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VIA FACSIMILE & REGULAR MAIL

Chief Paul Spicer
Seneca-Cayuga Tribe of Oklahoma
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Thomas C. Wilmot, Sr.
Caywil New York, LLC
1265 Scottsville Road
Rochester, New York 14624

Re: Consulting and Training Agreement between the Seneca-Cayuga Tribe and Caywil New York, LLC

Dear Chief Spicer and Mr. Wilmot,

The National Indian Gaming Commission (NIGC) has reviewed the Consulting and Training Agreement (Consulting Agreement), Exclusivity Agreement, Machine Placement Agreement and Promissory Note, all dated January 30, 2006, between the Seneca-Cayuga Tribe of Oklahoma (Tribe) and Caywil New York, LLC (Caywil) to determine whether the agreements are management contracts or collateral agreements to a management contract and therefore subject to our review and approval under the Indian Gaming Regulatory Act (IGRA).

After careful review, we have determined that the Consulting Agreement is a management contract and therefore requires approval of the Chairman of the NIGC pursuant to the IGRA. We have further determined that the Machine Placement and Exclusivity Agreements are collateral agreements to the Consulting Agreement and also require approval by the Chairman. Consequently, to be valid, these agreements must be submitted to the NIGC for the Chairman's approval.

We are also concerned that the agreements evidence a proprietary interest by Caywil in the Tribe's gaming activity. Such a proprietary interest would be contrary to IGRA, NIGC regulations, and the Tribe's approved gaming ordinance. *See* 25 U.S.C. § 2710(b)(2)(A); 25 C.F.R. § 522.4(b)(1); The Seneca-Cayuga Gaming Code, enacted July, 20, 1993, as amended, § 1003.

Authority

The authority of the NIGC to review and approve gaming related contracts is limited by the IGRA to management contracts and collateral agreements to management contracts. 25 U.S.C. § 2711. The authority of the Secretary of the Interior to approve such agreements under 25 U.S.C. § 81 was transferred to the NIGC pursuant to the IGRA. 25 U.S.C. § 2711(h).

**1. Management Contracts**

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. The NIGC has defined "collateral agreement" to mean "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.

Management encompasses activities such as planning, organizing, directing, coordinating, and controlling. *See NIGC Bulletin No. 94-5.* In the view of the NIGC, the performance of any one of these activities with respect to all or part of a gaming operation constitutes management for the purpose of determining whether an agreement for the performance of such activities is a management contract requiring NIGC approval.

The Supreme Court has held that 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 the specific job title of the position held by the employee. *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 – thus being a *de jure* manager – or recommends discretionary actions that are implemented by others possessing actual authority to control employer policy, thus being a *de facto* manager. *Id.* at 1399. (citing *N.L.R.B. v. Yeshiva*, 444 U.S. 672, 683 (1980)).

**2. Proprietary Interest**

Among IGRA's requirements for approval of tribal gaming ordinances is 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.

NIGC regulations also require that all tribal gaming ordinances include such a provision. *See* 25 C.F.R. § 522.4(b)(1).

"Proprietary interest" is defined in Black's Law Dictionary, 7th Edition (1999), as "the interest held by a property owner together with all appurtenant rights . . . ." An owner is defined as "one who has the right to possess, use and convey something." *Id.* "Appurtenant" is defined as "belonging to; accessory or incident to. . . ." *Id.* Reading these definitions together, proprietary interest creates the right to possess, use and convey something.

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. . . <u>One would have a proprietary interest if he were sharing in or deriving profit from the club</u> as opposed to being a salaried employee merely performing clerical and ministerial duties.

*Id.* (emphasis added).

The legislative history of IGRA is an additional aid for interpreting the statute's mandate that a tribe "have the sole proprietary interest and responsibility for the conduct of any gaming activity." 25 U.S.C. § 2710(b)(2)(A). The legislative history of the 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 the ordinary definition of proprietary interest, 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 of "proprietary interest." In a chapter on joint ventures in American Jurisprudence 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 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. If the payment constitutes merely compensation, the parties bear to each other, generally speaking, the relationship of principal and agent, or in some instances that of employer and employee [footnote omitted]. On the other hand, a proprietary interest or control may be evidence of a joint venture. [footnote omitted]

46 Am. Jur. 2d *Contracts* § 57 (emphasis added).

Consequently, if a joint venture is found to exist it would be further evidence that the Nation did not hold the sole proprietary interest in the gaming operation.

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

Determination

The Consulting Agreement establishes a management relationship between the Tribe and Caywil. Under the terms of this Agreement, Caywil has a pervasive presence and exerts significant control in all aspects of the operation of the gaming facility. The following is not a exhaustive list of the responsibilities set forth in the Consulting Agreement, but amounts to enough evidence to lead us to conclude that the Consulting Agreement is a management contract. Caywil has input into the following:

1. implementation of capital improvements to be made to the existing facility, including facility modifications, equipment selection, design, negotiations with vendors, ordering, set-up and testing. *See* Consulting Agreement § 4.1.A

2. types and amounts of insurance coverage. *Id.* § 4.1.B

3. internal control systems and manuals and implementation of the same. *Id.* § 4.2.A

4. financial statement and daily and weekly reports. *Id.* § 4.2.B

5. development of the annual budgets including developing budget for operations; capital expenses; contracts, including employment agreements; labor; and a salary/wage schedule. *Id.* § 4.2.C

6. development and implementation of a written system of internal controls. *Id.* § 4.2.D

7. establishment of procedures to have all gaming materials and receipts secured at all times, including the placement of additional security devices and measures. *Id.* § 4.2.E

8. ensuring that monthly statements of all gross receipts, gross profit, operating expenses, net profits, and other amounts collected and received and all deductions and distributions made therefrom, and all assets and liabilities of the Gaming Enterprise, are accurately reported by the Gaming Enterprise personnel. *Id.* § 4.2 F

9. staffing needs and necessary training of personnel. *Id.* § 4.3.A

10. developing procedures and forms for selection, hiring and maintaining employees. *Id.* § 4.3.B

11. surveillance and security systems and personnel, including the development of procedures, forms, and training programs. *Id.* § 4.3.C

12. all personnel policies and procedures. *Id.* § 4.3.D

13. developing and implementation of overall marketing plan. *Id.* § 4.4.A

14. advertising placement and purchasing. *Id.* § 4.4.C

15. protocol for dealing with media. *Id.* § 4.4.D

16. selection of types and mixes of gaming. *Id.* § 4.5

17. compliance systems for Title 31 of the Internal Revenue Code, IGRA, NIGC Regulations, and Gaming Compact, including manuals and implementation of the same. *Id.* § 4.6

Although the Agreement disavows being a management contract, it is one. *See* Consulting Agreement § 22. Management encompasses activities such as planning, coordinating, and controlling. *See* NIGC Bulletin No. 94-5. The performance of just one of these activities with respect to part of a gaming operation constitutes management. *Id.*

Under the terms of the Agreement, Caywil is planning and coordinating fundamental aspects of the Tribe's gaming operation and is therefore, a *de facto* manager, because it possesses the ability to develop policies and procedures and recommends action that is then implemented.

Further, the term of the Consulting Agreement is for a period of [redacted] years. *Id.* § 2. This is unusually long for a mere Consulting and Training Agreement. Such a lengthy term is an indication of a management contract. *See* NIGC Bulleting No. 94-5. b4

The Consulting Agreement further provides:

> "the Gaming Enterprise may hire an employee of Consultant to act in the capacity of General Manager. The employment of Consultant's employee will end when a qualified employee can be identified and trained for the position held by Consultant's employee subject to the terms and conditions of this contract..."

*See* Consulting Agreement § 6.

We understand that a Caywil employee has recently been named interim General Manager. Under certain circumstances, employment of a former employee of a Consultant by a Tribe may be appropriate. However, in this case, the Consulting Agreement is providing some of the terms of this employment arrangement which indicates that the Consultant is not simply a disinterested third party to the relationship. Despite the fact that the Consulting Agreement provides that Caywil recommendations may be rejected or modified, under these circumstances it is unlikely that a Caywil employee, as the gaming enterprise's General Manager would ever do so. *See* Consulting Agreement, § 23. Thus, such employment situation illustrates the pervasive nature of the relationship.

Caywil's fee is also indicative of the existence of a management relationship between the parties. *See NIGC Bulletin No. 94-5; First American*, 412 F.3d at 1173-74; *Machal, Inc. v. Jena Band of Choctaw Indians*, 387 F.Supp.2d 659, 668 (W.D. La. July 21, 2005). Although Caywil is receiving [redacted] of "Net Gaming Revenues," b4 defined as "gross gaming revenues less amounts paid out as, or paid for prizes" plus all out of pocket expenses, the fact remains that Caywil's compensation is based upon a percentage of revenue, not a fixed fee or a daily rate. *See* Consulting Agreement, § 10. Consequently, such a percentage fee is an indication of a management contract and gives Caywil a strong incentive to manage so as to maximize its own return. *See NIGC Bulletin No.* 94-5; *First American*, *supra* at 1174 (stating that such determinations by NIGC General Counsel confirmed the Court's conclusion that the lease at issue was a management contract).

Further, Caywil is to receive [ ] of all "Net Revenue" defined as "gross gaming revenues less amounts paid out as, or paid for, prizes. *See* Consulting Agreement § 10. IGRA defines net revenues as: "gross revenues of an Indian gaming activity less amounts paid out as, or paid for, prizes and total operating expenses, excluding management fees." *See* 25 U.S.C. § 2703(9) (emphasis added). It is possible for [ ] of gross revenue as defined in the Consulting Agreement to equal a far higher amount of net revenue as defined by IGRA because operating costs, such as electricity, building maintenance, and employee salaries, have not been deducted. [ ] b4

The fee obtained by Caywil connotes the existence of a management relationship. *See NIGC Bulletin No. 94-5; First American*, 412 F.3d at 1173 (finding that a equipment lease fee of 40% net revenue was a feature of a management contract); *Machal, Inc. v. Jena Band of Choctaw Indians*, 2005 WL 1711983 at 7 (W.D. La. July 21, 2005).

The fact that the Tribe cannot end the consulting relationship at will is yet another indication that Caywil is not simply a consultant and is managing the Tribe's gaming facility. The Consulting Agreement states that the "Tribe or Consultant may terminate this Agreement immediately upon an event of default due to gross negligence or willful misconduct that is not cured within the 30 day period." *See* Consulting Agreement, § 16.3. This language makes the Agreement extremely difficult to terminate.

In addition, Caywil represents and warrants that it has the ability to operate a gaming enterprise of comparable size and complexity. *See* Consulting Agreement, § 5.1B. If Caywil were not managing the Tribe's gaming facility then there would be no need to make such representations.

We are also concerned about the arbitration clause contained in the Consulting Agreement. The Consulting Agreement provides that any disputes that arise shall be resolved by binding arbitration. *See* Consulting Agreement § 19.1. The arbitration clause does not exclude essential governmental decisions from compelled arbitration. We recommend revising the Agreement so that the Tribe retains governmental control over the regulation of the gaming operation.

Further, the Exclusivity Agreement is a collateral agreement to the Consulting Agreement as it provides for the management of all or part of the Tribe's gaming facility. See 25 C.F.R. § 502.15. Under the terms of the Exclusivity Agreement, the Tribe "shall not negotiate or interact with any third party concerning the gaming operations for the Project." *See* Exclusivity Agreement, § 1. The Exclusivity Agreement remains in effect until the Consultation Agreement is terminated or [ ] years. *See* Exclusivity Agreement § 4. A lengthy term which establishes an ongoing relationship is an indication of a management contract. *See* NIGC Bulleting No. 94-5. Whether the Tribe utilizes the services of a consultant or a management contractor is another fundamental management decision typically left to the discretion of the Tribe. Unless Caywil were managing the Tribe's gaming facility, we can see no other valid reason to restrict the Tribe's ability to hire another consultant or manager. b4

The Machine Placement Agreement is also a collateral agreement because it provides for the management of a part of the Tribe's gaming facility . *See* 25 C.F.R. § 502.15. Caywil has a pervasive presence at the gaming facility. Under the terms of the Machine Placement Agreement, Caywil possesses placement authority for the entire floor space, approximately [ ] machines. *See* Machine Placement Agreement § 2(A). Not only does Caywil dictate which games will be placed and played in the Tribe's gaming facility, it also controls several management duties related to such games including technical training, technical assistance, maintenance and/or upgrades to the machines.[1] *See* Machine Placement Agreement §§ 2(C) and 2(D). Maintenance and/or upgrades are paid, in part, by the Tribe, yet it appears that Caywil determines the maintenance intervals and upgrade schedules.[2] Further, the term of the Machine Placement Agreement is for a period of at least [ ] years. *See* Machine Placement Agreement § 1. Again, a lengthy term which establishes an ongoing relationship is an indication of a management contract. *See* NIGC Bulleting No. 94-5. b4

Finally, we are concerned that the Agreements bestow a proprietary interest in the gaming activity to Caywil, in violation of IGRA, its implementing regulations and the Tribe's gaming ordinance, because of the excessive compensation provided to Caywil. Under the terms of the Machine Placement Agreement, Caywil "may supply an initial placement of [ ] games" and "will add games to maximize and fill floor space, which consists of approximately [ ] games." *See* Machine Placement Agreement, § 2(A). The term of the Machine Placement Agreement is for a period of [ ] years commencing on the date that the games are available for play. *Id.* § 1. As machines will be installed from "time to time," the actual term will exceed [ ] years. *Id.* The Tribe will compensate Caywil a percentage of the net distributable profits for each group of machines according to the following schedule: b4

| Year | Percentage |
|---|---|
| [ ] | |

b4

Id. § 3(A)

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[1] The Machine Placement Agreement is directly related to the obligations and duties created between the Tribe and Caywil under the Consulting Agreement. Under the terms of the Consulting Agreement, Caywil have input into the selection of types and mixes of gaming. *See* Consulting Agreement, § 4.5.

[2] "Lessee shall deposit into the Fund the amount equal to [ ]..Lessee shall make the Fund available to Lessor upon request...: *See* Machine Placement Agreement, § 2(D). b4

"Net distributable profits" is defined as gross receipts less costs of prizes awarded and less [redacted] of "Net Revenues", again defined as gross gaming revenue less amounts paid out as, or paid for, prizes, to an equipment maintenance and/or upgrade fund. [redacted] (b4)

The terms of compensation show that Caywil seeks to use the Tribe's gaming facilities as its "slot route" – a long term venue where Caywil is the exclusive supplier of machines and derives a significant amount of profit therefrom. For the term of the agreement, which is a period of at least [redacted] years, all gaming machines in the Tribe's facility will be owned by Caywil and leased to the Tribe. Thus, Caywil's machines will occupy all of the floor space at such facilities for a potentially lengthy period of time. (b4)

Considering the total amount of compensation being paid to Caywil, [redacted]

Caywil will be receiving approximately [redacted][3] Moreover, as previously discussed, under the terms of this Agreement, Caywil has a pervasive presence and exerts significant control in all aspects of the operation of the gaming facility and is consistent with one possessing an ownership interest. (b4)

Conclusion

The Consulting Agreement constitutes a management contract. Please be advised that an unapproved gaming management contract is void. As noted in *NIGC Bulletin No. 94-5*, management of a gaming operation under an unapproved agreement could result in closure of the operation. Therefore, the parties must cease acting under this agreement immediately until it is approved by the NIGC Chairman.

Further, the Exclusivity Agreement and Machine Placement Agreement are collateral agreements that include management of all or part of the Tribe's gaming facility. Such collateral agreements, also require the review and approval by the NIGC Chairman. Please submit these contracts and other regulatory management contract requirements to the NIGC Contracts Division.

[3] We note that under the terms of the Promissory Note that ownership of the machines leased to the Tribe will transfer to the Tribe at the end of [redacted] year. *See* Promissory Note, § 5. Such transfer of ownership does not negate the fact that Caywil will hold a proprietary interest in the Tribe's gaming facility for at least [redacted] years prior to such transfer. (b4)

We are also concerned that the Consulting Agreement and Machine Placement Agreement bestow a proprietary interest in the Tribe's gaming operation on Caywil, in violation of the IGRA, its implementing regulations and the Tribe's gaming ordinance. This concern is based upon the excessive compensation provided to Caywil over an extensive period of time that does not appear to be commensurate with Caywil's services.

If you have any questions or concerns, please contact Staff Attorney Esther Dittler at (202) 632-7003.

Sincerely,

Penny J. Coleman
Acting General Counsel

cc: Tim Harper, NIGC Region V Director