



December 8, 2009

Via facsimile and First Class Mail

Marilyn Winsea, Chairwoman
Kickapoo Tribe of Oklahoma
407 North Highway 102
P.O. Box 70
McCloud, OK 74851
Fax: 405-964-7065

Re: Consulting agreement by and between Kickapoo Tribe of Oklahoma and Paragon Consulting Group Inc. and [REDACTED]

Dear Chairwoman Winsea:

We received your response to our request for clarification of [REDACTED] relationship to the Kickapoo Tribe of Oklahoma on November 25, 2009. As you are aware, the National Indian Gaming Commission (NIGC) initiated a review of the August 24, 2009 service agreement between the Tribe and Paragon Consulting Group. The purpose of our review is to determine whether the service agreement is a management contract subject to review and approval by the NIGC Chairman under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2711. Based on the agreement and your response, it appears that [REDACTED] is managing without an approved management contract in violation of IGRA and must cease immediately. b6

Per your response, [REDACTED] was appointed [REDACTED] by the Tribe in October 2009 and is performing his duties under the existing service agreement as an independent contractor. As [REDACTED] serve[s] in a management oversight role over the General Manager and the day-to-day operations of the gaming operation." Kickapoo Tribe of Oklahoma Gaming Ordinance, § 114(a). He has the following specific duties: b6

1. Monitor and oversee the day-to-day operations of the gaming facility, whether managed by a tribal employee or by an approved management contractor;
2. Inspect and examine on a periodic basis all books, records, and papers of the gaming facility;
3. Set hours of operation for the gaming facility;
4. Develop marketing plans;
5. Oversee the interview, selection, and training of employees of the gaming operation;

6. Establish employee policies, rates of pay, and hours of work;
7. Adopt an annual operating budget, subject to Business Committee approval; and
8. Enter into contracts on behalf of the gaming facility, subject to Business Committee approval.

Id. § 114(b). These duties meet the definition of *management* under IGRA – planning, organizing, directing, coordinating, and controlling all or part of a tribe’s gaming activity. *NIGC Bulletin No. 94-5*: “Approved Management Contracts v. Consulting Agreements (Unapproved Management Contracts are Void).” Given [redacted] duties, he is managing the Tribe’s gaming facility. As his only contract with the Tribe is the service agreement that the NIGC Chairman has not approved, [redacted] is managing without an approved contract in violation of IGRA. 25 U.S.C. § 2711(a)(1). b6

Even disregarding the duties given [redacted] by ordinance, the service agreement itself appears to be a management contract. As the NIGC Chairman has not approved the service agreement, it is my opinion that managing under it is also a violation of IGRA.

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-Millennium 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* to mean “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 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. Again, management encompasses activities such as planning, organizing, directing, coordinating, and controlling. *See attached 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 the 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.

The distinction between a consulting agreement and a management contract often 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, may be determined to be a consulting agreement. 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.*

The service agreement provides a broad scope of work to provide financial advice and guidance regarding the Tribe’s business affairs for the tribal government, casino, and economic development enterprises. Service Agreement, Exhibit A – Scope of Work. There are no specific tasks outlined in the agreement or limits on the tasks to be performed. The scope of work states:

KTOK seeks executive level business leadership and guidance with their operations including financial guidance on the Tribe’s business affairs. The KTOK business committee desires to retain a financial consultant to provide advice and guidance regarding the Tribe’s business affairs. [T]he Tribe understands that as projects unfold and depending on the magnitude and complexity of these assignments, the Contractor may add additional consultant’s to manage and complete the necessary projects in a timely and efficient basis.

Service Agreement, Exhibit A – Scope of Work. The scope of work and the lack of limitations set forth in the agreement are too broad to be considered a finite task list. Indeed, the agreement itself recognizes the “magnitude and complexity of these assignments” but does not attempt to identify or detail any of them. The lack of specific tasks is more consistent with a management contract than a consulting agreement.

The agreement also fails to set specific dates by which the services are to be completed, further suggesting that this could be construed as a management contract. Service Agreement § 1. The agreement does provide that the "Contractor" will provide periodic reports to the Tribe, but there is no specific schedule for these reports. *Id.* § 7. The lack of specific deadlines and finite deliverables for each task in this agreement is more consistent with a management contract than a consulting agreement.

The agreement is unclear on the compensation for services provided by [redacted]] b6
In Exhibit A – Scope of Work under Fee Schedule, the hourly rate states "TBD" (to be b4
determined) for [redacted]. It does provide hourly rates for additional staff required on
project at rates varying from [redacted] per hour for administrative staff to [redacted] per hour for a
principal. However, it is unclear if the principal rate of [redacted] per hour applies to [redacted].
The agreement does require bi-weekly invoices from the Paragon Consulting
Group to the Tribe with detailed notes on service provided, hours worked, and services
completed. Service Agreement § 3. Under the agreement, the Tribe will not withhold taxes
and the contractor is responsible for any estimated state and federal income tax liability,
social security and self employment tax liability, and for maintaining appropriate records
relating thereto as an independent contractor. *Id.* § 4.

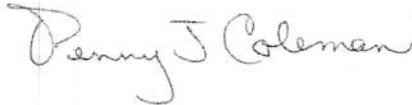
Further, the agreement does not appear to have a fixed term. Service Agreement
§ 5. It appears that the agreement could last indefinitely until the Tribe gives a thirty-day
written notice of termination. If either party is in material breach and fails to cure the
breach within ten days after written notice of the breach, the other party can terminate
immediately. While the termination clause does state that [redacted] will only be paid for
services provided up to the termination date, the potentially long-term relationship
contemplated by the agreement is more consistent with a management contract than a
consulting agreement. b6

Finally, even if all of the ultimate decision-making authority is retained by the
Tribe, an agreement may still be a management contract. 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 operations. *See*
NIGC Bulletin 94-5. In this instance, as [redacted] is b6
managing the day-to-day operations of the gaming facility. *See* Kickapoo Tribe of
Oklahoma Gaming Ordinance, § 114(a).

In analyzing your response and the Tribe's gaming ordinance language, it is my
opinion that [redacted] is managing without an approved management contract in
violation of IGRA. The Tribe and [redacted] must immediately stop such illegal
management activities. That said, if [redacted] were to become an employee of the Tribe,
he would be able to perform these management duties without violating IGRA because
management contract approval is not required for tribal employees. Alternatively, the Tribe
and [redacted] could submit a management contract to the NIGC Chairman for review
and approval. However, until a management contract is approved, [redacted] could not
manage the Tribe's gaming facility. b6

We are referring this matter to the NIGC Enforcement Division for further follow-up. We understand that Mr. Cunningham and Ms. Freeman of the NIGC Oklahoma City Region Office are scheduled to provide training to the Tribe on December 9 and 10, 2009. During this visit, they will be meeting with you to determine what steps you have taken, or plan to take in the immediate future, to correct this violation. If you have any questions, please feel free to contact Staff Attorney Dorinda Strmiska at (202) 632-7003.

Sincerely,



Penny J. Coleman
Acting General Counsel

Enclosure

cc: [Thomas Cunningham, Region Director, NIGC Oklahoma City Region] Paragon Consulting Group, Inc.

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