The City of Barstow

AGENDA MATTER:

Agreement for Legal Services for the City of Barstow

EXECUTIVE SUMMARY:

Council authorized staff to distribute a Request for Qualifications (RFQ) to attorneys and law firms with state and federal Indian Gaming knowledge and experience. Three attorneys responded. Staff recommends Mr. Dennis Whittesey of the Firm of Jackson Kelly PLLC. An Agreement for legal services is attached.

DISCUSSION:

Council authorized staff to solicit qualified attorneys to assist the City with the review, editing, and negotiations of a Municipal Services Agreement (MSA) between the City of Barstow and the Los Coyotes Band of Cahuilla and Cupeno Indians. Staff conducted a solicitation and received 3 responses. knowledge and experience in state and federal Indian Gaming laws were the key factors used in evaluating each attorney,

Using this criteria, Mr. Whittesey, from the law firm of Jackson Kelly located in Washington, is recommended by staff. Mr. Whittesey represents all elements to the Indian Gaming industry: tribes, developers and local governments. He was involved in the drafting of Section 20, 25 U.S.C. Section 2719 of the Indian Gaming Regulatory Act (IGRA), which outlines the conditions by which an existing Tribe can acquire off reservation land and subsequently move the land into Trust. In addition, Mr. Whittesey previously represented four California Counties in the development of their MSAs with local Tribes.

An Agreement for legal services is attached. The Agreement was drafted by the City Attorney's office and outlines the legal services that are being request by the City. Mr. Whittesey primary responsibility is to make sure the MSA is legally enforceable in state and federal courts. Negotiating the financial terms of the Agreement rests with staff initially and ultimately with City Council. The Agreement restricts Mr. Whittesey's services to a not to exceed amount of \$10,000. Barwest has agreed, in writing, to pay for these legal expenses up to this amount.

RECOMMENDED ACTION:

Select Mr. Dennis Whittlesey from the law firm of Jackson Kelly PLLC as the firm most qualified to review, edit, and negotiate a Municipal Services Agreement between the City and the Los Coyotes Band of Cahuilla and Cupeno Indians. The cost for these services will be reimbursed by Barwest.

PROPOSED BY	FUNDS BUDGETED	FUNDS REMAINING	MEETING DATE
Ron Rector (7	N/A	N/A	January 20, 2004
C.M. APPROVAL	AMOUNT REQUIRED	CATEGORY	ITEM NUMBER
Vijay Singhal	N/A	Economic Development	14

CC/JJ/AGBILL11-2003.DOR

AGREEMENT FOR LEGAL SERVICES FOR THE CITY OF BARSTOW

This agreement is made and entered into by and between the law firm of Jackson Kelly PLLC (hereinafter "the Firm"), and the City of Barstow (hereinafter "the City").

RECITALS:

- A. The City desires to retain attorney Dennis J. Whittlesey of the Firm to assist City with the review, editing, and negotiations of a Municipal Services Agreement ("MSA") between the City and the Los Coyotes Band of Cahuilla and Cupeno Indians for an off-reservation Resort and Casino project.
- B. Mr. Whittlesey and all Firm personnel engaged in the work contracted for pursuant to this Agreement shall be qualified to perform such services and Mr. Whittlesey and the Firm each represent that he/it possesses all licenses necessary to discharge the services contemplated by this Agreement.

NOW, THEREFORE, the parties hereto agree as follows:

- Scope of Services.
 - A. The legal services to be provided by the Firm shall consist of those set forth in Exhibit "A".
 - B. The services provided pursuant to this Agreement shall be performed primarily by Mr. Whittlesey, assisted by Mr. Thad Huffman. Firm shall bill at the rate of \$250.00 per hour for Mr. Whittlesey and Mr. Huffman's time. The Firm shall obtain the City's prior written consent if any other person is to undertake to provide substantial services.
 - C. Firm shall not incur more than \$10,000.00 in legal fees and disbursement costs without obtaining the prior written consent of City. Firm is not required to perform legal services pursuant to this Agreement in the event legal fees and disbursement costs exceed \$10,000.00 and the City chooses not to authorize additional payment.
- 2. Billing Procedures and Monthly Statements.
 - A. The Firm shall submit to the City, within thirty (30) days after the end of each calendar month, an itemized statement of the professional services provided and the time expended to provide those services in the form customarily submitted by the Firm to clients which are billed on an hourly basis. The parties acknowledge that payment of all monthly statements is expected to be made within thirty (30) days of the billing date.

Jackson Kelly Agreement for Legal Services
Page 1 of 4

- B. The Firm will bill the City for items such as, but not limited to, long distance telephone calls, filing fees, duplication, computerized legal research, and similar out-of-pocket expenditures. Photocopies shall be billed at 15 cents per page and the Firm will not charge for word-processing services or secretarial overtime. These items will be separately designated on the Firm's monthly statements as "disbursements," and will be billed in addition to fees for professional services.
- C. Firm shall not incur any travel expenses without prior authorization from the City Manager of the City.
- D. Time will be charged by the Firm in increments of 1/10 of an hour (i.e., six-minute units). The rate structure in general, or the rates of particular attorneys, may not be increased during the term of this Agreement.
- 3. Resolution of Fee Disputes.

The City is entitled to require that any fee dispute be resolved by binding arbitration in San Bernardino County pursuant to the arbitration rules of the San Bernardino County Bar Association for legal fee disputes. In the event that City chooses not to utilize the San Bernardino County Bar Association's arbitration procedures, City agrees that all disputes regarding the professional services rendered or fees charged by the Firm shall be submitted to binding arbitration in San Bernardino County to be conducted by the American Arbitration Association in accordance with its commercial arbitration rules.

Choice of Law

This Agreement shall be governed and construed according to the laws of the State of California and, regardless of where and by what method the Agreement is executed, is to be construed as having been entered into in the City of Barstow, California.

5. Term of the Agreement.

This Agreement shall be effective as of February 1, 2004 and shall be and remain in full force and effect until terminated in accordance with the provisions of Section 6 hereof.

6. Termination of the Agreement.

City has the right to terminate the Firm's representation at any time, without cause, subject to an obligation to give notice in writing to the Firm at least thirty (30) days prior to termination. The Firm has the same right, subject to the Firm's ethical obligations to allow the City sufficient notice prior to termination so that City will be able to arrange alternative representation. In either circumstance, City agrees to

secure new counsel as quickly as possible and to cooperate fully in the substitution of the new counsel as counsel of record in any action in which the Firm may represent the City. The Firm agrees to cooperate fully in any such transition, including the transfer of files. Notwithstanding the termination of the Firm's representation, City will remain obligated to pay the Firm all fees and costs incurred prior thereto.

7. Files.

All legal files of the Firm pertaining to the City shall be and remain the property of City. The Firm will control the physical location of such legal files during the term of this Agreement.

8. Modifications to the Agreement.

Unless otherwise provided for in this Agreement, modifications relating to the nature, extent or duration of the Firm's professional services to be rendered hereunder shall require the prior written approval of the City Council of the City. Any such written approval shall be deemed to be a supplement to this Agreement and shall specify any changes in the Scope of Services and the agreed-upon billing rates to be charged by the Firm and paid by the City.

9. Independent Contractor.

No employment relationship is created by this Agreement. The Firm shall, for all purposes, be an independent contractor to the City.

10. Nondiscrimination.

In the performance of this Agreement, the Firm shall not discriminate against any employee or applicant for employment because of race, religion, color, sex, national origin, medical condition, or any other unlawful basis.

11. Assignment and Delegation.

This Agreement contemplates the personal professional services of attorney Dennis J. Whittlesey of the Firm and this Agreement, or any portion thereof, shall not be assigned or delegated without the prior written consent and approval of the City Counsel.

12. Insurance.

A. The Firm shall maintain in full force and effect a professional liability insurance policy which provides coverage in an amount not less than \$2,000,000 per occurrence and \$2,000,000 aggregate. Said insurance policy provides coverage to the City for any damages or losses suffered by

- the City as a result of any error or omission or neglect by the Firm which arises out of the professional services required by this Agreement.
- B. The Firm shall maintain workers' compensation insurance in accordance with Section 3700 of the California Labor Code.
- C. The Firm agrees to notify City in the event the limits of its insurance should fall below the coverages stated in paragraph A or if the insurance policies noted here are allowed to lapse and substitute insurance is not obtained.

13. Entire Agreement

This Agreement, together with Exhibit "A" hereto, shall constitute the full and complete agreement and understanding of the parties and shall be deemed to supersede all other written or oral statements of any party hereto relating to the subject matter hereof.

IN WITNESS WHEREOF, TO EFFECTUATE THIS AGREEMENT, the parties have caused their duly authorized representatives to execute this Agreement on the dates set forth below.

ATTEST:	CITY OF BARSTOW
JoAnne V. Cousino CITY CLERK	Lawrence W. Dale Mayor
Date	Date
	Dennis J. Whittlesey, Esq.
	Member Date

EXHIBIT "A"

Scope of Services

The City has prepared a draft Municipal Services Agreement ("MSA") between the City of Barstow ("City") and the Los Coyotes Band of Cahuilla and Cupeno Indians ("Tribe") for an off-reservation Destination Resort and Casino. The Firm's role under this Professional Services Agreement ("Agreement") is to review the draft MSA to identify any shortcomings in its substance, its language, its legality, and most importantly, its enforceability in state and federal courts.

In addition to reviewing the document, the Firm will negotiate, as part of the City's negotiating team, the MSA with the Tribe on behalf of the City with special focus on maintaining the legal integrity of the document. The Firm, nor any member of the negotiating team, is authorized to commit to a final Agreement. City Council will make the ultimate decision as it relates to the Agreement.

Jan-23-04 07:34P NEW LIFE FELLOWSHIP

1131 W., Gixth Street, Suite 300 Ontario, California 91762 Telephone (909) 983-9393 Facsimile (909) 391-6762 760 256 0807

Robert E. Dougherty Robert F. Schauer Edward R. Ulloa M. Brian Cullen Faith S. Askar Retired

Maurice G. Covington (1909 - 1997) Harold A. Badin (1930 - 1988)

P.08

COVINGTONACROWELLP

October 27, 2003

Ron Rector, Economic Development Manager City of Barstow 220 Mountain View Street, Suite A Barstow, California 92311 VIA FACSIMILE AND FEDERAL EXPRESS

Fax No.: 760.256.1750 Airbill No. 8433.2684.7632

Re:

Letter of Interest and Statement of Qualifications for Legal Services for a Municipal Services Agreement with Native American Tribe

Dear Sir:

This letter is in response to your request for Statement of Qualification with respect to the completion and execution of a Municipal Services Agreement between the City of Barstow and the Los Coyotes Band of Cahuilla and Cupeno Indians for an off-reservation Resort and Casino project.

The firm of Covington & Crowe has had extensive experience with respect to negotiating, and preparing municipal service agreements specifically relating to Indian casinos as well as advising municipalities with respect to zoning and regulatory matters as they relate to sovereign immunity issues concerning Indian tribal lands.

Our hourly billing rates for the work is as follows:

Partners \$175.00 per hour Associates \$150.00 per hour Paralegals \$ 95.00 per hour

If you would like references regarding our specific work in San Bernardino County or Riverside County, you may contact the following persons:

Mike O'Connor, Administrative Assistant, County of Riverside, (310) 529.0388. Mr. O'Connor is in charge of negotiations between the County of Riverside and the various Indian tribes operating within the County.

Dennis Nowicki, Mayor, City of Hesperia, (760) 244.0783. Mr. Nowicki has personal knowledge of our work with respect to the proposed Municipal Services Agreement between the City of Hesperia and the Timbisha Shoshone Tribe.

Mr. Ron Rector October 27, 2003 Page 2

Our experience includes reviewing tribal pacts with the State of California as well as consulting with the Bureau of Indian Affairs regarding off-reservation matters. I would be happy to meet with you to discuss our previous experience. I would be happy to meet with you or other representatives of the City to further discuss this matter.

cespectivity

SAMUEL P. CROWE, for

COVINGTON & CROWE, LLP

SPC:km

LAW OFFICE OF RICHARD G. McGEE

8028 Morgan Circle Brooklyn Park, MN 55444

Telephone: 763-560-8608 Facsimile: 763-560-0542 Email: richardmcgee@comcast.net



October 7, 2003

City of Barstow

Attention: Ron Rector

220 East Mountain View Street, Suite A

Barstow, California 92311

Re:

Statement of Qualifications

Los Coyotes Band project

Dear Mr. Rector:

Thank you for the opportunity to respond to Barstow's request for a Statement of Qualifications relating to the proposed Municipal Services Agreement between the City of Barstow and the Los Coyotes Band of Cahuilla and Cupeno Indians.

My unique experiences in the practice of law make me a strong candidate to assist with the proposed project. I have been practicing law for fifteen years. I was an attorney with a Minneapolis law firm that had a substantial municipal law practice. While I was employed at that Minneapolis law firm, I had several opportunities to work on municipal government issues.

While working for the Minneapolis law firm I was invited to serve as in-house legal counsel for the Prairie Island Indian Community which owns and operates Treasure Island Resort & Casino located near Red Wing, Minnesota. I accepted Prairie Island's offer to serve as in-house legal counsel to the tribe and its enterprises. Of the tribe's enterprises, the largest is Treasure Island Resort & Casino which operates 2,400 slot machines, table games and bingo. While at Prairie Island, I addressed a wide variety of issues that will assist me in representing the City of Barstow in connection with the above-referenced matter. I dealt with the full range of gaming issues, agreements between the tribe and the City of Red Wing, sovereign to sovereign relationships with the State of Minnesota and matters between Prairie Island and the local county government.

The wealth of experience I obtained at Prairie Island and previously have prepared me to focus much of my practice on tribal issues. I started this firm almost two years ago

after leaving Prairie Island. My firm represents casinos, tribal gaming agencies, and tribal governments. I also have the privilege of teaching gaming, gaming regulation, and federal Indian law for Falmouth Institute, National Indian Gaming Association, and the Minnesota Institute of Legal Education among others. Teaching in these areas gives me the opportunity to stay abreast of the latest developments in the law.

Furthermore, as a litigator with fifteen years of courtroom experience, I not only understand legal theory, but I also understand the reality of enforcing agreements in the courtroom. One of your goals is to prepare an agreement that not only governs your relationship when the parties are on friendly terms, but the agreement must also serve the parties if a dispute arises that cannot be resolved without judicial intervention. My mix of experience in this area helps me to understand the importance of enforceability terms in an agreement.

My hourly rate is \$150. That hourly rate is less than the rates charged by my former law firm. My reduced rate reflects the flexibility of a law firm that is agile, has little overhead and controls its costs. My savings are passed along to my clients.

I have enclosed a resume which memorializes some of my experience. I am happy to provide information for as many references as you want to contact.

I wish you the best of luck with this project and if you have any questions please feel free to contact me.

Thank you.

Sincerely,

Richard G. McGee

RGM/dmm

RICHARD G. McGEE

Attorney at Law 8028 Morgan Circle Brooklyn Park, MN 55444 Telephone: 763-560-8608 Facsimile: 763-560-0542

E-mail: richardmcgee@comcast.net

Education:

1984 - Graduate of Mankato State University

Bachelor of Arts Degree in Psychology and Political Science

1988 - Graduate of Oklahoma University Law School Juris Doctor

Employment:

December 2001-Present - Law Office of Richard G. McGee

The law firm focuses on tribal employment and gaming issues

May 1999-December 2001 - Prairie Island Indian Community

Assistant General Counsel

Practice Areas:

Litigation

Constitution Revision

Gaming

Employment

Indian Child Welfare

Acquisitions

January 1988-May 1999 - Arnold, Anderson & Dove

Principal Litigation Attorney

Practice Areas:

Commitment Defense

Business Litigation

Employment Litigation

Creditors Remedies

Guardianship and Conservatorship

Personal Injury

Insurance Defense - Dram Shop

Criminal Prosecution and Defense

Represented Plaintiffs in <u>Jensen v. Hercules</u>, which is the largest reported verdict in a Minnesota workers' compensation retaliatory discharge case.

Service:

Past President of the Hennepin County Bar Association Debtor-Creditor Committee
Past Chairperson of the Commitment Defense Project CLE Subcommittee
Attorney for Volunteer Attorneys Network since 1988
Volunteer speaker for the Osseo Public School District
Board Member for CEAP (Community Emergency Assistance Program)

References:

Available upon request



2401 PENNSYLVANIA AVENUE, NW. SUITE 400 • WASHINGTON, DC 20037 • TELEPHONE: 202-973-0200 • TELECOPIER: 202-973-0232

www.jacksonkelly.com

October 9, 2003

VIA FACSIMILE AND FIRST CLASS MAIL

CITY OF BARSTOW

Attn: Mr. Ron Rector

220 East Mountain View Street - Suite A

Barstow, California 92311

Re: Potential Agreement with Indian Tribe -- Letter of Interest and Statement of Oualifications for Legal Services to City.

Dear Mr. Rector:

We are in receipt of your letter dated September 24, 2003, concerning the referenced matter. Specifically, we understand that the City of Barstow anticipates completing and executing a Municipal Services Agreement with the Los Coyotes Band of Cahuilla and Cupeno Indians for an off-reservation Resort and Casino project and intends to retain outside legal counsel experienced in such matters to work with the City and its attorneys in developing the final agreement.

At the outset, I will state that we are very interested in representing the City of Barstow in this matter; in support of this letter, we believe that our qualifications for this project are without equal.

This firm's Gaming Practice has extensive expertise and experience in the matters identified in your letter, and the undersigned is especially qualified for the project. In this regard, enclosed are two documents concerning the undersigned relevant to this letter: (1) law firm profile which also can be found at the firm's web page – www.jacksonkelly.com – and (2) Gaming Practice Resume.

We represent all elements to the Indian gaming industry: tribes, developers and local governments. It is important to note that none of our tribal clients are located in Southern California, as well as that we fully disclose to tribal clients our work with local governments in negotiating agreements with tribes seeking to develop gaming projects. We believe it is critical to this kind of work to reach agreements which are fair to all parties but also are designed to enhance the success of the project once completed. In short, we seek "partnerships" between tribes and local governments, and this is true whether we are negotiating on behalf of a tribe or a local government.

CITY OF BARSTOW Page Two October 9, 2003

Experience with the Federal Indian Gaming Law.

Essential to any Indian gaming project is an understanding of the federal Indian Gaming Regulatory Act, 25 U.S.C. § 2701, et seq. ("IGRA"), the law which governs virtually every aspect of Indian casinos including the qualification of lands for such projects. As you will see from my Resume, I was involved in the development of this law in 1988 with particular focus on Section 20, 25 U.S.C. § 2719, which specifically deals with gaming on lands acquired by tribes subsequent to the enactment of IGRA on October 17, 1988. This section goes to the heart of your project since the development would be located on newly-acquired lands. There are some difficult federal land and trust acceptance issues which the tribe will have to confront on its own, but they need to be fully understood by the City and provided for in the agreement where appropriate.

Since 1988, we have worked extensively in Indian gaming as regulated by IGRA, including our work in negotiating and writing the first Indian Gaming Compact in Oregon—work which is discussed in the enclosed Resume.

Work with Local Governments for Agreements with Tribes.

The following summary outlines our work on behalf of governments in working with Indian tribes to develop agreements for local services.

The City of Detroit, Michigan -- We represented the City of Detroit in intensive roundthe-clock negotiations with the Sault Ste. Marie Band of Chippewa Indians in writing a comprehensive local services agreement, which ultimately was vetoed by the Governor under the "gubernatorial concurrence" provisions of IGRA Section 20. We then subsequently worked on the development of the three casino (non-Indian) gaming industry which today operates in Detroit.

The City of Battle Creek and Calhoun County, Michigan – We have worked with both local governments in matters associated with a proposed Indian casino near Battle Creek and within the County. There are no agreements with the tribe since it refuses to negotiate, so our work has involved advising the two governments on relevant issues of Indian law, federal land and environmental law and gaming law in general.

The City of Buffalo, New York – We are Special Counsel for gaming to the City of Buffalo and have advised the Mayor for several years on issues relevant to the potential development of a casino within the city by the Seneca Nation.

Placer County, California – As Special Counsel for Gaming to the county, we worked closely with the County Counsel to develop, and secure Board of Supervisors approval of, an agreement for services with the United Auburn Indian Community and its Thunder Valley Casino. As you know, that casino recently opened near Sacramento and has been a success from its first day of operations. The agreement we developed has been described in national gaming publications as creating a "model" working relationship between a local government and an Indian tribe.

CITY OF BARSTOW Page Three October 9, 2003

Tuolumne County, California – As Special Counsel for Gaming to the county, we worked closely with the County Counsel to develop, and secure Board of Supervisors approval of, an agreement for services with the Tuolumne Rancheria Band of Me-Wuk Indians and its Black Oak Casino. The agreement we developed also has been widely praised as a "model" document. The casino opened some 18 months ago and has been both well-received and financially successful. Many public comments have credited the working relationship between the tribe and the county as having generated wide-spread good will which in turn has directly contributed to enhanced local patronage of the casino and it restaurants.

Madera County, California – As Special Counsel for Gaming to the county, we worked closely with the County Counsel to develop, and secure Board of Supervisors approval of, an agreement for services with the Picayune Rancheria of the Chukchansi Indians. That casino recently opened near Madera and Fresno and has been success since its first day of operations.

Sonoma County, California – We have a contract with the County which has required a much lower level of work than the other three California counties. The Sonoma work has primarily consisted of consultations with the County Counsel on various legal issues associated with a very acrimonious relationship between a Rancheria tribe in the Alexander Valley and the local governments and citizens. Relevant to this work is that we subsequently were retained by the Alexander Valley Association, an organization of the landowners in this important wine-producing area, to work with both local and state government officials to resolve problems created by the casino's development and operations. The problems encountered by the tribe with the particular site occupied by its Rancheria would be eliminated with a relocation of the casino to a site adjacent to U.S. 101, and this effort has been a principal element of our continuing work.

Cowlitz Tribe of Indians of Washington – We represent this newly-recognized tribe as General Counsel and currently are in negotiations with Clark County, Washington, for a comprehensive services agreement. Again, we are dealing with the very issues which have arisen in our work for the local governments identified above. The goal always is to secure an agreement which is fair to all parties, while insuring a working relationship designed to insure a successful enterprise.

Issues Which Need to be Addressed.

Since we have written many agreements for local governments, we feel that we are experts without peer in the issues which need to be examined during negotiations. We also know which issues are probably irrelevant to a given project. In this regard, we understand that every Indian deal is unique since tribes have different histories (which can affect their land entitlements) and different forms of governments (which can affect the way in which agreements are approved and Waivers of Sovereign Immunity adopted.) In Indian projects, there is no "one size fits all" way in which to proceed. Again, every project is different.

As for Waivers of Sovereign Immunity, the law is well-established as to what is required in order for a waiver to be valid and enforceable. However, many professionals do not fully understand the specific problems in drafting valid waivers. We have written many waivers for tribal execution and can provide documents which will satisfy both tribal and legal requirements.

CITY OF BARSTOW Page Four October 9, 2003

It is entirely possible that the City of Barstow already has seen some of the agreements we have written for various California counties. These documents reflect our approach and are evidence to the comprehensive knowledge we would bring to the project. However, central to any agreement is that you identify the tribe's needs, the local government's ability to address them and compensation provisions which insure that the tribe pays for the services it receives and this can only be done on a case-by-case basis. We should note that the major issues will include water, waste disposal, traffic and parking, and police and fire protection. However, there are other matters of tribal and local concern which should be addressed and they generally are identified and quantified during the negotiation process.

The Firm's Engagement and Retainer Requirements.

Enclosed is a draft retainer letter which is this firm's customary client agreement. We realize that you may require a contract with the City which in a standard form, and this certainly is acceptable to us. However, I am enclosing this letter so that you will understand our standard practices in accepting and serving new clients.

The draft retainer has been revised specifically for this proposal. The standard billing rate for the two attorneys who principally would be involved in this project is \$300.00 per hour, but we are proposing a reduced hourly rate of \$250.00 in consideration of the fact that many governments cannot justify paying our standard rate. In return for this reduction and the proposed waiver of our customary required retainer payment, we would expect prompt payment of invoices.

In closing, we are available to respond to any questions and to provide additional information. We look forward to hearing from you.

Sincerely yours

Dennis J. Whittlesev

Enclosures

SO305170