May 8, 2019

Via email: <*jdw@jdw-law.com*>
And First Class Mail

John D. Wheeler, Esq.
John D. Wheeler & Associates, Attorneys at Law
715 East Tenth Street
Alamogordo, NM 88311

Re: Review of Mescalero Apache Tribe's Consulting Agreement with American Wagering, Inc.

Dear Mr. Wheeler:

This letter responds to your October 31, 2018 request, on behalf of the Mescalero Apache Tribe of the Mescalero Reservation ("Tribe"), for the National Indian Gaming Commission, Office of the General Counsel, to review a proposed Consulting Agreement between the Tribe's Inn of the Mountain Gods Resort and Casino ("IMGRC" or "Casino"), an unincorporated Tribal enterprise, and American Wagering, Inc. ("Consultant"). For the purposes of this letter, the term "Tribe" may be used interchangeably to refer to the Tribe and/or the Casino. The draft Consulting Agreement contemplates an agreement between the Tribe's Casino and Consultant in which Consultant will provide consulting services and certain tasks to help the Tribe develop and operate a land-based sports betting facility ("Sports Betting Facility") located and operated within the Casino.

You have requested my opinion as to whether or not the revised Consulting Agreement submitted on May 4, 2019, constitutes a management contract requiring the NIGC Chairman's approval under the Indian Gaming Regulatory Act ("IGRA"). Additionally, you have requested my opinion as to whether this agreement violates IGRA's requirement that a tribe possess and maintain the sole proprietary interest in its gaming operation. After careful review, it is my opinion that the Consulting Agreement is not a management contract and does not require the approval of the NIGC Chairman. It is also my opinion that the Consulting Agreement does not violate IGRA's sole proprietary interest requirement.

Management Contracts

The NIGC has defined *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."[1] *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, or organizations) and a management contractor or subcontractor (or any person or entity related to a management contractor or subcontractor)."[2]

While NIGC regulations do not define "management," the NIGC has clarified that the term encompasses activities such as planning, organizing, directing, coordinating, and controlling.[3] A "primary management official" includes "any person who has the authority . . . [t]o set up working policy for the gaming operation."[4] Further, management employees are "those who formulate and effectuate management policies by expressing and making operative the decision of their employer."[5] Whether a particular employee is "managerial" is not controlled by an employee's actual job responsibilities, authority, and relationship to management.[6] Essentially, an employee may qualify as management if the employee possesses the actual authority to take discretionary actions – a *de jure* manager – or, in certain circumstances, where the employee acts as a *de facto* manager by directing the gaming operation through others possessing actual authority to manage the gaming operation.[7]

If a contract requires or permits 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 IGRA and requires the Chair's approval.[8] Management contracts that have not been approved by the Chair are void.[9]

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[1] 25 C.F.R. § 502.15.

[2] 25 C.F.R. § 502.5.

[3] *See* NIGC Bulletin No. 94-5, "Approved Management Contracts v. Consulting Agreements (Unapproved Management Contracts are Void)."

[4] 25 C.F.R. § 502.19(b)(2).

[5] *N.L.R.B. v. Bell Aerospace Co.*, 416 U.S. 267, 288 (1974).

[6] *See Waldau v. M.S.P.B.*, 19 F.3d 1395, 1399 (Fed. Cir. 1994).

[7] *Id.* at 1399 (*citing N.L.R.B. v. Yeshiva*, 444 U.S. 672, 683 (1980)). It is uncommon to see *de facto* management in the terms of an agreement, as it is typically an activity that arises in the day-to-day implementation of a consulting agreement. If, for example, a tribe is required to make the ultimate decision on whether to accept the advice of a consultant, but has no one on staff with the expertise or experience to make such a determination, the consultant may become the *de facto* manager in the sense that the consultant is simply executing management decisions through a tribal management official.

[8] 25 U.S.C. § 2711.

[9] 25 C.F.R. § 533.7; *see also, Wells Fargo Bank, Nat'l Ass'n v. Lake of the Torches Econ. Dev. Corp.*, 658 F.3d 684, 688 (7th Cir. 2011).

Management Analysis

The submitted Consulting Agreement specifically prohibits Consultant from making any management decisions at the Tribe's Sports Betting Facility or at the Casino, and states that Consultant is being engaged "solely in a consulting and advisory capacity."[10] (b) (4)
(b) (4)
(b) (4)
(b) (4)
(b) (4) In short, while the Tribe will have access to Consultant's full sports betting menu,[14] it is the Tribe that decides on which games it will or will not accept wagers, and/or whether or not it wants to change the lines on a particular game, regardless of Consultant's recommendations.

[10] *See* Consulting Agreement § 2(b).
(b) (4)

(b) (4)

Because the Consulting Agreement does not grant Consultant any management authority, it is my opinion that the Consulting Agreement is not a management agreement requiring approval of the NIGC Chairman.

Sole Proprietary Interest

IGRA also requires a tribe to possess "the sole proprietary interest and responsibility for the conduct of any gaming activity."[17] In order to determine whether an agreement violates the sole proprietary interest requirement, the NIGC typically analyzes three elements: 1) the term of the relationship; 2) the amount of revenue paid to the third party; and 3) a third party's right to exercise control over all or any part of the gaming activity.[18] Accordingly, if a party other than the tribe receives a high level of compensation, for a long period of time, and possesses some aspect of control, an improper proprietary interest may exist.

Term of the Relationship

The term of the Consulting Agreement is fixed. (b) (4)
(b) (4)
(b) (4) Thus, the term is definite and limited.

Amount of Revenue Paid to a Third Party

(b) (4)

15 (b) (4)
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[17] 25 U.S.C. § 2710(b)(2)(A); *see also*, 25 C.F.R. § 522.4(b)(1).

[18] *See* NIGC NOV-11-02 (July 12, 2011); *see also, City of Duluth v. Fond du Lac Band of Lake Superior Chippewa*, 830 F. Supp. 2d 712, 723 (D. Minn. 2011), *aff'd in pertinent part*, 702 F.3d 1147 (8th Cir. 2013) (discussing NIGC adjudication of proprietary interest provision); *Bettor Racing v. National Indian Gaming Com'n*, 812 F.3d 648, 652 (8th Cir. 2016).

19 (b) (4)
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(b) (4)

(b) (4)

While the consultation fee of (b) (4) of net revenue is higher than other consulting fees that we typically see, the Tribe's outside counsel indicated that the Tribe performed its due diligence and the parties have negotiated an arms-length contract. The Tribe stated that it surveyed the market for available vendors and found Consultant's (b) (4) fee rate to be competitive for an entity with Consultant's experience and expertise in this field. Further, sports books are relatively new additions to tribal gaming, and the Tribe will be one of the first Indian gaming casinos to offer sports book betting in its region. The Tribe sees value in being first to market for sports book betting. Lastly, (b) (4)

22 (b) (4)

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(b) (4)
(b) (4) For these reasons, and given the list of deliverables, the consulting fee does not raise sole proprietary interest concerns.

Third Party's Right to Exercise Control over Gaming Activity

The Consulting Agreement does not transfer any exercise of control from the Tribe to Consultant. (b) (4)
(b) (4)
(b) (4) As set forth above, the Consulting Agreement specifically limits Consultant's role to consulting and advisory, and lists several activities that Consultant cannot do, including, hiring and determining wages of any employees of the Sports Betting Facility or the Casino.

Finally, the Consulting Agreement also makes clear that Consultant is not a joint venturer with, or servant, employee, partner or agent of, the Tribe, and that Consultant does not have any "authority to make commitments of any form or enter into agreements on behalf of the Tribe."[27] Therefore, it is my opinion that the Consulting Agreement, in its present form, does not grant a controlling interest in the Tribe's Casino or Sports Betting Facility.

Upon review of these three criteria – term, compensation, and control – it is my opinion that the Consulting Agreement does not violate IGRA's requirement that the Tribe maintain the sole proprietary interest in its gaming operation.

Conclusion

It is my opinion that the Consulting Agreement is not a management agreement requiring the approval of the NIGC Chairman. Additionally, the Consulting Agreement, on its face, does not violate IGRA's requirement that the Tribe maintain the sole proprietary interest in its gaming operation.

It is my understanding that the Consulting Agreement is represented to be in substantially final form with respect to terms affecting this opinion. If such terms change in any material way prior to closing, or are inconsistent with assumptions made herein, this opinion shall not apply. Further, this opinion is limited to the Consulting Agreement. This opinion does not include or extend to any other agreements or documents not submitted for review.

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25 (b) (4)

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27 *Id.* at § 11(e).

Please note that it is my intent that this letter be released to the public through the NIGC's website. If you have any objection to this disclosure, please provide a written statement explaining the grounds for the objection and highlighting the information that you believe should be withheld. 25 C.F.R. § 517.7(c). If you object on the grounds that the information qualifies as confidential commercial information subject to withholding under Exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4), please be advised that the information was voluntarily submitted and, as such, any request to withhold will be analyzed in accordance with the standard set forth in *Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir. 1992). Any claim of confidentiality should also be supported with "a statement or certification by an officer or authorized representative of the submitter." 25 C.F.R. § 517.7(c). Please submit any written objection to <FOIASubmitterReply@nigc.gov> within thirty (30) calendar days of the date of this letter. After this time elapses, the letter will be made public and objections will no longer be considered. *Id.* If you need any additional guidance regarding potential grounds for withholding, please see the United States Department of Justice's *Guide to the Freedom of Information Act* at <http://www.justice.gov/oip/doj-guide-freedom-information-act-0>.

If you have any questions, please contact Armando Acosta, Senior Attorney at (202) 379-6972.

Sincerely,

Michael Hoenig
General Counsel