to the economic terms proposed in the financial documents. Given this, if the economic terms outlined in the financial documents are not accurate and do not reflect the actual circumstances, I would be inclined to reexamine the proprietary interest issue. Further, because the parties intend to submit the agreements memorializing the economic terms to the NIGC OGC for a further opinion, and in anticipation that such economic terms may change, this opinion is limited and shall not apply to any written agreement between the parties.

I anticipate that this letter will be the subject of Freedom of Information Act (FOIA) requests. Since we believe that some of the information contained herein may fall within FOIA Exemption 4(c), which applies to confidential proprietary information, the release of which could cause substantial harm, I ask that you provide me with your views regarding release within ten days.

If you have any questions, please contact NIGC Senior Attorney Michael Hoenig at (202) 632-7003.

Sincerely,

Eric Shepard
Acting General Counsel