NATIONAL INDIAN GAMING COMMISSION

FEB 26 2009

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Dear Mr. Marsten:

This is in response to your letter of August 10, 2007. I apologize for the extraordinary delay in providing a response. You asked for an opinion from the Office of General Counsel (OGC) as to whether the development agreement (Agreement) between the Chemehuevi Indian Tribe (Tribe) and Barstow Enterprises LLC (Developer or Barstow) constitutes a management contract pursuant to the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2711. It is my opinion that the Agreement is not a management contract requiring the NIGC Chairman's approval. I do have concerns, however, that the Agreement contains impermissible arbitration provisions and violates IGRA's requirement that the Tribe have the sole proprietary interest in its gaming activity. 25 U.S.C. §2710(b)(2)(A).

Authority

The authority of the NIGC to review and approve gaming-related contracts is limited by IGRA to management contracts and collateral agreements to management contracts to the extent that they implicate management. *Catskill Development LLC v. Park Place Entertainment Corp.*, No. 06-5860, 2008 U.S. App. Lexis 21839 at *38 (2nd Cir. October 21, 2008) ("a collateral agreement is subject to agency approval under 25 C.F.R. § 533.7 only if it 'provides for management of all or part of a gaming operation.'"); *Machal Inc. v. Jena Band of Choctaw Indians*, 387 F. Supp. 2d 659, 666 (W.D. La. 2005) ("collateral agreements are subject to approval by the NIGC, but only if that agreement 'relate[s] to the gaming activity'"). *Accord*, *Jena Band of Choctaw Indians v. Tri-Millenium Corp.*, 387 F. Supp. 2d 671, 678 (W.D. La. 2005); *United States ex rel. St. Regis Mohawk Tribe v. President R.C.-St. Regis Management Co.*, No. 7:02-CV-845, 2005 U.S. Dist. LEXIS 12456, at *3-*4, *9-*10 (N.D.N.Y. June 13, 2005), *aff'd on other grounds*, 451 F.3d 44 (2nd Cir. 2006).

The NIGC has defined the term *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. *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, 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.

Though NIGC regulations do not define *management*, the term has its ordinary meaning. Management encompasses activities such as planning, organizing, directing, coordinating, and controlling. *NIGC Bulletin No.* 94-5: "Approved Management Contracts v. Consulting Agreements (Unapproved Management Contracts are Void)." Accordingly, the definition of *primary management official* is "any person who has the authority to set up working policy for the gaming operation." 25 C.F.R. § 502.19(b)(2). Further, 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 an employee's job title. *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 – a *de jure* manager – or recommends discretionary actions that are implemented by others possessing actual authority to control employer policy – a *de facto* manager. *Id.* at 1399 *citing N.L.R.B. v. Yeshiva*, 444 U.S. 672, 683 (1980).

If a contract requires the performance of any management activity with respect to all or part of a gaming operation, the contract is a management contract within the meaning of 25 U.S.C. § 2711 and requires the NIGC Chairman's approval. Management contracts not approved by the Chairman are void. 25 C.F.R. § 533.7.

In addition to the Chairman's approval of management contracts, IGRA requires gaming ordinances to provide 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. Accordingly, the Tribe's approved gaming ordinance specifically requires that the Tribe "have the sole proprietary interest in and responsibility for the conduct of any gaming activity." *An Ordinance of the Chemehuevi Indian Tribe Authorizing and Regulating Gaming on the Chemehuevi Indian Reservation*, § 2.

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.

Id. (emphasis added)

An additional aid to statutory interpretation includes the legislative history of the statute. The legislative history of 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 its ordinary definition, 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. 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 to a party 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*, and if the payment constitutes merely a compensation, the parties generally have the relationship of principal and agent. On the other hand, *where the agreement extends beyond the payment of compensation and provides for a proprietary interest in the subject matter out of which the profits arise and for an ownership in the profits themselves, the parties are usually regarded as joint venturers.*

46 Am. Jur. 2d *Joint Ventures* § 52 (emphasis added).

Finally, the preamble to the NIGC's regulations provides some examples of what contracts may be inconsistent with the sole proprietary interest requirement, but it 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).

Analysis

A. Management Contract

After reviewing the Agreement, it is my opinion that it does not establish a management relationship. Barstow's duties and obligations are limited to the development of the facility. Those obligations cease when the facility opens to the public. The Agreement does not give Barstow any authority to manage the gaming facility.

In your letter, you draw attention to several provisions in the Agreement you believe implicate management. The provisions cited, however, when put in the context of the entire Agreement, do not appear to expand Barstow's role beyond that of a developer.

You first assert that the Agreement gives Barstow the power to "administer and oversee the planning, design, development, construction, furnishing, equipping, and financing of the facilities." *Agreement* § 2.1. While it is true that such activities may suggest management, *see* NIGC Bulletin 94-5, this provision cannot be read in a vacuum. All of the duties listed in the Agreement are to take place before, and be completed by, opening and do not give Barstow any authority over the actual operation of the facility. Thus, while the provision may suggest management, it does not actually provide for it.

You also contend that the indefinite scope of Barstow's agency under the Agreement does not include limiting language to prevent Barstow from managing the facility. In fact, this limiting language is present. The Agreement explicitly states that nothing in the agreement shall provide or be construed to provide for the management of the gaming operation by Barstow. *Agreement* § 7.4. Even without the limiting language, though, the Agreement does not implicate management. In some circumstances, if an agreement does not explicitly provide for management, an implication of management may be drawn from an overly broad or vague description of a developer's duties. Limiting language may be necessary in such a case to ensure that an agreement will not allow management if other provisions of the agreement create an opportunity for a developer to exert management control over gaming activity. This Agreement, however, does not create any such opportunity because Barstow has not presence at the operation after opening. Therefore, the lack of such limiting language does not implicate management here.

With respect to naming Barstow the Tribe's "limited representative" for purposes of representing the Tribe at intergovernmental meetings, you argue that such representation usurps tribal functions and signifies that the Agreement is for management

of the facility. Section 2.1(h) of the Agreement undeniably gives developer authority to act as the Tribe's representative, but that authority is specifically limited in sections 2.1(g) and 2.1(h) to its activities as a developer. Barstow may only act as the Tribe's "limited representative" in meetings with state, county, and local governments, and then only where these would advance "pre-financing goals," i.e. taking land into trust. *Agreement* at §§ 1.1, 2.1(g), 2.1(h). Furthermore, § 2.1(i) states that the Developer cannot bind the Tribe to any agreement. *Id.* at § 2.1(i). These provisions temper the purported authority § 2.1(h) grants the tribe as its "limited representative" and places the representation outside the realm of management.

As for the exclusivity of the Development Agreement, I again believe that the provision does not allow Barstow to exercise any control over the facility after it opens. The duties set forth in §2.1(j) pertain to development and construction of the facility. *Id.* at § 2.1(j). Furthermore, the provision does not give the developer the authority to "control access" as you suggested. The Agreement grants Barstow "access to the property in order to meet its obligations," and "provide access to the property to the Architect, Professionals, General Contractor and/or Design Build Contractor" because access for these persons is necessary for construction. *Id.* The provision does not give Barstow the ability to deny access to anyone. As such, the Agreement does not give Barstow the ability to "control access."

All of that said, however, I agree with your assertion that the arbitration provision of the Agreement is problematic. The agreement provides that "[t]he Tribe's waiver of sovereign immunity from suit is specifically limited to permitting, and does permit" injunctive relief and specific performance of "any obligation under this agreement." *See Id.* at § 8.2(e)(iii). While arbitration is certainly appropriate when the only remedy can be monetary damages, the Agreement should be revised to acknowledge that tribal governmental decisions or actions are solely within the province of the tribe and not subject to arbitration. The tribal government must retain control over such matters as licensing and the regulation of the gaming operation. The Agreement's arbitration provisions are problematic as they permit interference with tribal governmental functions.

B. Sole Proprietary Interest

In my letter of December 14, 2006, I noted my concern regarding the Tribe's proprietary interest and requested further information so that the OGC could complete a thorough analysis of the issue. Due to the amount of time that has passed since that information was developed and assembled, and the ensuing changes in the state of the economy, I do not have enough information to opine as to whether the contract violates the sole proprietary interest requirement. That is not to say, though, that the terms of the Agreement do not, by themselves, raise a concern that the Tribe will not have the sole proprietary interest in its facility.

I am troubled that the Tribe is required to pay the developer [ ] of net income of the gaming facility for such a long period of time. Net income is defined by the agreement as "the amount by which all net revenues and business interruption insurance

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proceeds generated from the facilities during the period exceed operating expenses;" in other words, "profit." *Agreement* § 1.1; Black's Law Dictionary 1211 (6th ed. 1990). Typically, developers in construction charge a range of 2% to 5% of costs. You assert that projected net profits for the first year of operation is [redacted] Under the Agreement, Barstow is entitled to approximately [redacted] of that revenue. Assuming the annual net revenue remains [redacted] for the term of the contract, Barstow will earn [redacted] for its development work. Agreement provisions providing a large percentage of gaming revenues over a long period of time are evidence that either the developer has been granted an equity interest in the tribe's gaming activity, rather than merely compensation for services provided, or a joint venture between the tribe and developer.

In return for this fee, Barstow will act as the Tribe's agent for purposes of developing the gaming facility. *Id.* at § 2.1. Barstow will also be responsible for acquiring property for the facility and having that property taken into trust, procuring government approval necessary for developing the facility, overseeing construction, and securing financing for the project. *Id.* The Agreement also requires Barstow to contribute [redacted] to the project and requires the developer to raise all necessary funds and/or be prepared to "expend necessary funds" for all pre-development and pre-financing costs. *Id.* at § 5.1. Any advances Barstow makes to the Tribe shall be repaid at the [redacted] *Id.* After the gaming site has been taken into trust and the Tribe's compact amended to allow gaming at the site, Barstow must make a [redacted] also to be repaid at the [redacted] *Id.* at § 5.3.

I understand that Barstow made a [redacted] contribution to the Tribe's efforts, and I realize that Barstow is responsible for more than simple construction and has assumed a certain amount of risk in entering into the contract. Those risks recently became considerably more substantial with the Department of the Interior's memorandum giving guidance for taking off-reservation land into trust for gaming. *Guidance for Taking Off-Reservation Land into Trust*, January 3, 2008. The memorandum is decidedly opposed to off-reservation gaming and was quickly followed by the January 4, 2008 denial of the tribe's land-into-trust application by the Assistant Secretary for Indian Affairs, Carl Artman. It is unclear to me, however, whether these risks, the funds already advanced, and the developer's duties under the Agreement are substantial enough to warrant such a sizable fee.

Conclusion

Although I conclude that the Agreement does not constitute a management contract, the arbitration provision is problematic and I am concerned that the Agreement grants Barstow a proprietary interest in the Tribe's gaming activity in violation of IGRA, NIGC regulations, and the Tribe's gaming ordinance. However, as I presently do not have enough information to reach a fully informed decision on the sole proprietary interest issue, and the information I do have has grown stale, if you seek further review, please send the most recent projections on costs and revenues, as well as any explanation the developer wishes to offer for such a sizable fee.

In the meantime, a copy of this letter and the Development Agreement will be forwarded the Office of Indian Gaming of the U.S. Department of the Interior for review. If you have any questions, please contact NIGC Attorney Michael Hoenig.

Sincerely,

Penny J Coleman

Penny J. Coleman
Acting General Counsel

cc: Mr. Steve Yamashiro, Barstow Enterprises LLC
John Hay, Attorney, NIGC
Eric Schalansky, Region Director, NIGC
George Skibine, Acting Deputy Assistant Secretary for Policy and Economic Development
Paula Hart, Acting Directore, Office of Indian Gaming (with enclosure)