September 29, 2010

Via E-mail and U.S. Mail

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Re: Amended and Restated Consulting Agreements by and between the Spokane Tribe of Indians and WG-Washington LLC for the Chewelah Casino and Two Rivers Casino

Dear Mr. Bruce:

This letter responds to your August 9, 2010 request for the National Indian Gaming Commission ("NIGC" or "Commission") to review amended and restated consulting agreements between the Spokane Tribe of Indians ("Tribe"), and WG-Washington LLC ("Consultant"), a wholly owned subsidiary of Warner Gaming LLC. The parties previously submitted two consulting agreements for review; however both have been superseded by the agreements ("the Amended and Restated Consulting Agreements") submitted with the August 9 letter. The Amended and Restated Consulting Agreements are nearly identical and, as such, will be addressed together.

The Amended and Restated Consulting Agreements concern the Tribe's two existing gaming facilities: the Chewelah Casino and Two Rivers Casino. After careful review, it is my opinion that the Amended and Restated Consulting Agreements do not constitute management contracts under the Indian Gaming Regulatory Act (IGRA) and NIGC regulations, 25 U.S.C. § 2711; 25 C.F.R § 502.15, and do not require approval by the Chairwoman.

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 its regulations do not define *management*, NIGC has said that it 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 Chairwoman's approval. Management contracts not approved by the Chairwoman are void. 25 C.F.R. § 533.7; *Wells Fargo Bank, N.A. v. Lake of the Torches Economic Dev. Corp.*, No. 09-CV-768, 2010 U.S. Dist. LEXIS 1714 at *8-*9 (W.D. Wisc. January 11, 2010).

Analysis

The distinction between a consulting agreement and a management contract is elusive, but the Commission has issued guidance. *See* NIGC Bulletin No. 94-5. 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. By contrast, 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 the Amended and Restated Consulting Agreements that indicate they are consulting agreements and not management contracts.

The Amended and Restated Consulting Agreements both contain a task list that clearly and specifically defines the actions that the consultant will be taking. Amended and Restated Consulting Agreements, § 2(a). Specifically, the Consultant is responsible for evaluating and making recommendations on the casinos' player reward programs and slot operations, identifying and summarizing all contracts for goods and services currently in effect, providing assistance in compiling a 12-month budget for operation and capital expenditures for the casinos, and reviewing the existing facilities and assessing the need for capital improvements. 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. Amended and Restated Consulting Agreements, Exhibit A. This finite task list with specific due dates, together with an absence of any open-ended goals or assignments, supports an opinion that these are not management contracts.

I have also reviewed the method of compensation and the terms set forth in the Amended and Restated Consulting Agreements. 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, however, the Amended and Restated Consulting Agreements both provide, along with each task listed, a specific fee to be paid upon the completion of each task and a breakdown of the fee that will accrue in monthly increments. In the event the agreement is terminated, the agreement also limits the Consultant'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 opinion that the compensation is tied to specific work performed within a specified timeframe and therefore provide additional evidence that the Amended and Restated Consulting Agreements are not management contracts.

Next, 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 in and of itself 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 both agreements that specifically states that the Consultant 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 Amended and Restated Consulting Agreements, § 2(b).

More than this, though, the parties have included a provision prohibiting the Consultant from requesting, as a remedy for breach of contract, specific performance or other injunctive relief that would have the effect of overturning or nullifying any "Tribal Governmental Action." *See* Amended and Restated Consulting Agreements, § 9(f). A *Tribal Government Action* is defined to be "any resolution, ordinance, statute, regulation, order or decision of the Tribe, the Spokane Tribal Business Council, the Spokane Tribal Gaming Commission, or any instrumentality or agency of the Tribe, however constituted, that has the force of law." *Id.*

The Amended and Restated Consulting Agreements are, in short, carefully drafted to prohibit the Consultant from doing many of those things that would indicate management responsibility or affect the Tribe's ability to manage, and 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 can provide the management contractor with the ability to exert management control over the tribe's gaming facility prior to the Chairwoman's approval of the contract. One strong indication of this circumstance is an automatic termination of the consulting agreement upon the Chairwoman's approval of the management contract. Here, although the Amended and Restated Consulting Agreements are collateral agreements to management contracts recently submitted for the Chairwoman's review and approval, they are entirely separate.

The Amended and Restated Consulting Agreements do not terminate upon the approval of the management contracts. Rather they require independent action by the parties to terminate them if they are not permitted to expire. Because the duties of the Consultant are explicitly limited and exclude management of the casinos, 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 contracts.

Conclusion

Given the above, it is my opinion that the Amended and Restated Consulting Agreements are not management contracts and do not require review by the Chairwoman. Further, after careful review, it is my opinion that the Amended and Restated Consulting Agreements do 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). The Consultant is not compensated by a percentage of gaming revenue, its fees are not so high as to suggest it has an ownership interest, and nothing else in the agreement suggests that the Consultant has any ownership interest in the gaming operations.

I am sending a copy of the Amended and Restated Consulting Agreements 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 Melissa Schlichting at (202) 632-7003.

Sincerely,

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(Acting General Counsel)

cc: Greg Abrahamson, Chairman
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