December 17, 2009

Carleton Naiche-Palmer, President
Mescalero Apache Tribe
500 East Tenth Street, Suite 305
Alamogordo, NM 88340

Re: Consulting agreement by and between Mescalero Apache Tribe and WG-IMG LLC and [redacted]

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Dear President Naiche-Palmer:

This letter responds to your request for the National Indian Gaming Commission (NIGC) to review an amended and revised draft consulting agreement between the Mescalero Apache Tribe (Tribe) and [redacted] and WG-IMG to receive the benefit of their expertise and experience in the gaming industry in a limited capacity. This consulting agreement will terminate on August 31, 2010. The original draft contained a number of provisions that were problematic. We appreciate the parties' extensive revisions to the agreement that eliminated our concerns. After careful review of the draft agreement, it is my opinion that the consulting agreement does not constitute a management contract under the Indian Gaming Regulatory Act (IGRA) and NIGC regulations. 25 U.S.C. § 2711; 25 C.F.R § 502.15.

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.

Analysis

The distinction between a consulting agreement and a management contract is elusive, but the Commission has issued guidance. An agreement that identifies finite tasks or assignments to be performed, specifies the dates by which such tasks are to be completed, and provides for compensation based on an hourly or daily rate or a fixed fee, is more likely to be a consulting agreement. On the other hand, a contract that does not provide for finite tasks or assignments to be performed, is open-ended as to the dates by which the work is to be completed, and provides for compensation that is not tied to specific work performed is more likely to be construed as a management contract. *See* NIGC Bulletin No. 94-5. There are a number of provisions in this agreement that indicate it is a consulting agreement and not a management contract.

The consulting agreement contains a task list that clearly and specifically defines the actions that the consultant will be taking under the agreement. Consulting Agreement, § 2(a). Specifically, the consultant is responsible for evaluating and making recommendations on the Apache Spirit Club, hotel operations, and food and beverage operations; performing an analysis of the pay rates for all hourly employees and

recommending a final pay compendium; identifying and summarizing all contracts for goods and services currently in effect at the Inn of the Mountain Gods; and providing assistance in compiling a 12-month budget for operation and capital expenditures for the properties. Each task is composed of specifically enumerated elements that will be conducted to complete the task, and each task has clearly defined deliverables due to the Tribe on specific dates. Consulting Agreement, Exhibit A. This finite task list with specific due dates together with an absence of any open-ended goals or assignments supports a determination that this is not a management agreement.

In addition, I also reviewed the method of compensation and the term set forth in the agreement. Generally, compensation based on a percentage of net revenue and a term that establishes an ongoing relationship may indicate that an agreement is a management contract. *See* NIGC Bulletin No. 94-5. Here, the agreement provides, along with each task listed, a specific fee owed for the completion of each task as well as a breakdown of the fee that will accrue in monthly increments. In the event the agreement is terminated, the agreement also limits WG-IMG's fees to those that accrued prior to and including the day of the termination of the agreement. Together these facts lend themselves to the conclusion that the compensation is tied to specific work performed within a specified timeframe and therefore provides additional evidence that the agreement is not a management agreement.

Next still, even if all of the ultimate decision-making authority is retained by the tribe, an agreement may still be a management agreement. The exercise of such decision-making authority by the tribal council or the board of directors does not mean that an entity or individual reporting to such body is not managing all or part of the operation. *See* NIGC Bulletin 94-5.

In this instance, the parties appear to have foreseen that possibility and have included a clause in the agreement that specifically states that WG-IMG is not authorized to:

1. operate or manage any gaming activity;
2. hire, terminate or determine wages and benefits of gaming facility employees;
3. establish gaming facility policies and procedures;
4. instruct, direct, or supervise gaming facility employees;
5. bind the Tribe or act as agent for the Tribe; plan, organize, direct, coordinate or control any part of the gaming operations;
6. manage the gaming facilities; or, undertake any action that could reasonably be construed as managing or operating the Tribe's gaming facilities; or
7. otherwise violate the purpose and intent of the consulting agreement.

See Consulting Agreement, § 2(b). The consulting agreement is, in short, carefully drafted to prohibit the consultant from doing many of those things that would indicate management responsibility, the consultant's duties under the agreement do not represent management.

Finally, as a general matter, the NIGC cautiously reviews consulting agreements where there is a pending management contract between the same parties. This type of arrangement has often provided the management contractor with the ability to exert management control over the tribe's gaming facility prior to the Chairman's approval of a management contract. One strong indication of this circumstance is an automatic termination of the consulting agreement upon the Chairman's approval of the management contract. Here, although the agreement is a collateral agreement to a management contract recently submitted for the Chairman's review and approval, it is entirely separate from the management contract. It does not termination upon the approval of the management contract. Rather it requires independent action by the parties to terminate it prior to the expiration date defined in the agreement. Because the duties of the consultant are explicitly limited and exclude management of the Tribe's gaming activity, I am satisfied that the intent of the agreement is to provide consulting services as opposed to representing an avenue for the consultant to exert control prior to the approval of the management contract.

Given the above analysis I believe that the consulting agreement is not a management contract requiring review by the Chairman. Further, after careful review, it is my opinion that the consulting agreement does not grant a proprietary interest in the Tribe's gaming operations in violation of 25 U.S.C. § 2710(b)(2)(A) or 25 C.F.R. § 522.4(b)(1). This opinion is based on the Tribe's representations made July 7, 2009, that the fee for services rendered under the contract is [redacted] of the lowest competing bid, is below the consultant's actual cost, and is well within the industry standard. Furthermore, nothing else in the agreement suggests that WG-IMG has any proprietary interest in the gaming operations. b4

Conclusion

The consulting agreement, as drafted, does not constitute a management contract requiring approval of the NIGC Chairman. I am sending a copy of this agreement to the Department of Interior Office of Indian Gaming for its review under 25 U.S.C. § 81. On behalf of the NIGC, I wish the Tribe continued success in its gaming endeavors. If you have any questions regarding this matter, please contact Staff Attorney Heather McMillan Nakai at (202) 632-7003.

Sincerely,

Penny J. Coleman
Acting General Counsel

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