Tribal Gaming Management Contracts
Recent Case Decisions

By Heidi M. Staudenmaier

Contracting to manage or provide consulting services to a Native American casino is not as simple as negotiating and executing transaction documents. Pursuant to the Indian Gaming Regulatory Act of 1988 ("IGRA"), 25 U.S.C. § 2701 et. seq., the National Indian Gaming Commission ("NIGC") must approve a management contract before it is deemed valid and enforceable. Absent approval, a management contract is void and not binding. See, 25 U.S.C. § 2711; 25 C.F.R. § 533.7. Although consulting agreements and other non-management agreement documents do not need NIGC approval, it is advisable to obtain a "declination" letter from the NIGC confirming that the agreement does not constitute a management contract under the IGRA.

The NIGC regulations define management contract as "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 defined as "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 or 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.
The recent Catskill and Casino Magic court decisions underscore the critical importance of obtaining an NIGC declaration letter to assure enforceability of a non-management agreement and other documents that may be "collateral" to a management agreement.

Recent Case Law Impacting Enforceability Of Management Contracts

A. The Catskill Trilogy

The Catskill trilogy of cases provides some guidance as to what may be deemed a "collateral document" to the management contract, therefore possibly requiring NIGC approval before such agreement or document is deemed valid and enforceable.

By way of background, the St. Regis Mohawk Indian Tribe of New York ("Mohawk Tribe") retained Catskill Development ("Catskill") to develop, construct and manage a casino on Mohawk land. Catskill (including its two subsidiaries, Mohawk Management and Monticello Raceway Development) entered into numerous agreements with the Mohawk Tribe, including a management contract, a development and construction agreement, and a shared facilities agreement (collectively, the "Catskill Agreements"). A land purchase agreement was entered into between the Regis Mohawk Gaming Authority and Catskill pursuant to which Catskill had purchased the land for $10 million for the purpose of building the casino. A mortgage leasehold agreement also was executed between the Mohawk Tribe and a third-party mortgagee.

The management contract was submitted to both the NIGC and the Bureau of Indian Affairs ("BIA") for review and, where required, approval. Prior to obtaining NIGC approval, the Mohawk Tribe terminated the Catskill Agreements. Thereafter, Park Place Entertainment ("Park Place") and the Mohawk Tribe entered into similar agreements for the tribal casino.

Subsequently, Catskill sued Park Place for tortious interference with contract. In defending its actions, Park Place contended that, absent NIGC approval of the Catskill Agreements, there was no legitimately recognized contract between Catskill and the Mohawk Tribe, and, therefore, there could be no tortious interference claim.

1. Catskill I

In Catskill I, the Southern District Court of New York agreed with Park Place, holding that the Catskill-Mohawk Tribe management contract was void for not having been approved by the NIGC. See Catskill v. Park Place (Catskill I), 144 F. Supp. 2d 215, 232-33, 2001 U.S. Dist. LEXIS 6518 (S.D.N.Y. 2001) (citing 25 C.F.R. § 533.7).

Likewise, the New York court found that the remaining Catskill Agreements were void as "collateral agreements" to the management contract. Id. at 233 (citing 25 C.F.R. §§ 533.7, 502.5). The court stated:

Ccollateral agreements executed in conjunction with gaming management contracts are included in the definition of management contracts, and thus are also void absent NIGC approval. . . Each of the agreements executed by the parties relates either directly or indirectly to rights or obligations created between the Tribe and Catskill or one of its affiliates under the Management Agreement.

Id. The court concluded that, because all of the agreements were void as non-approved management contracts or collateral agreements, no enforceable contract existed and thus there was no basis for claiming tortious interference of contract. Id. at 234. The claims against Park Place were summarily dismissed.

2. Catskill II

Following the issuance of Catskill I, the plaintiffs sought reconsideration of the New York court's ruling regarding the invalidity of the agreements. More specifically, Catskill sought a reversal of the decision that included the land purchase agreement as a collateral agreement. See Catskill v. Park Place (Catskill II), 154 F. Supp. 2d 696, 2001 U.S. Dist. LEXIS 11150 (S.D.N.Y. 2001). Pursuant to the land purchase agreement, Catskill purportedly spent $10 million for the purchase of land that was intended as the casino site.

In seeking reconsideration, Catskill asserted that the land purchase agreement was not void as a collateral agreement because 25 U.S.C. § 2711(a)(3) applied only to Class II gaming. Id. at 702. Catskill claimed that it had sought approval from the NIGC of a management contract for Class III gaming only. Catskill contended that 25 U.S.C. § 2711(a)(3) therefore could not serve to bar validity of the collateral agreements, including the LPA. Id.

Following an extensive review of the prior arguments, the court again concluded that the documents were collateral agreements. However, the court further determined that, because 25 U.S.C. § 2711(a)(3) applied only to Class II gaming and not to Class III gaming, the collateral agreements were not void. Id. at 702-03. As a result, the land purchase agreement was not void as a collateral agreement and was binding on both parties. The court also held that the mortgage leasehold agreement was not void because it was executed between the Mohawk Tribe and an "unspecified mortgagee." Id. at 701. Therefore, the tortious interference claim based on the land purchase agreement and mortgage leasehold agreement was not subject to summary dismissal.

The New York court did hold that the development and construction agreement (found void as a collateral agreement in Catskill I) was still deemed void, regardless of its status as a collateral agreement. Id. at 703. The court relied on a letter issued by the NIGC, stating that the development and construction agreement was a "management
contract for the purposes of NIGC review," and was void pursuant to 25 C.F.R. § 533.7. Id.

3. Catskill III
Based upon the Eighth Circuit Court of Appeals' decision in U.S. v. Casino Magic Corp. in June of 2002 (see discussion below), Park Place sought reconsideration of Catskill II. Relying upon the reasoning in Casino Magic, Park Place urged that the collateral agreements relative to Class III gaming (and not just relative to Class II gaming) are subject to NIGC review and approval. Park Place argued that, contrary to the court's decision in Catskill II, the land purchase agreement was, in fact, a collateral agreement and should be deemed void and unenforceable. In essence, Park Place sought to have the court re-affirm its original decision made in Catskill I.


The court observed that none of the parties (including the judge) had paid sufficient attention to the NIGC regulations applicable to the review of all management contracts. In this regard, the court focused on the NIGC's authority pursuant to 25 C.F.R. § 533.1 to review management contracts for both Class II and Class III gaming. Id. at 25-26.

The court next examined the definition of management contract at 25 C.F.R. § 502.15 as "any contract, subcontract, or collateral agreement between an Indian tribe and a contractor of between a contractor and a subcontractor if such contract or agreement provides for the management of all or part of a gaming operation." Id. at 26 (emphasis in original). The court then noted that the NIGC regulations (25 C.F.R. § 502.5) define a collateral agreement as "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, or organizations) and a management contractor or subcontractor (or any person or entity related to a management contractor or subcontractor).” *Id.*

Based on its review of these definitions, the New York court concluded that the land purchase agreement fit squarely within the NIGC’s definition of an agreement “collateral” to the management contract. As such, because the land purchase agreement had not received NIGC approval, the court held that it was void and of no effect. *Id.* at 27-28. The prior summary judgment granted to Park Place in Catskill I was reinstated and Catskill’s claims against Park Place were dismissed.

B. U.S. v. Casino Magic Corp.

In *U.S. v. Casino Magic Corp.*, 293 F.3d 419 (8th Cir. 2002), the Sisseton-Wahpeton Sioux Tribe of South Dakota (“Sioux Tribe”) entered into a management contract with Casino Magic for the tribe’s gaming operations. The parties also entered into a secured loan agreement under which Casino Magic agreed to lend the Sioux Tribe $5 million to start the casino project. *Id.* at 419-20.

The Sioux Tribe and Casino Magic subsequently entered into a consulting agreement because the management contract was never approved by the NIGC. Casino Magic submitted the consulting agreement to the NIGC for the issuance of a declination letter. The NIGC did in fact issue such a letter, stating that the consulting agreement did not need to be approved as it contained no management provisions. At the same time, the BIA advised that its approval of the consulting agreement was not required pursuant to 25 U.S.C. § 81.

At or around the same time, the Sioux Tribe entered into a construction and term loan agreement with BNC (“BNC Loan Agreement”). Pursuant to the BNC Loan Agreement, BNC agreed to provide $17.5 million on the condition that Casino Magic committed to contributing $5 million to the project.

Casino Magic was not a party to the BNC Loan Agreement. BNC and Casino Magic did enter into a participation agreement to formalize Casino Magic’s participation in the $5 million loan.

The BNC Loan Agreement was submitted to the BIA, which determined that 25 U.S.C. § 81 did not apply to the document and therefore BIA approval was not necessary. The BNC Loan Agreement was not submitted to the NIGC at this juncture.

For various reasons, the Sioux Tribe later terminated the consulting agreement with Casino Magic. The Sioux Tribe subsequently sent both the consulting agreement and the BNC Loan Agreement to the NIGC for review. Notwithstanding the NIGC’s prior declination letter regarding the consulting agreement, the NIGC concluded that the two agreements “when considered as a whole, are management contracts.” The NIGC therefore determined that both agreements were void absent NIGC approval. *Id.* at 423.

In the ensuing litigation, the South Dakota District Court disagreed with the NIGC’s conclusion. The court held that the Sioux Tribe’s agreement to “accept and comply with all recommendations made by the Consultant” in the BNC Loan Agreement was “insufficient to change Casino Magic’s obligations to the Sioux Tribe from that of a consultant to that of a manager.” *United States Ex. Rel. Maynard Bernard v. Casino Magic Corp.*, Civ. 98-1033, slip op. at 14 (Order granting motion for summary judgment, D.S.D. April 23, 2001).

On appeal, the Eighth Circuit Court of Appeals found the lower court’s reasoning “unpersuasive” and
reversed. In so ruling, the Eighth Circuit relied on the NIGC decision and determined that the agreements, when considered together, constituted a management agreement thus requiring NIGC approval. The court reasoned that the BNC Loan Agreement transferred certain management responsibility to Casino Magic, even though Casino Magic was not a party to it. Id. at 425.

The court further found that the participation agreement enhanced the ownership interests of Casino Magic and reduced the management responsibilities of the Tribe. Id. at 425. The court noted that Casino Magic was "aware of the combined effect of all agreements, and it assumed the risk of proceeding without having submitted all documents to the (NIGC) Chairman." Id.

II. Lessons Learned

What essential knowledge can be gleaned from the Catskill and Casino Magic cases? These decisions – albeit not binding on courts outside of New York or the Eighth Circuit and certainly the subject of criticism by some gaming attorneys and legal scholars – highlight the need of parties pursuing any type of a business relationship with a tribal gaming operation to seek both NIGC and BIA review of the transaction documents and, where appropriate, the issuance of a declination letter. Lacking such assurances can lead to void and unenforceable agreements, without remedy or recourse.

The holding of the Casino Magic case further counsels that, even if an agreement is initially found not to constitute a management contract by the NIGC, if there are subsequent agreements and/or amendments negotiated which relate to the same transaction, it is wise to again confirm with the NIGC that the prior declination letter remains applicable. Alternatively, the parties may want to seek a new declination letter covering the new documents or amendments.

If these court decisions indicate the future trend in this area, one must be cognizant of and adhere to the NIGC approval process for management contracts (and any "collateral" documents thereto). Indeed, the new business person or entity will seek a declination letter from the NIGC for any transaction documents related to a tribal casino, if there is any question whatsoever whether such documents contain "management functions." This includes financing and loan documents. Failure to follow such a prudent course of action can result in potential enforceability issues with the transaction documents at a later date – not a situation with which anyone wants to be confronted after substantial monies already have been expended in the effort.

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1. The general process of obtaining NIGC approval of a tribal gaming management contract was the subject of "Tribal Gaming Management Contracts and the National Indian Gaming Commission," which appeared in the Winter 2001 issue of "The Gaming Lawyer."
2. The NIGC can usually issue a declination letter within 30-90 days after receipt of the agreement. The NIGC warns that the "consequences are severe for a manager who mistakes his management agreement for a consulting agreement." See NIGC Bulletin 94-S.
5. Certain of these transaction documents also may be subject to review and approval by the United States Secretary of the Interior, Bureau of Indian Affairs ("BIA"). Pursuant to 25 U.S.C. §§ 81 and 25 U.S.C. §§ 415-416. Approval by the BIA may be required even if NIGC approval is not. Failure to obtain BIA approval of a document – where such approval is required – has the same result; the document is invalid and unenforceable.
6. As noted in footnote 4, the BIA has certain approval rights over tribal blind transactions pursuant to 25 U.S.C. §§ 81 and 415-416.

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