No. 10-2069

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Wells Fargo, National Association, as Trustee,

Appellant,

v.

Lake of the Torches Economic Development Corporation,

Appellee.

Appeal from the January 11, 2010 Judgment and April 22, 2010 Order of the
United States District Court for the Western District of Wisconsin,
District Court Case No. 09-CV-768
The Honorable Judge Rudolph T. Randa, Presiding by Designation

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ADDENDUM TO BRIEF OF THE DEFENDANT-APPELLEE, LAKE OF THE TORCHES ECONOMIC DEVELOPMENT CORPORATION

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Oral Argument Requested

ADDENDUM

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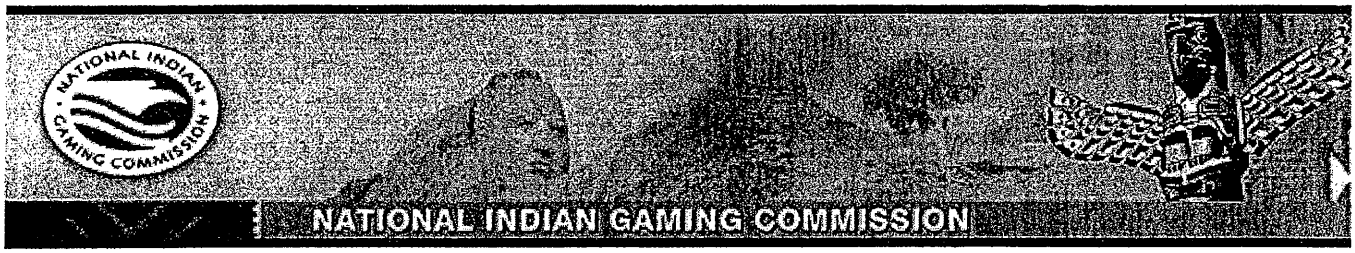

1441 L. Street NW Suite 9100, Washington DC 20005 Tel.: (202) 632-7003 Fax: (202) 632-7066 Email: info@nigc.gov

Bulletin No. 93-3

DATE: JULY 1, 1993

Subject: Submission of Gaming-Related Contracts and Agreements for Review

The NIGC has received several requests for guidance on whether particular gaming-related agreements require the approval of the NIGC or the Bureau of Indian Affairs (BIA).

Certain gaming-related agreements require the approval of either the National Indian Gaming Commission (NIGC) pursuant to 25 U.S.C. § 2711 (25 CFR Part 533) or the Bureau of Indian Affairs pursuant to 25 U.S.C. § 81.

In order to provide timely and uniform advice to tribes and their contractors, the NIGC and the BIA have determined that certain gaming-related agreements, such as consulting agreements or leases or sales of gaming equipment, should be submitted to the NIGC for review. In addition, if a tribe or contractor is uncertain whether a gaming-related agreement requires the approval of either the NIGC or the BIA, they should submit those agreements to the NIGC.

The NIGC will review each such submission and determine whether the agreement requires the approval of the NIGC. If it does, the NIGC will notify the tribe to formally submit the agreement.

If the NIGC determines that the agreement does not require the approval of the NIGC, the submitter will be notified of that fact and the NIGC will forward the agreement to the BIA for its review.

For additional information, contact Michael Cox at the NIGC (202/632-7003) or the BIA Gaming Management Office at (202/219-4068).

AD001

NATIONAL INDIAN GAMING COMMISSION

1441 L. Street NW Suite 9100, Washington DC 20005 Tel.: (202) 632-7003 Fax: (202) 632-7066 Email: info@nigc.gov

Bulletin No. 94-5

AD002

DATE: OCTOBER 14, 1994

Subject: Approved Management Contracts v. Consulting Agreements (Unapproved Management Contracts are Void)

One of the purposes of the Indian Gaming Regulatory Act (IGRA or Act) is:

to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players.

25 U.S.C. 2702(2). To carry out this purpose, the Act requires, among other things, the approval of management contracts for the operation and management of Indian gaming operations. 25 U.S.C. 2705(a)(4); 25 U.S.C. 2710 (d)(9); and 25 U.S.C. 2711.

Questions have been raised as to what distinguishes a management contract from a consulting agreement. The answers to these questions depend upon the specific facts of each case. The Commission stands ready to make a decision as to whether or not a particular contract or agreement is a "management contract" under Commission regulations. However, before doing so, the Commission must see the entire document including any collateral agreements and referenced instruments.

The consequences are severe for a manager who mistakes his management agreement for a consulting agreement. Consequently, the Commission offers the following information and observations.

MANAGEMENT CONTRACTS AND OTHER GAMING RELATED CONTRACTS

"Management contract" is defined 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 the gaming operation.

25 CFR § 502.15

NIGC approval of management contracts is required by IGRA as a means of protecting the tribes. A requirement for including within the scope of audit of the gaming operation other contracts, including supply contracts, is similarly a means of protecting the gaming operations and ultimately the tribes from those deemed unsuitable for Indian gaming or on terms at variance with IGRA's requirements. Other gaming-related contracts not providing for management may require the approval of the Secretary of the Interior.

EFFECT OF NON-APPROVAL

A management contract that has not been approved by the Chairman is void. Furthermore, the management of a gaming operation under a "management" contract or agreement that has not been approved could result in the gaming operation being closed. The consequences to the parties are:

- ★ The tribe would have to close down the operation or operate it on its own, and
- ★ The management contractor would have to vacate the operation and could be subjected to legal action to return to the tribe any funds it received under the contract.

MANAGEMENT

Management encompasses many activities (e.g., planning, organizing, directing, coordinating, and controlling). The performance of any one of such activities with respect to all or part of a gaming operation constitutes management for the purpose of determining whether any contract or agreement for the performance of such activities is a management contract that requires approval.

Furthermore, the Congress and the Commission have determined that certain management activities can or should be present in a management contract. The presence of all or part of these activities in a contract with a tribe strongly suggests that the contract or agreement is a management contract requiring Commission approval. Such activities or requirements with respect to the gaming operation include, but are not limited to, the following:

- ★ Maintenance of adequate accounting procedures and preparation of verifiable financial reports on a monthly basis;
- ★ Access to the gaming operation by appropriate tribal officials;
- ★ Payment of a minimum guaranteed amount to the tribe;
- ★ Development and construction costs incurred or financed by a party other than the tribe;
- ★ Term of contract that establishes an ongoing relationship;
- ★ Compensation based on percentage fee (performance); and
- ★ Provision for assignment or subcontracting of responsibilities.

It has been argued that if all of the ultimate decision-making is retained by the owner, the agreement should be construed as a consulting agreement. Some gaming operations are owned by individuals, some by corporations, some by partnerships, some by Indian tribes, etc. Regardless of the form of ownership, the owner always has the ultimate authority when it comes to decision-making. 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 operation.

CONSULTING CONTRACT

What then is a consulting contract and what regulatory requirements would apply? The answers to such questions must be made on a case-by-case basis because they depend on the facts and circumstances of the individual situation and the actual day-to-day relationship between the tribe and the contractor.

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 very well be determined to be a consulting agreement. On the other hand, 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.

Regardless of the specifics of a consulting agreement, advance approval is not required but an advance determination under Bulletin No. 93-3 is strongly recommended to avoid a later decision by the Commission that the agreement is a management contract.

REQUIREMENT FOR DETERMINATION

The Commission recognized early the need to provide guidance on which contracts are subject to approval and therefore issued Bulletin No. 93-3 on July 1, 1993. It provides for the submission of gaming-related contracts and agreements to the NIGC for review. The Bulletin states:

In order to provide timely and uniform advice to tribes and their contractors, the NIGC and the BIA have determined that certain gaming-related agreements, such as consulting agreements or leases or sales of gaming equipment, should be submitted to the NIGC for review. In addition, if a tribe or contractor is uncertain whether a gaming-related agreement requires the approval of either the NIGC or the BIA, they should submit those agreements to the NIGC.

The NIGC continues to make itself available to review all such gaming-related contracts and agreements.

NOV 30 2004

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Dear Mr. Gray, Mr. Pipestem, Mr. Lind, and Mr. Loebig:

In a letter dated December 15, 2003, you requested the National Indian Gaming Commission (NIGC) review a series of agreements between the Osage Tribe (Tribe) and K&D Gaming (K&D), Oklahoma Gaming Development, LLC (OGD), and Megabingo, Inc. (MBI). The submitted documents were as follows:

1. Memorandum of Understanding between the Tribe and K&D (MOU)
2. Construction Loan Agreement between the Tribe and OGD
3. Promissory Note from the Tribe to OGD
4. Security Agreement between the Tribe and OGD
5. Consulting Agreement between the Tribe and K&D
6. Development Agreement between the Tribe and K&D

7. Depository Control Agreement between the Tribe and OGD
8. Reel Time Bingo System Agreement (Rental) and Software License between the Tribe and MBI

The NIGC sent an informal letter listing the agency's concerns on May 13, 2004, following a meeting with the parties on May 11, 2004. On August 2, 2004, the following amended contracts were received:

1. Amended and Restated Construction Loan Agreement between the Tribe and MBI (Loan Agreement)
2. Amended and Restated Development Agreement between the Tribe and K&D
3. Amended and Restated Consulting Agreement between the Tribe and K&D
4. Resolution of the Osage Tribal Council
5. Certificate of Tribe
6. Amended and Restated Sand Springs Promissory Note between the Tribe and MBI
7. Amended and Restated Sand Springs Security Agreement between the Tribe and MBI
8. Amended and Restated North Tulsa Promissory Note between the Tribe and MBI
9. Amended and Restated North Tulsa Security Agreement between the Tribe and MBI
10. Amended and Restated Depository Control Agreement between the Tribe, MBI, K&D, and Bank of Oklahoma, N.A.
11. Termination and Release of Disbursement Agreement
12. Termination and Release of OGD/Osage Loan Documents
13. Termination and Release of MBI/OGD Loan Documents
14. Limited Liability Company Dissolution Agreement concerning OGD
15. Termination and Release of Participation Agreement
16. Amended and Restated Agreement (Sand Springs)
17. Amended and Restated Agreement (North Tulsa)

The purpose of our review is to determine whether the agreements constitute a management contract or collateral agreements to a management contract and are therefore subject to our review and approval under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701 *et seq.*

We are not prepared conclude that the agreements do not constitute a management contract subject to our review and approval. However, we are more concerned that the agreements evidence a proprietary interest by MBI 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 Class II Gaming Ordinance of the Osage Tribe of Indians, as amended, § 1.03.

AD005

Consequently, because of our concern, we request that the parties provide us with a justification for the fee obtained by the MBI in this instance. Please provide such justification in writing and submit it to us as soon as possible.

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).

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.

Determination

After careful examination, we conclude that the new agreements of August 2 separate MBI and K&D for the purposes of management contract review. The entities are no longer contracting together with the Tribe and appear to have separated their roles. We therefore review the MBI and K&D contracts independently. For the MBI review, we examined the Amended and Restated Construction Loan Agreement between the Tribe and MBI (Loan); Amended and Restated Sand Springs Promissory Note between the Tribe and MBI (Sand Springs Note); Amended and Restated Sand Springs Security Agreement between the Tribe and MBI (Sand Springs Security Agreement); Amended and Restated North Tulsa Promissory Note between the Tribe and MBI (North Tulsa Promissory Note); the Amended and Restated North Tulsa Security Agreement between the Tribe and MBI (North Tulsa Security Agreement); the Amended and Restated Depository Control Agreement between the Tribe, MBI, K&D, and Bank of Oklahoma,

N.A.; the Amended and Restated Agreement (Sand Springs); and the Amended and Restated Agreement (North Tulsa).

We are in the process of reviewing whether implementation of the agreements constitutes management.

Sole Proprietary Interest

Another area of concern is the amount of compensation MBI will receive under the Development Agreement. One of the 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. The NIGC, in its regulations, also requires that all tribal gaming ordinances include such a provision. 25 CFR § 522.4(b)(1). Our determination process for defining "proprietary interest" is set forth below.

Using the rules of statutory construction, we investigate the plain language and the ordinary meaning of the words themselves. "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 the definitions together, a proprietary interest creates the right to possess, use and convey something.

Then we examine case law. 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. . . One would have a proprietary interest if he were sharing in or deriving profit from the club as opposed to being a

> salaried employee merely performing clerical and ministerial duties. [emphasis added]

An additional aid to statutory interpretation includes the legislative history of the statute. The legislative history of the IGRA with respect to "proprietary interest" is scant, offering only a statement 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, 2nd Edition, 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] [emphasis added]

46 Am. Jur. 2d *Contracts* § 57.

Finally, the preamble to the NIGC's 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

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.

Management contracts approved by the Chairman of the NIGC have a fee cap set at thirty percent (30%) of net revenues or forty percent (40%) of net revenues if the capital investment required and the gaming operation's income projections require the higher fee. *See* 25 U.S.C. §§ 2711(c)(1)-(2). The 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).

As noted above, we are concerned that the agreements bestow a proprietary interest in the gaming activity on MBI, in violation of IGRA, its implementing regulations and the Tribe's gaming ordinance because of the excessive compensation provided to MBI in proportion to the services rendered.

MBI is a lender as well as game lessor. MBI is lending the Tribe [ ] Sand Springs Note at para. 2; North Tulsa Note at para. 2. The loan requires the Tribe to [ ] Loan Agreement § 5.1 para. 2, Sched. 3.1(o). [ ] 64

Although MBI does not provide any management services, the game lease agreements give MBI a fee equaling [ ] North Tulsa Lease Agreement § 4; Sand Springs Lease Agreement § 4 [ ] 64

Further monies are due to MBI under the Player Tracking Agreements.[1] The loan is to be repaid at [ ] Sand Springs Note at para. 2; North Tulsa Note at para. 2.

In light of MBI's fee, we are concerned with the amount of the Tribe's actual profit that is being paid to MBI is contrary to the IGRA. It is possible for [ ] 64

[1] A copy of the MBI Player Tracking License and Maintenance Agreement, Exhibit I to the lease agreements, was provided to us upon request. We were orally advised that the player tracking agreements were identical for both lease agreements. Despite several requests, the payment provisions of the player tracking agreement, Exhibit C, have not been provided.

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The rebate somewhat mitigates our concern, but does not appear to substantially lower the lease fee percentage under average Oklahoma game take.

We are also concerned that the security agreements and loan appear to suggest that real estate might form part of the loan collateral. The Loan Agreement defines "Lien" to mean "any mortgage, deed of trust, lien, pledge, security interest or other charge or encumbrance, of any kind whatsoever, including but not limited to the interest of the lessor or titleholder under any capitalized lease, title retention contract or similar agreement." § 1.1. The security agreements include as collateral the disposition of all or any portion of any Casino Facilities. North Tulsa Security Agreement § 1(b); Sand Springs Security Agreement § 1(b). The IGRA prohibits, in most circumstances, the conveyance of any interest in land or other real property. *See* 25 U.S.C. § 2711(g).

Conclusion

We are not prepared to conclude that the Agreement does not constitute a management contract. Furthermore, we are concerned that it bestows a proprietary interest in gaming activity on MBI in violation of IGRA, its implementing regulations, and the Tribe's gaming ordinance. Due to this concern, we request that the parties provide any explanation and information available that might establish that the contract terms do not violate the requirement that the Tribe maintain the sole proprietary interest in the gaming operation. Additionally, please submit Exhibit C to Exhibit I, the MBI Player Tracking License and Maintenance Agreement so that we may continue our review.

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

Sincerely,

Penny J. Coleman

Penny J. Coleman
Acting General Counsel

January 23, 2009

Kent E. Richey
Faegre & Benson LLP
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Re: Opinion regarding pledge of gross revenue from gaming operations

Dear Mr. Richey:

This responds to your letters dated January 21, 2009 and January 23, 2009. You informed me that the Muscogee (Creek) Nation intends to close shortly on a large loan with a number of lenders, and that the parties intend to secure the loan obligations in part by a pledge of gross revenues from certain gaming operations of the Nation.

From past opinions issued by this office, you are aware of our legal position that an agreement containing a security interest in a gaming facility's future gross revenues, without further limitation, authorizes management of the gaming facility. We take this position because in the event of default, a party with a security interest in a gaming facility's gross revenues has the authority to decide how and when operating expenses at the gaming facility are paid, which is itself a management function. Furthermore, a party that controls gross revenue potentially can control everything about the gaming facility by allocating or putting conditions on the payment of operating expenses. Therefore, agreements with such a security interest constitute management contracts that are void unless and until they are approved by the Chairman of the National Indian Gaming Commission (NIGC).

You have suggested that our concern could be addressed by including certain limitations in the agreement that would prevent the secured party or parties from exercising management control over the gaming facility, even if the secured party took control over gross revenues in the event of default. To that end, you have proposed to include language in the loan documents substantially in the following form:

> Notwithstanding any provision in any Loan Document, none of the Lending Parties shall engage in any of the following: planning, organizing, directing, coordinating, or controlling all or any portion of the Borrower's gaming operations (collectively, "Management Activities"), including, but not limited to:
>
> 1. the training, supervision, direction, hiring, firing, retention, compensation (including benefits) of any employee (whether or not a management employee) or contractor;

AD011

2. any employment policies or practices;

3. the hours or days of operation;

4. any accounting systems or procedures;

5. any advertising, promotions or other marketing activities;

6. the purchase, lease, or substitution of any gaming device or related equipment or software, including player tracking equipment;

7. the vendor, type, theme, percentage of pay-out, display or placement of any gaming device or equipment; or

8. budgeting, allocating, or conditioning payments of the Borrower's operating expenses;

provided, however, that a Lending Party will not be in violation of the foregoing restriction solely because a Lending Party:

A. enforces compliance with any term in any Loan Document that does not require the gaming operation to be subject to any third-party decision-making as to any Management Activities; or

B. requires that all or any portion of the revenues securing the Loan be applied to satisfy valid terms of the Loan Documents; or

C. otherwise forecloses on all or any portion of the property securing the Loan.

My opinion is that this negative covenant adequately addresses the concern. The language prohibits a lender from exercising management control or discretion, but permits it, in the event of default, to put a borrower on a revised schedule of payments, provide the borrower with a sum certain to pay operating expenses, or demand payment in full and cause the bankruptcy or insolvency of the gaming operation. It would not allow a lender to decide whether and to what extent the monies the Tribe retains would be used for operating expenses. As such, the pledge of gross revenues no longer authorizes management. Assuming that there are no other management provisions, the contract would not have to be approved by the Chairman of the NIGC.

If you have any questions or require any additional assistance, Senior Attorney Jeffrey Nelson is assigned to this matter.

Sincerely,

Penny J Coleman

Penny J. Coleman
Acting General Counsel

February 22, 2010

Via Facsimile, E-mail, and U.S. Mail

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Re: Review of financing documents for St. Croix Chippewa Indians of Wisconsin

Dear Mr. Richey:

This letter responds to your request on behalf of the St. Croix Chippewa Indians of Wisconsin (the Tribe) for the National Indian Gaming Commission's (NIGC's) Office of General Counsel to review the draft financing documents specified below (collectively the "Loan Documents"). Specifically, you have asked for our opinion regarding whether the Loan Documents are management contracts requiring the NIGC Chairman's approval pursuant to the Indian Gaming Regulatory Act (IGRA). After careful review, it is my opinion that the Loan Documents are not management contracts and do not require the approval of the Chairman.

In my review, I considered the following submissions, all undated and unexecuted drafts, which were represented to be in substantially final form:

- Construction loan agreement, a conventional bank loan from Heartland Business Bank (the Bank) to the Tribe (First Loan Agreement);
- Construction loan agreement guaranteed by the Department of the Interior from the Bank to the Tribe (Second Loan Agreement);
- Security agreement granted by the Tribe in favor of the Bank (Security Agreement);
- Depository agreement between the Tribe as borrower and the Bank as the security agent (Depository Agreement);
- Lease from Tribe to St. Croix Tribal Land Authority, an instrumentality of the Tribe;
- Sublease from the St. Croix Tribal Land Authority to the Tribe;
- Leasehold mortgage on sublease in favor of the Bank;
- Co-lending and inter-creditor agreement;

AD013

- Construction disbursing agreement between the Tribe and the Bank (Construction Disbursing Agreement);
- Deposit control agreement between the Tribe and the Bank (Deposit Control Agreement).

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 NIGC regulations do not define *management*, the term has its ordinary meaning. Management 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 Chairman's approval. Management contracts not approved by the Chairman 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

I am aware of the recent decision in *Wells Fargo v. Lake of the Torches* and the court's holding that any agreement in which receivership is a possible remedy upon default is a management contract. *See Wells Fargo v. Lake of the Torches*, at *11-*12. The court there found a bond trust indenture to be a management contract in part because it contained a specific provision allowing for the appointment of a receiver upon default. *Id.* Moreover, the court specifically rejected Wells Fargo's argument that a receiver would not exercise managerial control because its sole function would be to ensure that the gaming operation deposited its revenues and paid its liabilities. *Id.* Specifically, the court stated: "[b]y forcing the Corporation [Lake of the Torches] to deposit its revenues and pay its liabilities, the receiver would in fact be exerting a form of managerial control since those monies could not be used for other purposes related to the operation of the Casino facility." *Id.* at *12. While I generally agree with the court's analysis, I do not think it makes the Loan Documents management contracts.

None of the Loan Documents set out the appointment of a receiver as a specific remedy upon default. However the Security Agreement provides that the Bank, as the lender, "may exercise and enforce any one or more of the following rights and remedies; (i) exercise and enforce any or all rights and remedies available upon default to a secured party under the UCC . . . (ii) exercise or enforce any or all other rights or remedies available . . . by law." Those rights and remedies include the appointment of a receiver. However, to say that a clause that merely reserves to a creditor the rights available under the law makes the Security Agreement a management contract would produce undesirable results – many, if not most financing agreements for Indian casinos would become management contracts. It would also seem to go well beyond the intent of the parties. For example, in order to avoid any indicia of management in the Loan Documents, the parties have conditioned the Tribe's limited waiver of sovereign immunity on the Bank not engaging in any management activities or obtaining management authority through the exercise of any available remedy. *See i.e.* First Loan Agreement § 8.25(c).

More than this, though, the language of the Security Agreement itself precludes that result. Aside from the absence of any language intending a receiver as a remedy, the Security Agreement intends that its provisions be read so as to avoid such an interpretation:

> NOTWITHSTANDING ANY OTHER POSSIBLE CONSTRUCTION OF ANY PROVISION(S) HEREIN . . . THE PARTIES ACKNOWLEDGE AND AGREE THAT: (A) THE LOAN DOCUMENTS, INDIVIDUALLY AND COLLECTIVELY, DO NOT PROVIDE FOR THE MANAGEMENT OF ALL OR ANY PART OF THE GAMING BUSINESS WITHIN THE MEANING OF IGRA . . . (C) NO LENDER PARTY WILL EXERCISE ANY REMEDY OR OTHERWISE TAKE ANY ACTION UNDER ANY LOAN DOCUMENT IN A MANNER THAT WOULD CONSTITUTE MANAGEMENT OF ALL OR ANY PART OF THE GAMING BUSINESS WITHIN THE MEANING OF IGRA.

Security Agreement § 15.

The above provision is also present in the First Loan Agreement (§ 8.31), the Second Loan Agreement (§ 8.31), the Depository Agreement (§ 23), the Deposit Control Agreement (§ 15), and the Construction Disbursing Agreement (§ 7.7). In short, taken together, the Loan Documents are fairly read to preclude the appointment of a receiver. They are, therefore, unlike the agreement at issue in *Lake of the Torches*; they lack the receivership provision that was one of the bases of the court's finding management there. *Wells Fargo v. Lake of the Torches*, at *11-*12.

I also note that the *Lake of the Torches'* court based its finding of management in part on the bondholders' discretionary control over the amount of capital expenditures that could be incurred. The court found that the requirement that the Tribe obtain bondholder consent prior to incurring capital expenditures in excess of 25% of the previous year's capital expenditures is management. *Wells Fargo v. Lake of the Torches*, at *9.

In this case, however, while the Depository Agreement requires the Tribe to budget for and fund capital expenditures, it does not require the consent or approval of the bondholders of either the budget or the amount of capital expenditures. *See* Depository Agreement § 4(d) and Annex A. Therefore, because the Depository Agreement and other Loan Documents do not provide the bondholders with any discretionary control over capital expenditures, the provisions concerning capital expenditures do not make them management contracts.

I note finally that the Security Agreement pledges the gross gaming revenue of the Tribe's gaming operations as security. Previous OGC opinions have posited that an agreement containing a security interest in a gaming facility's future gross revenues,

without further limitation, authorizes management of the gaming facility. In January 2009, we provided guidance in the form of limiting language that would prevent a pledge of gross gaming revenues from resulting in a management contract. The Security Agreement has adopted our proposed limiting language in Section 16, which states:

> Notwithstanding any provision in any Loan Document, no Lender Party shall engage in any of the following: planning, organizing, directing, coordinating, or controlling all or any portion of the Debtor's gaming operations (collectively, "Management Activities"), including, but not limited to:
>
> (a) the training, supervision, direction, hiring, firing, retention, compensation (including benefits) of any employee (whether or not a management employee) or contractor;
>
> (b) any employment policies or practices;
>
> (c) the hours or days of operation;
>
> (d) any accounting systems or procedures;
>
> (e) any advertising, promotions or other marketing activities;
>
> (f) the purchase, lease, or substitution of any gaming device or related equipment or software, including player tracking equipment;
>
> (g) the vendor, type, theme, percentage of pay-out, display or placement of any gaming device or equipment; or
>
> (h) budgeting, allocating, or conditioning payments of the Borrower's operating expenses;
>
> *provided, however,* that upon the occurrence of a default, no Lender Party will be in violation of the foregoing restriction solely because that Lender Party:
>
> (i) enforces compliance with any term in any Loan Document that does not require the gaming operation to be subject to any third-party decision-making as to any Management Activities; or
>
> (ii) requires that all or any portion of the revenues securing the Secured Obligations be applied to satisfy valid terms of the Loan Documents; or
>
> (iii) otherwise forecloses on all or any portion of the property securing the Secured Obligations.

These limiting provisions are also present in the First Loan Agreement (§ 8.32), the Second Loan Agreement (§ 8.32), the Depository Agreement (§ 24); the Deposit Control Agreement (§15); and the Construction Disbursing Agreement (§7.8). As such, the pledge of gross revenues in the Loan Documents does not make them management contracts.

Conclusion

The Loan Documents have no indicia of management, and the parties have specifically agreed to exclude the possibility of management. Nothing in the provisions of the Loan Documents addressing remedies, capital expenditures, or the pledge of gross revenues gives to the Bank or any third party the discretion or authority to manage any part of St. Croix's gaming operations. Therefore, it is my opinion that the Loan Documents are not management contracts requiring the approval of the NIGC Chairman. I note, however, that the Loan Documents have been submitted to us as undated and unexecuted drafts that are in substantially final form, and to the extent that the Loan Documents change in any material way prior to closing, this opinion shall not apply.

Other Related Matters

Recently, we have seen financing agreements similar to the Loan Documents where the default provisions have conflicted with net gaming revenue allocations in tribal revenue allocation plans (RAP). In some instances, tribes have, presumably inadvertently, violated their RAP by complying with the default provisions on their financing agreements. The Tribe should consider reviewing its RAP to determine if it is consistent with the provisions of the Loan Documents.

I also anticipate that this letter will be the subject of Freedom of Information Act ("FOIA") requests. Since we believe that some of the information in this letter may fall within FOIA exemption 4(c), which applies to confidential and proprietary information the release of which could cause substantial harm, I ask that you provide me with your views regarding release within ten days.

I am also sending of copy of the submitted agreements to the Department of Interior Office of Indian Gaming for review under 25 U.S.C. § 81. If you have any questions, please contact NIGC Staff Attorney Melissa Schlichting at (202) 632-7003.

Sincerely,

Penny J. Coleman

Penny J. Coleman
Acting General Counsel

cc: Paula Hart, Office of Indian Gaming Management, Bureau of Indian Affairs (w/ incoming)
Lewis Taylor, Chairman, St. Croix Chippewa Indians of Wisconsin

February 22, 2010

Via Facsimile and U.S. Mail

Thomas Beauty, Chairman
Norman Smith, Vice Chairman
Yavapai-Apache Nation
2400 Datsi Street
Camp Verde, AZ 86322
Fax: (928) 567-1083

Gwendolyn Parada
Tribal Chairperson
La Posta Band of Mission Indians
P.O. Box 1120
Boulevard, CA 91905
Fax: (619) 478-2125

Re: Review of financing documents

Dear Chairman Beauty, Vice Chairman Smith, and Chairperson Parada:

This letter responds to your June 19, 2009 letter requesting on behalf of the Yavapai-Apache Nation (the Nation) and the La Posta Band of Mission Indians (the Band) the National Indian Gaming Commission's (NIGC's) Office of General Counsel to review the Second Amended and Restated Loan Agreement (Revised Loan Agreement) and related documents. Specifically, you have asked for our opinion regarding whether this agreement is a management contract requiring the NIGC Chairman's approval pursuant to the Indian Gaming Regulatory Act (IGRA). After careful review, it is my opinion that the Revised Loan Agreement is not a management agreement requiring the approval of the Chairman.

In my review, I considered the following submissions:

- Revised Draft Second Amended and Restated Loan Agreement, unexecuted but sent to the Office of General Counsel on January 11, 2010 (Revised Loan Agreement);
- Second Amended and Restated Loan Agreement, signed May 13, 2009;
- Closing Certificate of Borrower dated May 13, 2009;
- Resolution No. 88-09 of the Nation dated May 14, 2009;
- Resolution No. 091305(A) of the Band dated May 13, 2009;
- Deposit Account Control Agreement between JP Morgan Chase Bank and the Band, and California Bank and Trust dated December 21, 2005;

AD019

- Amended and Restated Security Agreement between the Band and JP Morgan Chase Bank dated November 7, 2006;
- Amended Promissory Note from the Band dated May 13, 2009;
- Opinion of Band's legal counsel, Robert Rosette, dated May 13, 2009; and,
- The Band's Ordinance Prescribing Allocation and Distribution of Net Revenues from Tribal Gaming Activities, adopted September 27, 2006, by Resolution No. 062709-E, and BIA approval letter dated February 16, 2007.

The parties had previously submitted a Development and Amended and Loan Agreement dated December 18, 2003, which the NIGC Office of General Counsel opined was not a management contract or a collateral agreement to a management contract. That agreement was terminated by the parties, however, when a new agreement regarding the debt financing was reached and executed on May 13, 2009. The Revised Loan Agreement is a revision of the May 13, 2009 agreement.

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 NIGC regulations do not define *management*, the term has its ordinary meaning. Management 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 Chairman's approval. Management contracts not approved by the Chairman 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

I am aware of the recent decision in *Wells Fargo v. Lake of the Torches* and the court's holding that any agreement in which receivership is a possible remedy upon default is a management contract. *See Wells Fargo v. Lake of the Torches*, at *11-*12.) The court found a bond trust indenture to be a management contract in part because it contained a specific provision allowing for the appointment of a receiver upon default. *Id.* Moreover, the court specifically rejected Wells Fargo's argument that a receiver would not exercise managerial control because its sole function is ensuring that the gaming operation deposited its revenues and paid its liabilities. *Id.* Specifically, the court stated: "[b]y forcing the Corporation [Lake of the Torches] to deposit its revenues and pay its liabilities, the receiver would in fact be exerting a form of managerial control since those monies could not be used for other purposes related to the operation of the Casino facility." *Id.* at *12. While I generally agree with the court's analysis, I do not think it makes the Revised Loan Agreement a management contract.

The Revised Loan Agreement does not set out the appointment of a receiver as a specific remedy upon default. The Revised Loan Agreement does allow the Lender to "exercise any and all of the rights and remedies of a secured party under the Uniform

Commercial Code or other applicable law." *See* Revised Loan Agreement, § 7.01(c). Those rights and remedies would include the appointment of a receiver. However, to say that a clause that merely reserves to a creditor the rights available under the law makes the Revised Loan Agreement a management contract would seem to go well beyond the intent of the parties. It would also produce undesirable results – many, if not most financing agreements for Indian casinos would become management agreements.

More than this, though, the language of the Revised Loan Agreement itself precludes that result. Aside from the absence of any language intending a receiver as a remedy, the Revised Loan Agreement intends that its provisions be read so as to avoid an interpretation:

> NOTWITHSTANDING ANY OTHER POSSIBLE CONSTRUCTION OF ANY PROVISION HEREIN . . . LENDER ACKNOWLEDGES AND AGREES THAT THE LOAN DOCUMENTS DO NOT CREATE, (A) ANY RIGHTS ON THE PART OF THE LENDER TO MANAGE THE CASINO OPERATIONS.

Revised Loan Agreement § 13.04.

I also note that the Amended and Restated Security Agreement dated November 7, 2006, between the Band and JP Morgan Chase Bank N.A. that was assigned to the Nation when it acquired the Band's debt, pledges the gross gaming revenues of the Band's casino operations as security. Previous OGC opinions have stated that an agreement containing a security interest in a gaming facility's future gross revenues, without further limitation, authorizes management of the gaming facility. In January 2009, we provided guidance in the form of limiting language that would prevent a pledge of gross gaming revenues from resulting in a management contract. The Revised Loan Agreement has adopted our proposed limiting language in Section 13.04, which states that in the event of default:

> Without limiting the generality of the foregoing, notwithstanding any provision in any Loan Document, in no event shall Lender engage in any of the following: planning, organizing, directing, coordinating, or controlling all or any portion of the Borrower's gaming operations (collectively, "Management Activities"), including, but not limited to:
>
> (a) the training, supervision, direction, hiring, firing, retention, compensation (including benefits) of any employee (whether or not a management employee) or contractor;
>
> (b) any employment policies or practices;
>
> (c) the hours or days of operation;
>
> (d) any accounting systems or procedures;
>
> (e) any advertising, promotions or other marketing activities;

(f) the purchase, lease, or substitution of any gaming device or related equipment or software, including player tracking equipment;

(g) the vendor, type, theme, percentage of pay-out, display or placement of any gaming device or equipment; or

(h) budgeting, allocating, or conditioning payments of the Borrower's operating expenses;

provided, however, that Lender will not be in violation of the foregoing restriction solely because Lender:

(i) enforces compliance with any term in any Loan Document that does not require the Casino Operations to be subject to any third-party decision-making as to any Management Activities; or

(ii) requires that all or any portion of the revenues securing the Restructured Loan and other Obligations be applied to satisfy valid terms of the Loan Documents; or

(iii) otherwise forecloses on all or any portion of the property securing the Restructured Loan an other Obligations in accordance with applicable provisions of the Loan Documents.

Notwithstanding any agreements that may become effective in the future based on the Management Proposal, this Agreement and the Loan Documents are and shall remain free of any and all Management Activities. The parties agree that the Security Agreement is hereby amended to comport with the provisions of this Section 13.04.

Taken together, all of the limiting language of § 13.04, and IGRA itself preclude the appointment of a receiver that assumes management responsibilities. Accordingly the Revised Loan Agreement is not a management contract.

Conclusion

The Revised Loan Agreement has no indicia of management, and the parties have specifically agreed to exclude the possibility of management. Therefore, it is my opinion that the Revised Loan Agreement is not a management agreement requiring the approval of the NIGC Chairman.

Other Concerns

Recently, we have been faced with issues related to the default provisions of financing agreements similar to the Revised Loan Agreement. Specifically, the default provisions have conflicted with net gaming revenue allocations in tribal revenue allocation plans (RAP). In some instances, tribes have violated their RAP by complying with the default provisions on their financing agreements.

I note that the Revised Loan Agreement restricts the distribution of net gaming revenue to the Band, including distributions to the Band's members and tribal general fund, when certain conditions have not been met (*i.e.* the Fixed Charge Coverage Ratio has not been met) or the loan is in default. The restrictions on the distribution of net gaming revenue as provided for in the Revised Loan Agreement may be inconsistent with the Band's RAP. I urge the Band to review its Ordinance Prescribing Allocation and Distribution of Net Revenues from Tribal Gaming Activities to determine if it is consistent with the provisions of the Revised Loan Agreement.

I anticipate that this letter will be the subject of Freedom of Information Act ("FOIA") requests. Since we believe that some of the information contained herein may fall within FOIA Exemption 4(c), which applies to confidential and proprietary information, the release of which could cause substantial harm, I ask that you provide me with your views regarding release within ten days.

I am also sending of copy of the submitted agreements to the Department of Interior Office of Indian Gaming for review under 25 U.S.C. § 81. If you have any questions, please contact NIGC Staff Attorney Melissa Schlichting at (202) 632-7003.

Sincerely,

Penny J Coleman

Penny J. Coleman
Acting General Counsel

cc: Paula Hart, Office of Indian Gaming Management, Bureau of Indian Affairs (w/ incoming)
Townsend Hyatt, Esq. (via e-mail: thyatt@orrick.com
Robert Rosette, Esq. (via e-mail: rosette@rosettelaw.com)
Rob Hunter, Esq. (via e-mail: rhunter@yan-tribe.org)

February 23, 2010

Via Facsimile and U.S. Mail

Kent E. Richey
Faegre & Benson LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402

Re: Opinion regarding loan documents between Shakopee Mdewakanton Sioux Community and Three Affiliated Tribes of the Fort Berthold Reservation.

Dear Mr. Richey:

This letter responds to your request on behalf of the Shakopee Mdewakanton Sioux Community ("Community") for the National Indian Gaming Commission's ("NIGC's") Office of General Counsel ("OGC") to review the proposed loan to the Three Affiliated Tribes of the Fort Berthold Reservation ("Tribe"). Specifically, you have asked for our opinion regarding whether this loan agreement and its related documents are management contracts requiring the NIGC Chairman's review and approval under the Indian Gaming Regulatory Act ("IGRA"). After careful review, it is my opinion that the loan agreement and collateral documents are not management contracts requiring the review and approval of the Chairman.

In our review, we considered the following submissions:

- Loan Agreement;
- Form of Promissory Note; and
- Depository Agreement between Three Affiliated Tribes of the Fort Berthold Reservation and First National Bank & Trust Co. of Williston. (Collectively, the "Loan Documents.")

We also considered a January 26, 2010 opinion of the Community's legal counsel.

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-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; *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

I am aware of the recent decision in *Wells Fargo v. Lake of the Torches* and the court's holding that any agreement in which receivership is a possible remedy upon default is a management contract. *See Wells Fargo v. Lake of the Torches*, at *11-*12. The court there found a bond trust indenture to be a management contract in part because it contained a specific provision allowing for the appointment of a receiver upon default. *Id.* Moreover, the court specifically rejected Wells Fargo's argument that a receiver would not exercise managerial

control because its sole function would be to ensure that the gaming operation deposited its revenues and paid its liabilities. *Id.* Specifically, the court stated: "[b]y forcing the Corporation [Lake of the Torches] to deposit its revenues and pay its liabilities, the receiver would in fact be exerting a form of managerial control since those monies could not be used for other purposes related to the operation of the Casino facility." *Id.* at *12. While I generally agree with the court's analysis, I do not think the circumstances here are the same.

None of the Loan Documents set out the appointment of a receiver as a specific remedy upon default. However, the Loan Agreement provides that the Community may upon default "exercise or enforce any and all other rights or remedies available by law," Loan Agreement § 7(s)(c), as can the Bank, on behalf of the Community, under the Depository Agreement. Depository Agreement § 5.3. Those rights and remedies include the appointment of a receiver as the Tribe has adopted a Uniform Commercial Code modeled after the State of North Dakota's Uniform Commercial Code. Three Affiliated Tribes Resolution #07-230-VJB. However, to say that a clause that merely reserves to a creditor the rights available under the law makes the Loan Documents management contracts would produce undesirable results – many, if not most, financing agreements for Indian casinos would be deemed management contracts. It would also seem to go well beyond the intent of the parties, who have structured a straightforward loan agreement.

More significantly, the Loan Documents themselves state that their provisions are to be read so as to exclude management:

> NOTWITHSTANDING ANY OTHER POSSIBLE CONSTRUCTION OF ANY PROVISION HEREIN, THE LENDER ACKNOWLEDGES AND AGREES (A) THAT IT NEITHER HAS, NOR SHALL IT ASSERT, ANY RIGHTS TO MANAGE THE CASINO FACILITIES; (B) THAT IT WILL NOT INTERFERE WITH THE BORROWER'S RIGHT TO DETERMINE STANDARDS OF OPERATION AND EFFICIENT MANAGEMENT OF THE CASINO FACILITIES, INCLUDING, BUT NOT LIMITED TO, BUDGETING MATTERS AND POLICIES RELATING TO GAMING AND CASINO SERVICES; AND (C) THAT ITS LIEN IS RESTRICTED TO THE PLEDGED FINANCIAL ASSETS, WHICH DO NOT CREATE A MORTGAGE LIEN ON THE CASINO FACILITIES.

Loan Agreement § 8.28. The Depository Agreement contains a substantively identical provision. Depository Agreement § 7.15. The Loan Documents also expressly limit the remedies available on default to exclude the exercise of management by the Community:

> [N]otwithstanding any provisions in any Loan Document, Lender shall not engage in any of the following: planning, organizing, directing, coordinating, or controlling all or any portion of the Borrower's gaming operations (collectively, "Management Activities"), including, but not limited to:
>
> (a) the training, supervision, direction, hiring, firing, retention or compensation (including benefits) of any employee (whether or not a management employee) or contractor;

(b) any working or employment policies or practices;
(c) the hours or days of operation;
(d) any accounting systems or procedures;
(e) any advertising, promotions or other marketing activities;
(f) the purchase, lease, or substitution of any gaming device or related equipment or software, including player tracking equipment;
(g) the vendor, type, theme, percentage of pay-out, display or placement of any gaming device or equipment; or
(h) budgeting, allocating, or conditioning payments of the Borrower's operating expenses; provided however, that upon the occurrence of an Event of Default, Lender will not be in violation of the foregoing restriction solely because Lender:
    i. enforces compliance with any term in any Loan Document that does not require the gaming operation to be subject to any third-party decision-making as to any Management Activities; or
    ii. requires that all or any portion of the revenues securing the Obligations be applied to satisfy valid terms of the Loan Documents; or
    iii. otherwise forecloses on all or any portion of the Project securing the Obligations.

Loan Agreement § 8.28. The Depository Agreement contains a substantively identical provision, § 7.15.

Accordingly, the Loan Documents are fairly read to preclude the appointment of a receiver that would exert management control over the gaming facilities. Therefore, unlike the agreement in *Lake of the Torches*, the Loan Documents here lack the receivership provision that was one of the bases of the court's finding management there.

I also note that the Loan Agreement pledges the revenues of the Tribe's casino operations as security. Loan Agreement § 1.1 and Depository Agreement § 1.1. Previously, OGC opinions have posited that an agreement containing a security interest in a gaming facility's future gross revenues, without further limitation, authorizes management of the gaming facility. Under the Loan Documents, however, the security interest extends only to net, not gross, revenue.

While the Tribe is required to deposit casino revenues with a depository, it retains the right to determine how much of those revenues are to be first placed in a casino operating account to pay casino operating costs. Depository Agreement § 3.1(b). Only after the casino operating account is fully funded are the remaining revenues pledged to secure the loan. *Id.* at § 3.2(a); *also See* Loan Agreement § 1.1 (definition of Pledged Revenues) and Depository Agreement § 1.1 (definition of Net Casino Revenue and Pledged Revenues). As the security interest does not extend to the casino operating expenses, these provisions preclude the Community's security interest from providing management authority upon default. The Tribe retains the right to determine the budgeted operating expenses for any given month and the ability to revise the budgeted expenses to the extent reasonably necessary. Depository

Agreement § 2.4. This ensures that the Tribe maintains management control over the decisions affecting the casino facility.

Conclusion

The Loan Documents can be fairly read to preclude management in the event of default. Nothing in the provisions of the Loan Documents addressing remedies or security interests gives the Community, or any third party, the discretion or authority to manage any part of the Three Affiliated Tribes' gaming operations. Therefore, it is my opinion that the Loan Documents are not management contracts requiring the approval of the NIGC Chairman. I note, however, that the Loan Documents have been submitted to us as undated and unexecuted drafts that are in substantially final form, and to the extent that the Loan Documents change in any material way prior to closing, this opinion shall not apply.

I anticipate that this letter will be the subject of Freedom of Information Act (FOIA) requests. Since we believe that some of the information contained herein may fall within FOIA Exemption 4(c), which applies to confidential proprietary information, the release of which could cause substantial harm, I ask that you provide me with your views regarding release within ten days.

I am also sending a copy of the submitted agreements to the Department of Interior Office of Indian Gaming for review under 25 U.S.C. § 81. If you have any questions, please contact NIGC Staff Attorney Dorinda Strmiska at (202) 632-7003.

Sincerely,

Penny J. Coleman

Penny J. Coleman
Acting General Counsel

cc: Paula Hart, Office of Indian Gaming Management, Bureau of Indian Affairs (w/ incoming)
Willie Hardacker, Counsel, Shakopee Mdewakanton Sioux Community
Donsia Strong Hill, Counsel, Three Affiliated Tribes of the Fort Berthold Reservation
Richard Helde, Counsel, Three Affiliated Tribes of the Fort Berthold Reservation

March 19, 2010

Via Facsimile and U.S. Mail

Peter Yucupicio, Chairman
Pascua Yaqui Tribe
7474 S. Camino De Oeste
Tuscon, AZ 85757

Re: Opinion regarding loan documents between Pascua Yaqui Tribe and Bank of America N.A.

Dear Chairman Yucupicio:

This letter responds to your request on behalf of the Pascua Yaqui Tribe ("Tribe") for the National Indian Gaming Commission's Office of General Counsel ("OGC") to review the draft financing documents specified below (collectively, the "Loan Documents"). Specifically, you have asked for our opinion regarding whether the Loan Documents are management contracts requiring the NIGC Chairman's review and approval under the Indian Gaming Regulatory Act and whether the Loan Documents violate IGRA's requirement that the Tribe have the sole proprietary interest in its gaming operations. After careful review, it is my opinion that the Loan Documents are not management contracts requiring the review and approval of the Chairman and do not violate IGRA's sole proprietary interest requirement.

In my review, I considered the following submissions, all undated and unexecuted drafts, which were represented to be in substantially final form:

- Credit agreement, an agreement for a construction loan, revolving loans, swing line loans, and letters of credit by Bank of America N.A. and other lenders (the "Administrative Agent" and "Lenders") to the Tribe;
- Security agreement granted by the Tribe in favor of the Administrative Agent and Lenders ("Security Agreement");
- Escrow agreement between the Tribe and Administrative Agent ("Escrow Agreement");
- Two deposit control agreements between the Tribe and Administrative Agent ("Waterfall Deposit Control Agreement" and "Collection Deposit Control Agreement").

I also considered a March 2, 2010 opinion of the Tribe's special legal counsel.

Briefly, by way of background, I understand that the Tribe is planning to build a new hotel; upgrade and expand its existing hotel; build a new parking structure, conference center, food and beverage space, and warehouse at the Casino Del Sol; and refinance certain debt. The financing for all of this will be provided in various forms by the Lenders. Bank of America will

act as administrative agent for the Lenders and itself provide[ ]loans and a line of credit. The various loans and letters of credit carry interest rates ranging from the prime rate plus [ ]for base rate loans or LIBOR plus[ ]for Eurodollar rate loans and are secured by the gross revenues of the Tribe's gaming operations and a pledge of substantially all personal property, including accounts, of the Tribe's gaming operations.

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Under the Loan Documents, the Tribe is required to deposit gross gaming revenues into an account controlled by the Administrative Agent. However, the Tribe will withdraw amounts to pay gaming operation expenses included in the Tribe's monthly budget, provided no event of default exists. Additionally, there are multiple provisions within the Loan Documents that preclude the Lenders or Administrative Agent from engaging in any management activities of the gaming operations.

Authority

Management Contract

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; *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).

Sole Proprietary Interest

No agreement may give a proprietary interest in any Indian gaming activity to any entity other than the tribe itself, except for certain individually owned gaming operations not at issue here. 25 U.S.C. § 2710(b)(2)(A); 25 U.S.C. § 2710(b)(4). Among IGRA's requirements 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. *See also* 25 C.F.R. § 522.4(b)(1).

Proprietary interest is not defined in the IGRA or the NIGC's implementing regulations. However, it is defined in Black's Law Dictionary, 7th Edition (1999), as "the interest held by a property owner together with all appurtenant rights..." *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, a proprietary interest is ownership, with the right to possess, use, and convey something.

Additionally, the NIGC has provided a non-exhaustive list of arrangements that would violate the sole proprietary interest clause:

- an agreement whereby a vendor pay the tribe for the right to place gambling devices that are controlled by the vendor on the gaming floor;
- a security agreement whereby a tribe grants a security interest in a gaming operation, if such an interest would give a party other than the tribe the right to control gaming in the event of default by the tribe; and
- stock ownership in a tribal gaming operation, even by tribal members.

58 FR 5802, 5804 (Jan. 22, 1993).

Analysis

Management Contract

I am aware of the recent decision in *Wells Fargo v. Lake of the Torches* and the court's holding that any agreement in which receivership is a possible remedy upon default is a management contract. *See Wells Fargo v. Lake of the Torches*, at *11-*12. The court there found a bond trust indenture to be a management contract in part because it contained a specific provision allowing for the appointment of a receiver upon default. *Id.* Moreover, the court specifically rejected Wells Fargo's argument that a receiver would not exercise managerial control because its sole function would be to ensure that the gaming operation deposited its revenues and paid its liabilities. *Id.* Specifically, the court stated: "[b]y forcing the Corporation [Lake of the Torches] to deposit its revenues and pay its liabilities, the receiver would in fact be exerting a form of managerial control since those monies could not be used for other purposes related to the operation of the Casino facility." *Id.* at *12. While I generally agree with the court's analysis, I do not think the circumstances here are the same.

None of the Loan Documents set out the appointment of a receiver as a specific remedy upon default. However, the Credit Agreement provides that the Administrative Agent shall upon default "exercise on behalf of itself, the Lenders and the L/C [letter of credit] Issuer all rights or remedies available to it, the Lenders and the L/C Issuer under the Loan Documents or applicable law,..." Credit Agreement § 9(d). Additionally, the Lenders, "shall have, in any jurisdiction where enforcement hereof is sought...all rights and remedies of a secured party under the Uniform Commercial Code as enacted in any jurisdiction, [and] all rights and remedies under the Tribal UCC..." Security Agreement § 9. Those rights and remedies include the appointment of a receiver. However, to say that a clause that merely reserves to a creditor the rights available under the law makes the Loan Documents management contracts would produce undesirable results – many, if not most, financing agreements for Indian casinos would be deemed management contracts. It would also seem to go well beyond the intent of the parties, who have structured straightforward loan agreements.

More significantly, the Loan Documents themselves state that their provisions are to be read so as to exclude management:

> NOTWITHSTANDING ANY OTHER POSSIBLE CONSTRUCTION OF ANY PROVISION(S) CONTAINED IN THIS AGREEMENT OR IN ANY OTHER LOAN DOCUMENT, IT IS AGREED THAT WITHIN THE MEANING OF THE INDIAN GAMING REGULATORY ACT: (A) THE LOAN DOCUMENTS, INDIVIDUALLY AND COLLECTIVELY, DO NOT AND SHALL NOT PROVIDE FOR THE MANAGEMENT OF ALL OR ANY PART OF BORROWER'S GAMING OPERATIONS BY ANY PERSON OTHER THAN BORROWER OR DEPRIVE BORROWER OF THE SOLE PROPRIETARY INTEREST AND RESPONSIBILITY FOR THE CONDUCT OF THE GAMING OEPRATIONS; AND (B) NONE OF ADMINISTRATIVE AGENT, SWING LINE LENDER, L/C ISSUER OR ANY LENDER (OR ANY OF THEIR SUCCESSORS, ASSIGNS OR AGENTS) WILL EXERCISE ANY REMEDY OR OTHERWISE TAKE ANY ACTION UNDER OR IN

CONNECTION WITH ANY LOAN DOCUMENT IN A MANNER THAT WOULD CONSTITUTE MANAGEMENT OF ALL OR ANY PART OF THE GAMING OPERATIONS OR THAT WOULD DEPRIVE BORROWER OF THE SOLE PROPIETARY INTEREST AND RESPONSIBILITY FOR THE CONDUCT OF THE GAMING OPERATIONS.

Security Agreement § 19. The Loan Documents also expressly limit the remedies available on default to exclude the exercise of management by the Administrative Agent or Lenders:

> Notwithstanding any provisions in any Loan Document, or any other right to enforce the provisions of any Loan Document, none of the Secured Creditors shall engage in any of the following: planning, organizing, directing, coordinating, or controlling all or any portion of the Borrower's gaming operations (collectively, "Management Activities"), including, *but not limited to*:
>
> (a) the training, supervision, direction, hiring, firing, retention or compensation (including benefits) of any employee (whether or not a management employee) or contractor;
> (b) any working or employment policies or practices;
> (c) the hours or days of operation;
> (d) any accounting systems or procedures;
> (e) any advertising, promotions or other marketing activities;
> (f) the purchase, lease, or substitution of any gaming device or related equipment or software, including player tracking equipment;
> (g) the vendor, type, theme, percentage of pay-out, display or placement of any gaming device or equipment; or
> (h) budgeting, allocating, or conditioning payments of the Borrower's operating expenses; provided however, that upon the occurrence of an Event of Default, a Secured Creditor will not be in violation of the foregoing restriction solely because it:
> i. enforces compliance with any term in any Loan Document that does not require the gaming operation to be subject to any third-party decision-making as to any Management Activities;
> ii. requires that all or any portion of the revenues securing the Obligations be applied to satisfy valid terms of the Loan Documents; or
> iii. otherwise forecloses on all or any portion of the Collateral securing the Obligations.

Credit Agreement § 11.25. The Escrow Agreement, Waterfall Account Control Agreement and the Collection Account Control Agreement all contain substantively identical provisions, § 4.15; § 12(g); and § 12(g), respectively.

Accordingly, the Loan Documents are fairly read to preclude the appointment of a receiver that would exert management control over the gaming facilities. Therefore, unlike the agreement in *Lake of the Torches*, the Loan Documents here lack the receivership provision that

was one of the bases of the court's finding management there. *Wells Fargo v. Lake of the Torches*, at *11-*12.

I also note that the *Lake of the Torches* court based its finding of management in part on the bondholders' discretionary control over the amount of capital expenditures that could be incurred. The court found that the requirement that the Tribe obtain bondholder consent prior to incurring capital expenditures in excess of 25% of the previous year's capital expenditures is management. *Wells Fargo v. Lake of the Torches*, at *9.

Here, however, while the Credit Agreement fixes a maximum budget for capital expenditures—[redacted] for new construction; [redacted] per year for maintenance; and [redacted] per year for maintenance after completion—the Administrative Agent and Lenders have no authority to review or approve how or on what the Tribe makes these capital expenditures. *See* Credit Agreement § 7.13. Therefore, because the Credit Agreement and other Loan Documents do not provide the Administrative Agent or Lenders with any discretionary control over capital expenditures, the provisions concerning capital expenditures do not make the Loan Documents management contracts. b4

I note finally that the Security Agreement pledges the gross gaming revenue of the Tribe's gaming operations as security. Previous OGC opinions have posited that an agreement containing a security interest in a gaming facility's future gross revenues, without further limitation, authorizes management of the gaming facility. In January 2009, we provided guidance in the form of limiting language that would prevent a pledge of gross gaming revenues from resulting in a management contract. The Credit Agreement has adopted our proposed limiting language in Section 11.25. The Escrow Agreement, Waterfall Account Control Agreement and the Collection Account Control Agreement all contain substantively identical provisions, § 4.15; § 12(g); and § 12(g), respectively. As such, the pledge of gross revenues in the Loan Documents does not make them management contracts.

Sole Proprietary Interest

The Agreements do not violate IGRA's sole proprietary interest provision. An area of concern when analyzing whether an entity other than the Tribe has a proprietary interest in a gaming operation is the compensation paid by the Tribe. The question is whether the compensation paid to the vendor is so large that it indicates an ownership interest rather than a reasonable measure of value for services provided or risks taken.

Here, the Agreements provide for repayment of the loans in principal and interest. Credit Agreement § 2.08 and 2.09. The interest is equal to prime plus [redacted] for loans denominated in dollars and LIBOR plus [redacted] for loans from Eurodland banks, the range in rate resulting from various facts such as timing and the leverage ratio. b4

Additionally, upon an event of default, neither the Administrative Agent nor the Lenders obtain a right to control the gaming operations under the Security Agreement or any other Loan Document. *See* Security Agreement § 19; Credit Agreement § 11.25; Escrow Agreement § 4.15;

Waterfall Account Control Agreement §12(g); and Collection Account Control Agreement § 12(g). Nothing about the transaction indicates it is anything other than a loan, and the proprietary interest in the gaming remains solely with the Tribe. Therefore, the interest provisions in the Credit Agreement do not provide the Lenders an ownership interest and do not violate the sole proprietary interest requirements under IGRA.

Conclusion

The Loan Documents can be fairly read to preclude management in the event of default. Nothing in the provisions of the Loan Documents addressing remedies, capital expenditures or pledge of gross revenues gives to the Administrative Agent, the Lenders, or any third party, the discretion or authority to manage any part of the Pascua Yaqui Tribe's gaming operations. Therefore, it is my opinion that the Loan Documents are not management contracts requiring the approval of the NIGC Chairman, nor do they violate IGRA's sole proprietary interest requirement. I note, however, that the Loan Documents have been submitted to us as undated and unexecuted drafts that are in substantially final form, and to the extent that the Loan Documents change in any material way prior to closing, this opinion shall not apply.

I anticipate that this letter will be the subject of Freedom of Information Act (FOIA) requests. Since we believe that some of the information contained herein may fall within FOIA Exemption 4(c), which applies to confidential proprietary information, the release of which could cause substantial harm, I ask that you provide me with your views regarding release within ten days.

I am also sending a copy of the submitted agreements to the Department of Interior Office of Indian Gaming for review under 25 U.S.C. § 81. If you have any questions, please contact NIGC Staff Attorney Dorinda Strmiska at (202) 632-7003.

Sincerely,

Penny J Coleman

Penny J. Coleman
Acting General Counsel

cc: Paula Hart, Office of Indian Gaming Management Bureau of Indian Affairs (w/ incoming)
Kimberly Van Amburg, Assistant Attorney General, Pascua Yaqui Tribe
Luis A. Ochoa, Special Counsel for Pascua Yaqui Tribe
Don Schulke, Senior Vice President, Bank of America, N.A.
Kent Richey, Special Counsel for Bank of America

APR 2 2010

Larriann Musick, Chairperson
La Jolla Band of Luiseno Indians
22000 Highway 76
Pauma Valley, CA 92061

Re: Agreements between the La Jolla Band of Luiseno Indians and Panther Partners LLC

Dear Chairperson Musick:

This is in response to the La Jolla Band of Luiseno Indians' ("Tribe's") request that the National Indian Gaming Commission ("NIGC") review certain agreements between the Tribe and Panther Partners LLC ("Panther") to determine whether the agreements constitute management contracts pursuant to the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2711. Specifically, these agreements are entitled: Development Agreement, Developer Credit Agreement, Note, and Developer Security Agreement (collectively "the Agreements"). The parties have also submitted a management agreement ("MA") for the Chairman's review and approval and would like an opinion that the Agreements, considered independently, are not themselves management contracts and that they do not grant a proprietary interest to Panther. After careful review, it is my opinion that the Agreements, by themselves, are not management agreements requiring the approval of the Chairman. However, as they are collateral agreements to a management contract submitted to the Chairman for review and approval, these agreements must also be submitted as part of that review. Finally, the Agreements do not grant a proprietary interest to Panther.

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

As to proprietary interests, 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. The NIGC, in its regulations, also requires that all tribal gaming ordinances include such a provision. 25 CFR § 522.4(b)(1).

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. . . *One would have a proprietary interest if he were sharing in or deriving profit from the club* as opposed to being a salaried employee merely performing clerical and ministerial duties. [emphasis added]

Id. An additional aid to statutory interpretation includes the legislative history of the statute. 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. 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.

Finally, in regulatory preamble language, the NIGC provided a non-exhaustive list of arrangements that would violate the sole proprietary interest clause. According to this published guidance, sole proprietary interest violations would exist under:

- an agreement whereby a vendor pays the tribe for the right to place gambling devices that are controlled by the vendor on the gaming floor;
- a security agreement whereby a tribe grants a security interest in the gaming operation, if such interest would give a party other than the tribe the right to control gaming in the event of default by the tribe; and
- stock ownership in a tribal gaming operation, even by tribal members.

58 Fed. Reg. 5802, 5804 (Jan. 22, 1993). Again, this list was not meant to be exhaustive, but it does provide three types of scenarios that are not allowed under IGRA's sole proprietary interest clause.

Management Contract Analysis

Pursuant to *NIGC Bulletin No. 94-5*, the presence of certain management activities in a contract between a tribe and an outside party indicates that the contract is a management contract. The agreements contain no indicia of management and the parties have specifically agreed to exclude the possibility of management. (Developer Credit Agreement § 11.19, Development Agreement § 12.18).

I am aware of the recent decision in *Wells Fargo v. Lake of the Torches* and the court's holding that any agreement in which receivership is a possible remedy upon default is a management contract. *See Wells Fargo v. Lake of the Torches*, at *11-*12. The court there found a bond trust indenture to be a management contract in part because it contained a specific provision allowing for the appointment of a receiver upon default. *Id.* Moreover, the court specifically rejected Wells Fargo's argument that a receiver would not exercise managerial control because its sole function would be to ensure that the gaming operation deposited its revenues and paid its liabilities. *Id.* Specifically, the court stated: "[b]y forcing the Corporation [Lake of the Torches] to deposit its revenues and pay its liabilities, the receiver would in fact be exerting a form of managerial control since those monies could not be used for other purposes related to the operation of the Casino facility." *Id.* at *12. While I generally agree with the court's analysis, I do not think the circumstances here are the same.

The Developer Security Agreement pledges all gaming revenues as security. Previous opinions have posited that an agreement containing a security interest in all gaming revenues, without further limitation, authorizes management of the facility. But, here, the Agreements specifically restrict management activities:

> [N]otwithstanding any provisions in any Project Document, unless the Management Agreement has been approved on behalf of the Chairman of NIGC and is in effect under IGRA, the Developer shall not engage in any of the following after the occurrence of the Opening Date: planning, organizing, directing, coordinating, or controlling all or any portion of the Tribe's gaming operations (collectively, "Management Activities"), including, but not limited to:
>
> 1. the training, supervision, direction, hiring, firing, retention, compensation (including benefits) of any employee (whether or not a management employee) or contractor;
> 2. any employment policies or practices;
> 3. the hours or days of operation;
> 4. any accounting systems or procedures;

5. any advertising, promotions or other marketing activities;
6. the purchase, lease, or substitution of any gaming device or related equipment or software, including player tracking equipment;
7. the vendor, type, theme, percentage of pay-out, display or placement of any gaming device or equipment; or
8. budgeting, allocating, or conditioning payments of the Borrower's operating expenses; provided however, that upon the occurrence of an Event of Default, the Developer will not be in violation of the foregoing restriction solely because the Developer:
   A. enforces compliance with any term in any Project Document that does not require the gaming operation to be subject to any third-party decision-making as to any Management Activities; or
   B. requires that all or any portion of the revenues securing the Tribe's obligations be applied to satisfy valid terms of the Project Documents; or
   C. otherwise forecloses on all or any portion of the property securing the Tribe's obligations under the Project Documents.

Developer Credit Agreement § 11.19. The Development Agreement contains a substantively identical provision, § 12.18. The presence of these provisions in the Agreements ensures that the Tribe maintains management control over the decisions affecting the casino facility.

None of the Agreements specifically set out the appointment of a receiver as a specific remedy upon default. However, the Developer Security Agreement provides that upon default the Developer may "exercise any of the remedies available to the Developer as a secured party under the UCC." (§ 4(d)). Those remedies include the appointment of a receiver. Fortunately, the Developer Security Agreement contains the same limitations set forth in § 11.19 of the Developer Credit Agreement. Accordingly, the Developer Security Agreement is fairly read to preclude the appointment of a receiver that would exert management control over the gaming facilities. Therefore, unlike the agreement in *Lake of the Torches*, the Agreements here lack the receivership provision that was one of the bases of the court's finding management there.

Proprietary Interest Analysis

Under the Development Agreement, Panther will receive a development fee of [ ] of the aggregate project costs. Additionally, under the Developer Loan, Panther will receive interest at a rate of [ ] of the first [ ] and [ ] on the balance. Although payment is not measured as a payment of gaming revenue, [ ] of development costs with interest rates of [ ] and [ ] respectively on the loan balance

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do raise concerns. Specifically, the development fee would be approximately [redacted] and interest on the loan would amount to [redacted] This seems to be an incredible return on Panther's investment, and this amount does not include any revenue received from managing the facility. In other instances, we have opined that such a large compensation structure would constitute a proprietary interest. Therefore, we must examine why this situation is unique. Additionally, we must analyze whether the tribe is getting value for the payment and whether Panther's risk is proportionate.

The parties have provided a detailed analysis of the risks involved as well an analysis of the value to the Tribe. The most significant of the risks seems to be the availability of credit and the competitiveness of the regional market.

At this time, no party other than Panther has committed any financing to the proposed project. The Tribe selected Panther through a competitive bidding process in which the Tribe received a total of [redacted] other bids. After reviewing all the proposals, the Tribe concluded that Panther's constituted "the very best terms the Tribe can obtain." Moreover, in your letter you state that "but for Panther Partners this project would not be going forward." Therefore, Panther seemed to be the only option for the Tribe. Panther will be advancing the Tribe [redacted] prior to the opening of the gaming facility and to date has advanced [redacted] This loan may be subordinate to the additional financing required to complete the project. The repayment of this loan is tied to the Tribe obtaining permanent financing and the success of the gaming operation. If the Tribe is unable to obtain permanent financing or if the facility is not successful Panther could lose its advance. Additionally, if the parties terminate their relationship, under certain circumstances, prior to the opening of the casino then the Tribe, [redacted] the Developer Loan. (Development Agreement § 11). In addition to providing the initial funds for the project, Panther offers a long resume of gaming management experience which will be necessary considering the competition the Tribe faces.

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There are approximately 20 other gaming facilities within the target market for the Tribe's proposed casino. This represents a significant amount of direct competition with the Tribe's proposed casino; competition that already has a well established customer base. This risk is compounded by the fact that the proposed location is situated farther from the areas highest population center than the majority of its competitors. This facility will also be [redacted] than most of its competitors. Specifically, this market includes the Pechanga Casino that hosts 4,000 slot machines, 214 table games, and 522 hotel rooms. Finally, it is important to note that the Tribe has previously attempted to develop a casino project but those attempts failed. Contractual obligations related to the most recent of these attempts have not yet been resolved and may require further financial assistance from Panther.

As part of the management contract approval process, the parties submitted a business plan that included projections of the facility's profits. These projections indicate that the Tribe will be receiving over [redacted] of the net gaming revenue from this facility. Despite the development compensation structure and the management fee the Tribe will be retaining the lion's share of the profits.

In light of these risks, the fee and interest rates while high are not out of proportion to the risk involved. More importantly, neither the fee nor the high interest rate reflects an ownership interest in the gaming operation. Finally, as previously noted, the agreements specifically exclude the possibility of management thereby strictly limiting Panther's ability to control the gaming activity.

Conclusion

The Agreements are collateral agreements that should be submitted as part of the management contract review. The Agreements are not, individually or collectively, management agreements that would require the approval of the Chairman. Finally, the Agreements do not grant Panther a proprietary interest in the gaming activity.

I anticipate that this letter will be the subject of Freedom of Information Act (FOIA) requests. Since we believe that some of the information contained herein may fall within FOIA Exemption 4(c), which applies to confidential proprietary information, the release of which could cause substantial harm, I ask that you provide me with your views regarding release within ten days.

I am also sending a copy of the submitted agreements to the Department of Interior Office of Indian Gaming for review under 25 U.S.C. § 81. If you have any questions please contact John Hay at (202) 632-7003.

Sincerely,

Penny J Coleman

Penny J. Coleman
Acting General Counsel

cc: Paula Hart, Office of Indian Gaming (w/ incoming)
James Kawahara, Esq.
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April 6, 2010

Via Facsimile, E-mail, and U.S. Mail

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Re: Review of financing documents for the Manchester Band of Pomo Indians and request for declination letter

Dear Mr. Cohen:

This letter responds to your March 1, 2010 request on behalf of the Manchester Band of Pomo Indians ("the Tribe") to have the National Indian Gaming Commission's Office of General Counsel review the financing documents specified below (collectively, the "Loan Documents"). You have asked whether the Loan Documents are management contracts requiring the NIGC Chairman's approval pursuant to the Indian Gaming Regulatory Act. After careful review and two revisions to the Loan Documents, it is my opinion that the Loan Documents are not management contracts and do not require the approval of the Chairman.

In my review, I considered the following submissions, all undated and unexecuted drafts, which were represented to be in substantially final form:

- Loan agreement marked as the THIRTEENTH DRAFT 4-5-10 received by e-mail on April 5, 2010, by and between the Tribe, the Pueblo of Laguna and Morongo Band of Mission Indians (collectively, "the Lenders"), and the Bank of New York Mellon Trust Company N.A.("the Loan Agreement");
- Disbursement agreement between the Tribe, the Collateral Agent, and Millar & Associates Inc. ("the Disbursement Agreement");
- Blocked account control agreement between the Tribe, the Collateral Agent, and Westamerica Bank ("the Control Agreement");
- Assignment of construction contract between the Tribe, the Collateral Agent, and Stevens-Hemingway-Stevens Inc.("the Construction Assignment Agreement");

- Subordination agreement of general contractor between Stevens-Hemingway-Stevens Inc. and the Collateral Agent, as consented to by the Tribe ("the Subordination Agreement").

All of the above documents were reviewed together as collateral agreements and were defined as such by the Loan Agreement. *See* Loan Agreement § 1.01 *Collateral Agreements.* Furthermore, the Disbursement Agreement, the Control Agreement, the Construction Assignment Agreement, and the Subordination Agreement all reference or incorporate the terms, covenants, and conditions contained in the Loan Agreement. Because the terms and conditions of the Loan Agreement are so tightly woven with the other collateral agreements and are controlling in the event of any inconsistency, our analysis will focus on the Loan Agreement.

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 NIGC regulations do not define *management*, the term has its ordinary meaning. Management 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 Chairman's approval. Management contracts not approved by the Chairman 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

I am aware of the recent decision in *Wells Fargo v. Lake of the Torches* and the court's holding that a bond trust indenture was a management contract. *Id.* at *12-*13. In *Lake of the Torches*, the court found the bond trust indenture at issue to be a management contract, in part because the bond trust indenture gave the bondholders on-going discretionary control over management decisions such as the annual amount to be spent on capital expenditures and the hiring or firing of management personnel or a management company. *Id.* at *9-*11. The court also found the bond trust indenture to be management because the bondholders could require the tribe to hire a management consultant. The bondholders would also approve the consultant, and Lake of the Torches was required to "use its best efforts to implement" the consultant's recommendations if the defined debt service ratio was not met. *Id.* at *9-*10. The court ultimately found these and other terms, "taken collectively and individually," made the bond trust indenture a management contract. *Id.* at *12-*13.

In this case, the Loan Agreement requires the Tribe to engage an independent consultant if the debt service coverage ratio falls below a specified level. *See* Loan Agreement § 6.01(b). Unlike the *Lake of the Torches*, the Loan Agreement does not require the Tribe to obtain the Lenders' approval of the independent consultant. Instead it defines *Independent Consultant* to mean:

> a firm (but not an individual) which (1) does not have any direct financial interest or any material indirect financial interest in the Borrower or any Affiliate thereof, and (2) is not serving the Borrower or any Affiliate as an officer, employee, promoter, underwriter, trustee, partner, director or

> Person performing similar functions, qualified to pass upon questions relating to the financial affairs of facilities of the type or types operated by the Borrower and having a favorable reputation for skill and experience in the financial affairs of such facilities.

Loan Agreement § 1.01, definition of *Independent Consultant*.

Therefore, because the ultimate decision remains with the Tribe, the provision in the Loan Agreement requiring the Tribe to hire an independent consultant who meets the specified objective criteria whenever the debt service coverage ratio is not met does not make the Loan Agreement a management contract.

Next, the court's analysis of the debt service ratio provision at issue in *Lake of the Torches* went beyond the bondholder approval of the independent consultant and looked at the requirement that the Lake of the Torches use its "best efforts" to implement the recommendations of the consultant. The court found such a requirement to be management. While I generally agree with the court's reasoning that a provision requiring the tribe to follow the recommendations of a consultant is management, such is not the case here. The debt service coverage ratio provision in the Loan Agreement only requires the Tribe to hire an independent consultant, but does not require the Tribe to follow or implement the consultant's recommendation. Because the discretion to make operational changes aimed at improving income remains with the Tribe, the requirement to hire an independent consultant does not make the Loan Agreement a management contract.

Similar issues arise out of the Loan Agreement's provisions concerning insurance. In addition to requiring the Tribe to maintain a minimum level of insurance, the Loan Agreement requires the Tribe to hire an insurance consultant at least once every two years to review and make recommendations regarding the gaming operation's insurance coverage. *See* Loan Agreement § 6.07(d). The Loan Agreement defines *Insurance Consultant* to mean: "an Independent Consultant qualified to survey risks and to recommend insurance coverage for the Casino Operations." *Id.* at §1.01 *Insurance Consultant*.

The definition of *Insurance Consultant* not only contains the objective criteria applicable to an *Independent Consultant*, it also specifies additional objective criteria such as requiring that the consultant be qualified to survey risks and to recommend insurance coverage. *Id.* at §1.01 *Insurance Consultant*. There is no requirement that the Lenders approve of the Tribe's selection of the insurance consultant, therefore, the provision requiring the Tribe to hire an insurance consultant does not make the Loan Agreement a management contract.

Further, nothing in the Loan Agreement requires the Tribe to use its best efforts to implement the recommendations of the insurance consultant. The Loan Agreement only requires the Tribe to hire an insurance consultant. *See* Loan Agreement § 6.07(d).

Because the Tribe retains the discretion to decide who the insurance consultant will be and whether to implement the recommendations of the insurance consultant, the requirement to hire an insurance consultant to provide recommendations to the Tribe does not make the Loan Agreement a management contract.

Also, by entering into the Loan Agreement, the Tribe agrees to maintain insurance in amounts required by the terms of the Tribe's Compact with the State and as is "customarily carried by similar businesses with such deductibles, retentions, self-insured amounts and coinsurance provisions as are customarily carried by similar businesses of similar size." *Id.* at § 6.07(a). The Loan Agreement allows for the Tribe to choose how it will comply with this requirement by either purchasing policies of insurance or by adopting an alternative risk management program such as becoming self-insured. *Id.* at § 6.07(b) and (e). Both options, however, have conditions that must be met in order for the insurance requirement to be satisfied.

An insurance consultant, however, also must be consulted whenever the Tribe determines that an alternative risk management program, such as self-insurance, is reasonable. *See* Loan Agreement § 6.07(e). The Loan Document provides that the Tribe:

> shall have the right to alternative risk management programs . . . all as may be determined, in writing, as reasonable and appropriate risk management by the Insurance Consultant applying the standards set forth in the first paragraph of Section 6.07(a).

Id.

The Loan Agreement also requires that any policies of insurance that the Tribe purchases be issued by a reputable insurer meeting the qualifications of Section 6.07(b). Because the Tribe ultimately has the choice to meet the Loan Agreement's insurance requirement by either purchasing an insurance policy or having an alternative risk management program, the condition that the Tribe obtain a written determination from an insurance consultant prior to implementing the alternative risk management program does not make the Loan Agreement a management contract.

I note also that the Loan Agreement pledges the gross gaming revenue of the Tribe's gaming operations as collateral. *See* Loan Agreement § 3.01(a). The court in *Lake of the Torches* found a similar pledge of gross gaming revenue to be management. *Wells Fargo 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). While previous OGC opinions have posited that an agreement containing a security interest in a gaming facility's future gross revenues, *without further limitation*, authorizes management of the gaming facility, in January 2009, we provided guidance in the form of limiting language that would prevent a pledge of gross gaming revenues from resulting in a management contract. The bond trust indenture at issue in the *Lake of the Torches* case did not contain any limiting language. The Loan Agreement has adopted limiting language, substantially similar to that contained in our January 2009 letter, in Section 14.13, which states:

> In addition to the limitations set forth above, notwithstanding any provision in any Loan Document, neither the Collateral Agent nor the Lenders shall engage in any of the following: planning, organizing, directing, coordinating, or controlling all or any portion of the Debtor's gaming operations (collectively, "Management Activities"), including, but not limited to:
>
> (i) the training, supervision, direction, hiring, firing, retention, compensation (including benefits) of any employee (whether or not a management employee) or contractor;
>
> (ii) any employment policies or practices;
>
> (iii) the hours or days of operation;
>
> (iv) any accounting systems or procedures;
>
> (v) any advertising, promotions or other marketing activities;
>
> (vi) the purchase, lease, or substitution of any gaming device or related equipment or software, including player tracking equipment;
>
> (vii) the vendor, type, theme, percentage of pay-out, display or placement of any gaming device or equipment; or
>
> (viii) budgeting, allocating, or conditioning payments of the Borrower's operating expenses;
>
> *provided*, however, that no Lender or Collateral Agent shall be deemed in violation of the foregoing restriction solely because the Lender or the Collateral Agent:
>
> (i) enforces compliance with any term in any Loan Document that does not require the gaming operation to be subject to any third-party decision-making as to any Management Activities; or
>
> (ii) requires that all or any portion of the revenues securing the Secured Obligations be applied to satisfy valid terms of the Loan Documents; or
>
> (iii) otherwise forecloses on all or any portion of the property securing the Loans or other Obligations.

As such, the pledge of gross revenues in the Loan Agreement does not make it a management contract.

A concern similar to that of a pledge of gross revenues also arises because the Loan Agreement grants the Collateral Agent the right to require all depository banks to make daily transfers to an account controlled by the Collateral Agent whenever the debt service coverage ratio is not met. *See* Loan Agreement § 3.02(c). However, the Loan Agreement also requires that in such circumstances, the Collateral Agent apply the proceeds first to payment of the Budgeted Operating Expenses prior to any other obligations. *Id.* Budgeted Operating Expenses are defined as "the projected cash flow

required for payment of Operating Expenses." *Id.* at § 1.01 Definitions, *Budgeted Operating Expenses*. The definition also provides that whenever the Collateral Agent has exercised control over the gross revenues "the Collateral Agent shall be authorized to disburse and release sufficient amounts as reasonably determined by the Borrower" to pay Budgeted Operating Expenses. *Id.*

Without any further limiting language, the above provision could be read to allow the Collateral Agent to refuse the release of money for payment of Budgeted Operating Expenses because the Collateral Agent might disagree with the Tribe's determination that the amount is reasonable. However, because the Collateral Agent is specifically prohibited from "budgeting, allocating, or conditioning payments of the Borrower's operating expenses" by § 14.13, our concerns with regard to the ability of the Collateral Agent to require that all depository banks make daily transfers to an account controlled by the Collateral Agent is alleviated.

The court in *Lake of the Torches* also found a provision allowing for the appointment of a receiver to be management. *Wells Fargo 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). Previous OGC opinions have questioned whether a court could appoint a receiver for a tribal gaming operation if such an appointment would usurp the tribe's ability to own, operate and regulate its gaming enterprise, because doing so would be contrary to IGRA. The NIGC previously opined as to when a tribe, which secures a loan for gaming purposes, would be deprived of its sole proprietary interest, stating:

> Regarding collateral for loans, a tribe may not grant a security interest in a gaming operation if such an interest would give a party other than the tribe the right to control gaming in the event of default by the tribe. Such a security interest would be inconsistent with the IGRA's requirement that a tribe have the 'sole proprietary interest and responsibility for the gaming activity.'

58 Fed. Reg. 5804 (January 22, 1993).

Our concerns over the appointment of a receiver are similar to those expressed in connection with a pledge of gross revenues; if a third party has the ability to condition the payment of operating expenses, then that third party effectively has control over a tribe's gaming operation and its management decisions. Therefore, a provision providing for the appointment of a receiver, *without further limitation*, is management.

In this case, however, the Loan Agreement limits the authority that may be granted to a receiver by prohibiting any receiver from exercising any of the management activities set forth in Section 14.13. *See* Loan Agreement § 7.09. Specifically, the Loan Agreement provides that: "the limitations set forth in Section 14.13 hereof shall apply to any receiver and any Waiver Beneficiary [Lender]." *Id.* The limitations placed on the receiver by the terms of the Loan Agreement satisfy our concerns over the appointment of a receiver. Presumably a court will not grant the receiver authority beyond that

expressly provided for in the Loan Agreement because to do so would be a violation of federal law, *i.e.* IGRA, and result in the Loan Agreement becoming an unapproved management contract and thus void – a result which the parties clearly intended to avoid. As such, the provision allowing for the appointment of receiver with the specified limitations does not make the Loan Agreement a management contract.

Conclusion

The Loan Agreement has no indicia of management, and the parties have specifically agreed to exclude the possibility of management. Nothing in the provisions of the Loan Agreement addressing remedies, the debt service coverage ratio, or the pledge of gross revenues gives to the Bank or any third party the discretion or authority to manage any part of Tribe's gaming operations. Therefore, it is my opinion that the Loan Documents are not management contracts requiring the approval of the NIGC Chairman. I note, however, that the Loan Documents have been submitted to us as undated and unexecuted drafts that are in substantially final form, and to the extent that the Loan Documents change in any material way prior to closing, this opinion shall not apply.

Other Related Matters

Recently, we have seen financing agreements similar to the Loan Documents where the default provisions have conflicted with net gaming revenue allocations in tribal revenue allocation plans (RAP). In some instances, tribes have, presumably inadvertently, violated their RAP by complying with the default provisions on their financing agreements. The Tribe should consider reviewing its RAP to determine if it is consistent with the provisions of the Loan Documents.

I also anticipate that this letter will be the subject of Freedom of Information Act ("FOIA") requests. Since we believe that some of the information in this letter may fall within FOIA exemption 4(c), which applies to confidential and proprietary information the release of which could cause substantial harm, I ask that you provide me with your views regarding release within ten days.

I am also sending of copy of the submitted agreements to the Department of Interior Office of Indian Gaming for review under 25 U.S.C. § 81. If you have any questions, please contact NIGC Staff Attorney Melissa Schlichting at (202) 632-7003.

Sincerely,

Penny J. Coleman
Acting General Counsel

cc: Paula Hart, Office of Indian Gaming Management, Bureau of Indian Affairs
(w/ incoming via U.S. Mail)
Naomi Barnes, Kutak Rock L.L.P.
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May 27, 2010

Via Facsimile, E-mail, and U.S. Mail

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Re: Review of financing documents for the Sokaogon Chippewa Community and request for declination letter

Dear Messrs. Larson, Reynolds, and Williams:

This letter responds to the February 2, 2010 request on behalf of Wells Fargo Bank, National Association ("Wells Fargo" or "the Trustee"), which sought this office's review of certain financing documents of the Sokaogon Chippewa Community ("the Tribe"). I respond as well to the March 26, 2010 letter in reply on behalf of the Tribe. Both the Tribe and Wells Fargo have asked for an opinion about whether these documents constitute management contracts requiring the NIGC Chairman's approval pursuant to the Indian Gaming Regulatory Act. Both have also provided detailed analyses of the question, but they reach opposite conclusions. Wells Fargo is of the opinion that the financing documents are not management contracts, and the Tribe is of the opinion that they are.

After careful review of the documents and the parties submissions, after having multiple conversations with the parties, and taking into consideration their on-going litigation over this specific issue, I am unwilling to provide a definitive opinion regarding whether these documents are management contracts. I note, however, that my reluctance to do so is based on a single provision that is subject to multiple interpretations. The remaining provisions that the Tribe has identified as management, such as the specific remedy allowing the appointment of a receiver, are, for the reasons explained at length below, not management in my opinion.

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In my review, I considered the following documents, all between the Tribe and Wells Fargo as the Trustee (collectively, the "Bond Documents"):

- Trust Indenture dated January 1, 2006, ("the Trust Indenture");
- Guaranty and Pledge Agreement dated December 1, 2005 ("the Guaranty and Pledge Agreement");
- General Obligation Taxable Gaming Bond Series 2006A; and
- General Obligation Taxable Gaming Bond Series 2006B.

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 NIGC regulations do not define *management*, the term has its ordinary meaning. Management 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 Chairman's approval. Management contracts not approved by the Chairman are void. 25 C.F.R. § 533.7; *Wells Fargo Bank, N.A. v. Lake of the Torches Economic Dev. Corp.*,677 F.Supp.2d 1056, 1060-1061.

Analysis

I am aware of the recent decision in *Wells Fargo v. Lake of the Torches* and the court's holding that a bond trust indenture was a management contract. *Id.* at 1060-1061. In *Lake of the Torches* the court found the bond trust indenture at issue to be a management contract, in part because it gave the bondholders ongoing discretionary control over management decisions such as the annual amount to be spent on capital expenditures and the hiring or firing of management personnel or a management company. *Id.* at 1059-1060. The court also found management in the bondholders' right to require the tribe to hire a management consultant, their right to veto any management consultant chosen by the tribe, the tribe's obligation to use its best efforts to implement the consultant's recommendation, and some of the bondholders' rights upon default, *e.g.* the appointment of a receiver and the right to require new management be hired. *Id.* at 1060. The court ultimately found that these terms 'taken collectively and individually' made the bond trust indenture at issue a management contract. *Id.* at 1060.

Also of import to the court in *Lake of the Torches* was the fact that the security for the bonds at issue was the gross gaming revenues of the Lake of the Torches Economic Development Corporation ("Lake of the Torches"), which is the tribal entity that wholly owns the Lake of the Torches Resort Casino, a successful tribal gaming operation. *Id.* at 1059.

Both the Tribe and Wells Fargo have pointed to several provisions of the Trust Indenture that are similar to those examined by the court in *Lake of the Torches*. I note that the Trust Indenture, which was drafted in 2006, contains many of the same headings, corresponding section numbers, definitions, and provisions as the bond trust indenture at issue in *Lake of the Torches*, which was drafted in 2008. However, there are also significant differences.

First, the most significant difference between the Trust Indenture and the bond trust indenture in *Lake of the Torches* is that the Trust Indenture exempts operating expenses from the security interest granted in the gross revenue of the casino. In the Trust Indenture, the Tribe grants "[a] first priority lien on and pledge of all right, title and

interest in and to the Gross Revenues of the Casino Facility remaining *after* payment of Operating Expenses." *See* Trust Indenture at p.18, Granting Clause I. By contrast, the bond trust indenture in *Lake of the Torches*, pledged "[a]ll right, title and interest in and to the Gross Revenues of the Corporation, and investment earnings on the Gross Revenues of the Corporation." *Lake of the Torches*, at 1059, (quoting the bond trust indenture at 2, granting clause I).

Previous OGC opinions have posited that an agreement containing a security interest in a gaming facility's future gross revenues, without further limitation, authorizes management of the gaming facility. In the event of default, a party with a security interest in a gaming facility's gross revenues has the authority to decide how and when operating expenses are paid, which is itself a management function. Furthermore, a party that controls gross revenues potentially controls everything about the gaming facility by allocating or putting conditions on the payment of operating expenses.

In January 2009, we provided guidance in the form of limiting language that would prevent a pledge of gross gaming revenues from resulting in a management contract. *See* Letter from Penny J. Coleman, Acting General Counsel, to Kent Richey, Esq. (January 23, 2009). Such limiting language is unnecessary, however, where an agreement exempts operating expenses from the pledge of gaming revenues or where a pledge of net gaming revenues excludes operating expenses. Excluding operating expenses from the gaming revenues in which a party is granted a security interest ensures that the secured party cannot manage the gaming facility should the tribe default.

Unlike the indenture in *Lake of the Torches*, the Trust Indenture excludes operating expenses from the gaming revenues pledged as security for the debt. Because the pledge of revenues in the Trust Indenture excludes operating expenses, the Trustee has no security interest in the operating expenses and cannot exert control over the gaming operation in the event of default. Therefore, the pledge of gross revenues after payment of operating expenses does not make the Trust Indenture a management contract.

Second, the provisions of the Trust Indenture relating to capital expenditures, Sections 5.04 and 6.15, are significantly different than the analogous provisions of the bond trust indenture in *Lake of the Torches*. There, the capital expenditures provision was found to be management because it required the written consent of a majority of the bondholders in order for the tribe to spend more than 25% of what was spent on capital expenditures the previous year. *Id.* at 1059-1060. The court based its finding of management in part on the bondholders' discretionary control over the capital expenditures. *Id.* at 1060.

A financing agreement is a management contract if it requires a third party to approve or accept a tribe's management decisions about its gaming activity. This is so because the management decision is ultimately left to the discretion of, and is therefore under the control of, the third party. For example, an agreement that requires a tribe to obtain the consent of its lenders before making capital expenditures for the casino is a

management contract. Such was the case in *Lake of the Torches*, and I agree with the court's finding there.

Here, by contrast, the Trust Indenture specifies the amount of money to be set aside by the Tribe for capital expenditures on a monthly basis, and it requires the Tribe to spend a minimum of $1,000,000 on capital expenditures every two years. *See* Trust Indenture §§ 5.04 and 6.15. Unlike the bond trust indenture at issue in *Lake of the Torches*, this does not give the Trustee or the bondholders any discretionary control over the Tribe's capital expenditures. The Tribe is not required to obtain their consent or approval for capital expenditures, and the Trustee and bondholders cannot exercise any discretionary control over the expenditures.

The Tribe's March 26 letter argues that the requirement that a minimum amount be spent on capital expenditures is management because it takes away the Tribe's discretion to use the money for "other more urgent purposes, such as marketing, or even debt service payments" and "constitutes control by the Trustee over the Casino's ability to buy new equipment which is a Casino Operation." I disagree. The Trustee is not controlling capital expenditure. The Tribe has already made the management decision to make minimum capital expenditures, and it embodied its decision in the Trust Indenture as part of the consideration granted to investors in its bonds. Finding management by the Trustee in this would produce absurd results.

For example, the Tribe's obligation to make monthly principal and interest payments also removes its discretion to use that money for other purposes. In fact, payments on the debt service and to the capital expenditures fund are due on the same day each month. *See* Trust Indenture § 5.04. If, as the Tribe's attorneys suggest, any restriction of the Tribe's discretion to use gaming revenue as it sees fit constitutes management, then all contracts requiring payment from the gaming operation or from gaming revenue would be management contracts, and the Chairman would have to approve all of them.

Further, if the Tribe could not pledge collateral for a loan, credit, or debt, then the Tribe could not obtain financing at all. Here, the parties bargained for and agreed to the covenants set forth in the Trust Indenture, and although the Tribe agreed to limit its discretion over the minimum amount of capital expenditures, the Trust Indenture does not vest in the Trustee, the bond holders, or any third-party, any discretion over capital expenditures.

In a similar vein, the Tribe's March 26 letter argues that the requirement that the Tribe submit a "Draw Request" to the Trustee in order to withdraw funds from the capital expenditures fund grants the Trustee the discretion to decide whether the capital expenditures funds are released. In support of its argument the Tribe includes two "Draw Requests" that were not funded by the Trustee.

When reviewing contracts submitted to the Office of General Counsel for a determination as to whether they are management contracts, I can only render an opinion

about provisions within the four corners of the documents. I cannot opine about actions of the parties following the execution of a contract, even those taken under the auspices of the contract. Of course, any entity that manages a tribal gaming facility without an approved management contract is in violation of the IGRA, and the NIGC Chairman can bring an enforcement action against it.

In looking at the provisions of the Trust Indenture that require the Tribe to submit a "Draw Request," I see no opportunity for the Trustee to exercise discretion or control over the funds. The Trust Indenture provides that "[d]isbursement *shall* be made by the Trustee upon request of the Tribe or Casino Enterprise, through submission of a Draw Request." *See* Trust Indenture § 5.04 (emphasis added). When the Tribe is in default, however, Section 8.05 of the Trust Indenture prohibits the Trustee from transferring any funds to the Tribe from the capital expenditures fund. *Id.* at § 8.05. Based on these provisions, the Trustee has no discretion to withhold or deny the transfer of capital expenditure funds to the Tribe when the Tribe is not in default, and also has no discretion to transfer capital expenditure funds to the Tribe if it is in default.

I note, however, that both "Draw Requests" offered as evidence of the Trustee's discretionary control over the capital expenditures fund were submitted after the Tribe had failed to make its monthly principal and interest payments on the debt and was thus in default. *See* Complaint, ¶ 29; *Wells Fargo Bank v. Sokaogon Gaming Enterprise and the Sokaogon Chippewa Community*, Case No. 09CV-79, State of Wisc. Circuit Court, Forest County (filed August 4, 2009). That being the case, the Trustee had no choice and no discretion as to whether to fund the Tribe's draw requests and was in fact prohibited from doing so by the terms of the Trust Indenture.

For all of the reasons above, it is my opinion that the capital expenditures provisions of the Trust Indenture do not make it a management contract.

Third, the debt service coverage covenant in the Trust Indenture has an analogous provision in *Lake of the Torches*. *See* Trust Indenture § 6.13. The covenant is subject to multiple interpretations and gives me pause.

In *Lake of the Torches*, the debt service ratio provision provided that when the debt service coverage ratio fell beneath a threshold level, and if 51% of the bondholders required it, then "the Corporation will promptly retain an Independent management consultant with sufficient experience in and knowledge of the gaming industry approved by the Bondholder Representative." *Lake of the Torches*, at 1059-1060, (citing the bond trust indenture at § 6.19). The gaming operation was then required to "use its best efforts to implement the recommendations of the management consultant." *Id.* The court found that these "provisions give the bondholders the opportunity to exert significant control over the management operations of the Casino Facility" and the bond trust indenture was therefore a management agreement. *Id.* at 1060. I agree with this reasoning.

Here, like the debt service ratio provision in *Lake of the Torches*, the debt service coverage covenant also requires the Tribe to hire an independent consultant should the

debt service coverage ratio not be met. *Id.* However, rather than requiring the approval of the bondholder representative, the independent consultant must be "acceptable to the Trustee." *See* Trust Indenture § 6.13.

Although the word *approve* is not used, *acceptable* implies that the Trustee must approve of the Tribe's selection of an independent consultant. The definition of *accept* is "to admit and agree to; accede to or consent to; receive with approval; adopt; agree to." *Black's Law Dictionary* (Abridged 6th Ed.1995). As such, one could read the phrase "acceptable to the Trustee" to mean that the Trustee must approve of or agree to the Tribe's selection of an independent consultant. Such an interpretation would mean the provision calls for the Trustee's management.

However, in this instance the term *acceptable* is further qualified by illustration: a "consulting firm recognized for its experience in the field of tribal casino gaming or a firm of certified public accountants." Trust Indenture, § 6.13. By illustrating what is "acceptable to the Trustee," one could also read the covenant to mean the Trustee's approval is not required when the Tribe's selected independent consultant meets the specified objective criteria, *i.e.* a firm of certified public accountants, or a firm with experience in the field of tribal casino gaming. Read that way, the provision is not management.

The ambiguity extends further. Unlike the 'Debt Service Ratio' provision at issue in *Lake of the Torches,* the Trust Indenture does not require the Tribe to implement the recommendations of the independent consultant. It states instead:

> The Tribe agrees that the Casino Enterprise will, to the extent permitted by law, follow the recommendations of the Independent consultant unless the Tribal Council in good faith resolves in a writing delivered to the Trustee . . . that such recommendations are not in the best interests of the Casino Enterprise and that a proposed alternative set of recommendations of management are likely to achieve the 150% debt service coverage ratio in this Section. So long as an Independent consultant shall be employed and the Casino Enterprise accepts and follows the recommendations of the Independent consultant or such alternate recommendations of the Tribal Council the Tribe shall be deemed to be in compliance with the covenants provided . . ., notwithstanding that the Income Available for Debt Service realized may have been less than 150% of Total Principal and Interest Requirements.

Trust Indenture, § 6.13 (emphasis added). As such, the ultimate decision whether the independent consultant's recommendations are implemented remains with the Tribe because the Tribe can come up with its own set of alternative recommendations and opt to follow them instead.

Legal counsel for Wells Fargo argues that this choice resolves the question of management here. Counsel contends that because the Tribe may choose whether to

follow the independent consultant's recommendations, it does not matter whether the Tribe, the bondholders, or the Trustee selects the independent management consultant. It is not at all clear to me, however, that the Tribe has an unfettered choice here.

If the Casino falls below a certain debt service overage ratio, the Tribe must pay for the services of an independent consultant, which is not an inexpensive proposition. Trust Indenture, § 6.13. If the Tribe chooses not to follow the consultant's recommendations, it must, pay for alternative recommendations, presumably from another consultant, and because the Casino is not making its debt service coverage ratio, it is already under some financial distress.

If the Tribe is unable to raise the debt service ratio to the required threshold after implementing its alternate recommendations, the Tribe can avoid default only by continuing to employ the independent consultant and continuing to implement its alternative recommendations. *Id.*

The Commission, through Bulletin 94-05, observed that even though a tribe, as the owner of the gaming operation, has the ultimate authority to make decisions, "[t]he exercise of such decision-making authority by the tribal council or a board of directors does not mean that an entity or individual reporting to such body is not 'managing' all or part of the operation." NIGC Bulletin 94-05. In explaining the differences between management and consulting in Bulletin 94-05, the Commission clarified that an agreement that provides no finite tasks or assignments to be performed; has an open-ended date of completion; and, does not tie compensation to specific work or objectives to be met, is more likely to be construed as a management contract. *Id.*

Therefore, although the Tribe retains the ultimate authority to decide whether to implement the independent consultant's recommendations, the provision also suggests management by a third party consultant. This along with the ambiguous phrase "acceptable to the Trustee" makes it unclear whether the covenant makes the Trust Indenture a management contract, and I offer no opinion one way or the other.

Fourth, the Trust Indenture provides for the appointment of a receiver in case of default, and the identical provision is in the bond trust indenture examined in *Lake of the Torches*. *See* Trust Indenture § 8.04. Both state:

> Upon the occurrence of an Event of Default, and upon the filing of a suit or other commencement of judicial proceedings to enforce the rights of the Trustee and the holders of Bonds under this Indenture, the Trustee shall be entitled, as a matter of right, to the appointment of a receiver or receivers of the Trust Estate and the revenues, issues, payments and profits thereof, pending such proceedings, with such powers as the court making such appointment shall confer.

Id. at § 8.04.

The court in *Lake of the Torches* found this to be management. *Lake of the Torches,* at 1060. The court noted that the receiver would have control over the trust estate, which was defined to include all of the gross gaming revenues of the gaming operation without limitation. *Id.* I agree. In previous opinions, I have questioned whether a court could appoint a receiver for a tribal gaming operation because such an appointment would usurp the tribe's ability to manage and control its gaming enterprise. The concern is closely analogous to those I have expressed about pledges of gross revenues.

If, upon default, a third party has the ability to condition the payment of operating expenses, then that third party effectively has control over a tribe's gaming operation and its management decisions. As such, I have opined that an agreement providing for a security interest in gross gaming revenue is a management contract. I have also opined, however, that agreements with pledges of gross revenue are not management contracts if they also contain detailed language expressly prohibiting the lenders' or trustees' ability to manage upon default. In short, a security interest in gross gaming revenue, without further limitation, makes a finance agreement a management contract.

Similarly, the appointment of a receiver may give a third party substantial management control over a tribe's gaming operation. I see no reason why a receiver's authority could not be limited to preclude management, either with appropriate limiting language or by removing operating expenses from the receiver's authority altogether. As with gross revenue, then, a provision providing for the appointment of a receiver over gross gaming revenues, without further limitation, is management.

It is in this way that the Trust Indenture and the *Lake of the Torches* bond trust indenture differ. The *Lake of the Torches* bond trust indenture defines the term *Trust Estate* to mean "the Collateral," and it defines *Collateral* to mean "the assets of the Corporation in which a security interest has been granted to the Trustee to secure the bonds pursuant to the Granting Clauses and/or the Security Agreement." *See* Exhibit A to Plaintiff Wells Fargo Bank's Rule 15(a) Motion for Leave to Amend Complaint, *Wells Fargo Bank, N.A. v. Lake of the Torches Economic Dev. Corp.*, No. 09-CV-768, (W.D. Wisc. December 21, 2009), Bond Trust Indenture, filed February 8, 2010. Appointing a receiver over the *Lake of the Torches* trust estate would give the receiver control over operating expenses and management authority over the casino.

Here, by contrast, the Trust Indenture defines *Trust Estate* as:

> [T]he revenues to be derived from the Casino Facility, pledged and assigned under Granting Clause I of this Indenture; the revenues, moneys, investments, contract rights, general intangibles and instruments and proceeds and products and accessions thereof as set forth in Granting Clause II of this Indenture; and additional property held by the Trustee pursuant to Granting Clause III of this Indenture.

Id. at § 1.01 Definition of *Trust Estate.* In turn, Granting Clause I exempts from the pledge of a security interest in gross gaming revenue the payment of operating expenses. *See* Trust Indenture at p.18, Granting Clause I. Thus, the Trust Indenture limits the authority of the receiver to the Trust Estate, which by definition excludes operating expenses. It is my opinion that, limited in this way, the Trust Indenture's receivership provision is not management.

In its March 26 letter, the Tribe identifies three other provisions of the Trust Indenture that it argues make the Trustee a manager. I disagree.

Selection of auditor and audit expense.

The Tribe argues that ¶8(b) of the Guaranty is management because it provides the Trustee with the power to audit the casino at the casino's expense. This is not management. In order for the Trustee to be able to order an audit, the casino must first fail to provide unaudited monthly financial statements within 30 days of a written request from the Trustee or bondholders. The Trustee's ability to order an audit depends solely on the action, or inaction, of the casino.

What is more, this kind of audit is not the annual independent audit of the gaming activity that IGRA requires tribes to file annually with NIGC. 25 U.S.C. § 2710(b)(2)(C). The choice of auditor and responsibility for that audit is a management function. This audit allows the Trustee and bondholders to understand the casino's finances and, presumably, the Tribe's ability to service its debt. The Trustee and bondholders cannot use the audit for any management purpose, nor can they require the Casino to rely on the audit to affect any management decisions. The fact that the Tribe must pay for the audit is immaterial. This provision is, in short, one of a number that give the Trustee's a tool to safeguard the bondholder's investments and that give the Trustee the right to charge fees and costs associated with the enforcement of the Guaranty and Trust Indenture. This provision is, therefore, not management.

Trustee control over gaming operation funds and investments.

Next, the Tribe argues that the Trust Indenture's provisions requiring the Tribe to deposit the original bond proceeds and the pledged revenues into accounts controlled by the Trustee is management. I disagree. The bond proceeds have already been spent and were spent in accordance with the purpose of the bond financing – construction of a new gaming facility. Further, if the Trustee truly had control over the gaming operation's funds, as the Tribe suggests, the Trustee would not need to seek a receiver nor enforcement of the Trust Indenture. Further still, the pledged revenues deposited in accounts controlled by the Trustee come only after payment of all operating expenses. As discussed above, control over net revenue does not allow a third party to have control over the gaming operation and is not management.

Trust Indenture unlawfully encumbers Tribal lands.

Lastly, the Tribe argues that the covenant that prohibits the Tribe from selling or pledging fee simple tribal lands violates 25 U.S.C. § 81. It appears that the Tribe is arguing that § 81 requires approval of the Trust Indenture because it encumbers the Tribe's fee lands. If so, the Tribe should address its concern directly to Interior's Office of Indian Gaming, which is responsible for reviewing any gaming-related agreements that fall within § 81. Although the Secretary of Interior's authority to approve management contracts for gaming under § 81 was transferred to the NIGC Chairman by IGRA, 25 U.S.C. § 2711(h), the remainder of the Secretary's authority under that section was not. The question is outside of NIGC's jurisdiction.

Conclusion

I understand that, as was the case in *Lake of the Torches*, Wells Fargo is the Tribe's trustee under the Trust Indenture, and as trustee, Wells Fargo has filed an action against the Tribe and is seeking the appointment of a receiver. I note that as in *Lake of the Torches,* Wells Fargo did not seek NIGC review and approval of the Bond Documents prior to their execution, but in light of the court's ruling in *Lake of the Torches* I am not surprised that Wells Fargo now seeks a determination that the Bond Documents are not management contracts subject to the NIGC Chairman's review and approval.

Generally, the Office of General Counsel refrains from opining on matters that are currently in litigation. However, given the recent decision in *Lake of the Torches*, the similarity between the Bond Documents here and the bond trust indenture there, and the need to provide guidance to others, I believe the issuance of an opinion letter in these circumstances is warranted.

For the reasons stated above, it is my opinion that the provisions for capital expenditures, the appointment of a receiver, audits, deposits, and restrictions on fee lands, do not collectively or by themselves make the Bond Documents into management contracts. The only provision that gives me pause is debt service covenant provision, and I offer no opinion about it.

I anticipate that this letter will be the subject of Freedom of Information Act ("FOIA") requests. Since I believe that some of the information in this letter may fall within FOIA exemption 4(c), which applies to confidential and proprietary information the release of which could cause substantial harm, I ask that you provide me with your views regarding release within ten days.

I am also sending of copy of the submitted agreements to the Department of Interior Office of Indian Gaming for review under 25 U.S.C. § 81. If you have any questions, please contact NIGC Staff Attorney Melissa Schlichting at (202) 632-7003.

Sincerely,

Penny J Coleman

Penny J. Coleman
Acting General Counsel

cc: Paula Hart, Director, Office of Indian Gaming (w/ incoming)

June 2, 2010

Via facsimile and U.S. Mail

Robert Garcia, Chairman
Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians
1245 Fulton Avenue
Coos Bay, OR 97420
Fax: (541) 888-0302

Re: Review of financing documents for the Confederated Coos, Lower Umpqua and Siuslaw Indians and request for declination letter.

Dear Chairman Garcia:

This letter responds to your April 22, 2010 request for the National Indian Gaming Commission's Office of General Counsel to review the documents specified below (collectively, the "Loan Documents"). You have asked whether the Loan Documents are management contracts requiring the NIGC Chairman's approval pursuant to the Indian Gaming Regulatory Act and whether the Loan Documents violate IGRA's requirement that a tribe have the sole proprietary interest in its gaming operations. After careful review, it is my opinion that the Loan Documents are not management contracts and do not require the approval of the Chairman. It is also my opinion that the Loan Documents do not violate IGRA's sole proprietary interest requirement.

In my review, I considered the following submissions:

- Indenture between Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians (Tribe) and Wells Fargo Bank, National Association, dated October 27, 2006 (Indenture).

- Undated and unexecuted draft of the First Supplemental Indenture between the Tribes and Wells Fargo, submitted on May 6, 2010 (First Supplemental Indenture).

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., 547 F.3d 115, 130 (2nd Cir. 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 NIGC regulations do not define *management*, the term has its ordinary meaning. Management 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 Chairman's approval. Management contracts not approved by the Chairman are void. 25 C.F.R. § 533.7; *Wells Fargo Bank, N.A. v. Lake of the Torches Economic Development Corp.*, 677 F. Supp. 2d 1056 (W.D.W.I. 2010).

Sole Proprietary Interest

No agreement may give a proprietary interest in any Indian gaming activity to any entity other than the tribe itself, except for certain individually owned gaming operations not at issue here. 25 U.S.C. § 2710(b)(2)(A); 25 U.S.C. § 2710(b)(4). Among IGRA's requirements is that "the Indian tribe will have the sole proprietary interest and responsibility for the conduct of any gaming activity." 25 U.S.C. §27109(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. *See also* 25 C.F.R. § 522.4(b)(1).

Proprietary interest is not defined in the IGRA or the NIGC's implementing regulations. However, it is defined in Black's Law Dictionary, 7th Edition (1999), as "the interest held by a property owner together with all appurtenant rights..." *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, a proprietary interest is ownership, with the right to possess, use, and convey something.

Additionally, the NIGC has provided a non-exhaustive list of arrangements that would violate the sole proprietary interest clause.

- An agreement whereby a vendor pays the tribe for the right place gambling devices that are controlled by the vendor on the gaming floor;
- A security agreement whereby a tribe grants a security interest in a gaming operation, if such an interest would give a party other than the tribe the right to control gaming in the even of default by the tribe; and
- Stock ownership in a tribal gaming operation, even by tribal members.

58 F.R. 5802, 5804 (Jan. 22, 1993).

Analysis

To begin with, I am aware of the recent decision in *Wells Fargo v. Lake of the Torches*, 677 F. Supp. 2d 1056 (W.D.W.I. 2010), and the court's holding there that a bond trust indenture was a management contract. *Id.* at 1060-61. This was based in part on the grant to the bondholders of ongoing discretionary control over management decisions such as the annual amount to be spent on capital expenditures and the hiring or firing of management personnel or a management company. *Id.* at 1059-61. The court also found the bond trust indenture was management because the bondholders could require the Lac du Flambeau Tribe to hire a management consultant, and could exercise approval authority over its choice of consultant. The Lac du Flambeau Tribe was then required to "use its best efforts to implement" the consultant's recommendations if the defined debt service ratio was not met. *Id.* at 1059-60. The court ultimately found these and other terms, "taken collectively and individually," made the bond trust indenture a management contract. *Id.* at 1060-61.

Here, the Loan Documents require the Tribe to engage an independent consultant if the debt service coverage ratio falls below a specified level. *See* First Supplemental Indenture § 2.9. The Loan Documents define *Independent Consultant* to mean:

> a firm (but not an individual) which (1) does not have any direct financial interest or any material indirect financial interest in the Tribe or any Affiliate of the Tribe, (2) is not serving, or directly or indirectly controlled by any Person serving, the Tribe or any Affiliate of the Tribe as an officer, employee, promoter, underwriter, trustee, partner, director or Person performing similar functions, (3) is designated by the Tribe, (4) is qualified to pass upon questions relating to the financial affairs or facilities of the type or types operated by the Tribe or any Component of the Tribe and (5) has a favorable reputation for skill and experience in the financial affairs of such facilities.

First Amended Indenture, § 2.1, *Independent Consultant.*

Unlike *Lake of the Torches,* the Loan Documents here do not require the Tribe to obtain the bondholder's approval of the independent consultant. Rather, the Loan Documents merely require that the Tribe hire an independent consultant should certain circumstances arise. The decision of whom to hire remains with the Tribe and the bondholders have no control over, and exercise no discretion in, the decision. Therefore, the provision does not make the Loan Documents a management contract.

Beyond bondholder approval of the consultant, the *Lake of the Torches* court found that the requirement in the debt service ratio provision that the Lake of the Torches use its "best efforts" to implement the recommendations of the consultant was management. *Lake of the Torches,* 677 F. Supp. 2d at 1059-60. While I generally agree with the court's reasoning on that point, the Loan Documents here present a different scenario. The debt service coverage ratio provision in the Loan Documents requires the Tribe to hire an independent consultant, but it does not require the Tribe to follow or implement the consultant's recommendation. First Amended Indenture, § 2.9. The discretion to make any and all management decisions and operational changes remains with the Tribe, and thus the requirement to hire an independent consultant does not make the Loan Documents a management contract.

Next, similar issues arise out of the Loan Documents' provisions concerning insurance. In addition to requiring the Tribe to maintain a minimum level of insurance, the Loan Documents require the Tribe to hire an insurance consultant at least once every two years to review and make recommendations regarding the gaming operation's insurance coverage. *See* Indenture § 6.6(d). The Loan Documents define *Insurance Consultant* to mean, "an Independent Consultant qualified to survey risks and to recommend insurance coverage for the Gaming Operations." *Id.* at §1.1 *Insurance Consultant.*

Nothing in the Loan Documents gives the bondholders the authority to choose or approve the insurance consultant, and nothing requires the Tribe to use its "best efforts" to implement its recommendations. The Loan Documents only require the Tribe to hire an insurance consultant. *See* Indenture § 6.6(d). Because the Tribe retains the discretion to decide whom to hire as an insurance consultant, and the Tribe also decides whether to implement the recommendations of the insurance consultant, the requirement to hire the consultant does not make the Loan Documents a management contract.

The Tribe also agrees to maintain insurance "in such amounts as is customarily carried by similar businesses with such deductibles, retentions, self-insured amounts and coinsurance provisions as are customarily carried by similar businesses of similar size." *Id.* at § 6.6(a). The Loan Documents allow for the Tribe to comply either by purchasing insurance policies or by adopting an alternative risk management program such as becoming self-insured. *Id.* at § 6.6(b); First Supplemental Indenture §2.10. Both options, however, have conditions that must be met for the insurance requirement to be satisfied.

If the Tribe decides to purchase insurance policies, the Loan Documents require that those policies be issued by a reputable insurer meeting certain objective qualifications, such as the amounts and kinds of coverage and the insurer's rating for claims-paying ability. Indenture § 6.6(b). If, on the other hand, the Tribe decides that an alternative risk management program, such as self-insurance, is reasonable, it must hire an insurance consultant. *See* First Supplemental Indenture § 2.10. The Loan Documents provide that the Tribe:

> shall have the right to adopt alternative risk management programs which the Tribe determines to be reasonable…all as may be determined, in writing, as reasonable and appropriate risk management by the Insurance Consultant, applying the standards set forth in Section 6.6(a), and reviewed by the Insurance Consultant every year thereafter which such determination shall not be withheld if the Insurance Consultant reasonably determines that such proposed alternative risk management program will not have a Material Adverse Effect."

First Supplemental Indenture, § 2.10.

Because the tribe ultimately has the choice to meet the Loan Agreement's insurance requirement by either purchasing an insurance policy or having an alternative risk management program, the condition that the Tribe obtain a written determination from an insurance consultant prior to implementing the alternative risk management program does not make the Loan Documents a management contract.

A similar concern related to the Tribe's control over its gaming operations arises because the Loan Documents grant the Trustee the right to require all depository banks to make daily transfers to an account controlled by the Trustee whenever the debt service coverage ratio is not met. *See* First Supplemental Indenture § 2.5. This could result in management by the Trustee if it has control over the casino's operating expenses. The Loan Documents, however, require that in such circumstances, the Trustee first deposit

funds in the Operating Account in the amount necessary to cover the *Operating Cost Set Aside Amount*, which is defined as operating expenses: "the projected cash flow reasonably required for payment of Operating Costs." Indenture § 1.1 *Operating Cost Set Aside Amount.* Further, while this provision could be read in isolation to allow the Trustee to refuse the release of money for operating expenses if he disagrees with the Tribe's determination that a given amount is necessary, language in the Loan Documents ensures that the Tribe, and not the Trustee, will make operating expense decisions. The Trustee or his representative is prohibited from "budgeting, allocating, or conditioning payments of the Borrower's operating expenses." First Supplemental Indenture § 2.15. Accordingly, absent any control by the Trustee over operating expenses, the provisions concerning daily deposits do not make the Loan Documents management agreements.

The provisions discussed thus far are designed to prevent default by the Tribe. But the Loan Documents also include protections for the bondholders should any of the events of default listed in the Indenture occur. The court in *Lake of the Torches* addressed several provisions similar to those in the Loan Documents, finding them to be management. These include a security interest in gross gaming revenue, which the court found to be management. *Lake of the Torches*, 677 F. Supp. 2d at 1059-60.

The Loan Documents pledge the gross gaming revenue of the Tribe's gaming operations as collateral. *See* Indenture § 1.1 *Collateral*; § 10.3. While previous OGC opinions have posited that an agreement containing a security interest in a gaming facility's future gross revenues, without further limitation, authorizes management of the gaming facility, in January 2009, we provided guidance in the form of limiting language that would prevent a pledge of gross gaming revenues from resulting in a management contract. *See* January 23, 2009 letter from Penny Coleman, NIGC Acting General Counsel, to Kent Richey. The bond trust indenture at issue in the *Lake of the Torches* case did not contain any limiting language. The Loan Documents, though, have adopted limiting language that expands upon that contained in our January 2009 letter, which states:

> The Trustee and the Bondholders shall not have recourse to any property with respect to the obligations under the bonds and this indenture except the Collateral. Notwithstanding any other possible construction of any provision herein, the Trustee and Bondholders acknowledge and agree that this indenture and the bonds do not create, (A) any rights on the part of the Trustee or the Bondholders to manage the gaming operations, (B) Any rights on the Trustee or the Bondholders to interfere with the Tribe's and/or the Tribal Gaming Commission's right to determine standards of operation and efficient management of the gaming operations (including, but not limited to, operating budgeting matters of the gaming business and policies relating to gaming and gaming operations services) or any rights to have access to the secured areas in the gaming operations; or (C) any lien or right of recourse against any property other than the Collateral or any interest therein, whether tangible or intangible, legal or beneficial, vested or contingent, or any occupancy or other rights or entitlements

therein or related thereto. The liens of the Trustee and the Bondholders are strictly limited to the Collateral specifically referred to in this indenture and specifically pledged to the payment of the bonds. The bonds and the Tribe's obligations under this indenture are not general obligations of the Tribe or any affiliate or component of the Tribe.

In addition to the limitations set forth above, and notwithstanding any other provision in any Transaction Document, neither the Trustee nor the Bondholders nor anyone acting on their behalf shall engage, nor shall they cause any receiver appointed pursuant to Section 10.4 of this Indenture to engage, in any of the following: planning, organizing, directing, coordinating, or controlling all or any portion of the Gaming Operations (collectively, "Management Activities"), including, but not limited to:

(i) the training, supervision, direction, hiring, firing, retention, compensation (including benefits) of any employee (whether or not a management employee) or contractor;

(ii) any employment policies or practices;

(iii) the hours or days of operation;

(iv) any accounting systems or procedures;

(v) any advertising, promotions or other marketing activities;

(vi) the purchase, lease, or substitution of any gaming device or related equipment or software, including player tracking equipment;

(vii) the vendor, type, theme, percentage of pay-out, display or placement of any gaming device or equipment; or

(viii) budgeting, allocating, or conditioning payments of the Tribe's operating expenses (it being understood that the collection and disbursement of the Tribe's revenues by a receiver shall not constitute Management Activities under this clause (viii) so long as such receiver disburses to the Operating Account, from funds received by the receiver and legally available therefore, amounts necessary to fund the Operating Costs Set Aside Amount each month and, if there has been a shortfall in the amount transferred to the Operating Account in the previous month, the amount of such shortfall; *provided* that no such disbursements shall be required to be made in the event of any exercise of the rights and remedies of the Trustee and the Bondholders under Sections 10.2 and 10.3 of this Indenture);

provided, however, that neither the Trustee nor any Bondholder shall be deemed in violation of the foregoing restriction solely because they:

> (1) enforce compliance with any term in the Indenture or the Bonds that does not require the Gaming Operations to be subject to any third-party decision-making as to any Management Activities; or
>
> (2) require that all or any portion of the Gaming Revenues securing the Bonds and other Obligations be applied to satisfy valid terms of the Indenture; or
>
> (3) otherwise foreclose on all or any portion of the Collateral securing the Bonds and other Obligations."

First Supplemental Indenture § 2.15. With the inclusion of the above language, the pledge of gross revenue does not transform the Loan Documents into a management contract because it prevents the bondholders from exerting any management control over the Tribe's gaming operations in the event of a default.

Another area of concern related to control of the facility arises from the Loan Documents' provision permitting the appointment of a receiver. First Supplemental Indenture § 2.13. The provision in the Supplemental Indenture is similar to that found in the bond trust indenture examined in *Lake of the Torches*, and states: "the Trustee shall be entitled, as a matter of right, to the appointment of a receiver of the Collateral..." *Id.*

The Court in *Lake of the Torches* found this to be management. *Lake of the Torches*, 677 F. Supp. 2d at 1060-61. The court noted that the receiver would have control over the trust estate, which was defined to include all of the gross gaming revenues of the gaming operation without limitation. *Id.* I agree. In previous opinions, I have questioned whether a court could appoint a receiver to a tribal gaming operation because such an appointment would usurp the tribe's ability to manage and control its gaming enterprise. The concern is closely analogous to those I have expressed about pledges of gross revenues.

If, upon default, a third party has the ability to condition the payment of operating expenses, then that third party effectively has control over a tribe's gaming operation and its management decisions. Based on that, I have opined that an agreement providing for a security interest in gross gaming revenue is a management contract. I have also opined, however, that agreements with pledges of gross revenue are not management contracts if they also contain detailed language expressly prohibiting the lenders' or trustees' ability to manage upon default. In short, a security interest in gross gaming revenue, without further limitation, makes a finance agreement a management contract.

Similarly, the appointment of a receiver may give a third party substantial management control over a tribe's gaming operation. I see no reason why a receiver's authority could not be limited to preclude management, either with appropriate limiting language or by removing operating expenses from the receiver's authority altogether. As with gross revenue, then, a provision allowing for the appointment of a receiver over gross gaming revenues, without further limitation, is management.

In this case, while the Loan Documents expressly contemplate the appointment of a receiver, they limit the authority granted a receiver by prohibiting the exercise of management activities. *See* First Supplemental Indenture § 2.13. Specifically, the Loan Documents provide that "the rights of the receiver shall be limited to the extent set forth in Section 15.15 hereof." *Id.* Section 15.15 requires the receiver to first distribute funds necessary to pay the operating expenses. Thus, the Loan Documents prohibit the receiver from exercising authority over operating expenses. It is my opinion that limited in this way, the Trust Indenture's receivership provision is not management

All of that said, in addition to an opinion that the Loan Documents are not a management contract, you asked for my opinion as to whether the Loan Documents grant any person a proprietary interest in the Tribe's gaming facilities in violation of IGRA. It is my opinion that they do not. The bonds were offered and sold at prevailing market rates. The Indentures do not transfer any ownership interest in the Tribe's facilities, nor do they give the bondholders or any of their representatives any right to control the facility. The Loan Documents, therefore, do not violate IGRA's requirement that the Tribe have the sole proprietary interest in its gaming facilities.

Conclusion

In sum, the Loan Documents specifically exclude the possibility of management by anyone other than the Tribe. Nothing in the provisions of the Loan Documents addressing remedies, the debt service coverage ratio, or the pledge of gross revenues gives to the Bank or any third party the discretion or authority to manage any part of Tribe's gaming operations. Therefore, it is my opinion that the Loan Documents are not management contracts requiring the approval of the NIGC Chairman and do not infringe on the Tribe's sole proprietary interest in its gaming operations.

I note, however, that the First Supplemental agreement was submitted to us as an undated and unexecuted draft in substantially final form. To the extent that the Loan Documents change in any material way prior to closing, this opinion shall not apply.

Other Related Matters

Recently, we have seen financing agreements similar to the Loan Documents where the default provisions have conflicted with net gaming revenue allocations in tribal revenue allocation plans (RAP). In some instances, tribes have, presumably inadvertently, violated their RAP by complying with the default provisions on their financing agreements. If the Tribe decides to adopt a RAP at some point in the future, it should take into consideration the terms of this Loan Documents to ensure consistency with the RAP provisions.

I also anticipate that this letter will be the subject of Freedom of Information Act ("FOIA") requests. Since we believe that some of the information in this letter may fall within FOIA exemption 4(c), which applies to confidential and proprietary information

the release of which could cause substantial harm, I ask that you provide me with your views regarding release within ten days.

I am also sending of copy of the submitted agreements to the Department of Interior Office of Indian Gaming for review under 25 U.S.C. § 81. If you have any questions, please contact NIGC Staff Attorney Michael Hoenig at (202) 632-7003.

Sincerely,

Penny J. Coleman
Acting General Counsel

AD074

NATIONAL INDIAN GAMING COMMISSION

June 2, 2010

Via facsimile and U.S. Mail

Robert Garcia, Chairman
Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians
1245 Fulton Avenue
Coos Bay, OR 97420
Fax: (541) 888-0302

Re: Review of Further Assurances Agreement

Dear Chairman Garcia:

This letter responds to your April 23, 2010 request for the National Indian Gaming Commission's Office of General Counsel to review the Further Assurances Agreement (Agreement) entered into by the Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians (Tribe) and Wells Fargo Bank. You have asked whether the Agreement is a management contract requiring the NIGC Chairman's approval and whether it violates IGRA's requirement that a tribe have the sole proprietary interest in its gaming operation.

The Tribe entered into the Agreement to reassure the holders of [redacted] in Gaming Enterprise Revenues Bonds that the Tribe will honor its obligations should a "triggering event" occur under its Indenture and First Supplemental Indenture, which are the subject of a separate opinion letter, also dated today. After careful review, it is my opinion that the Agreement is not a management contract and does not require the approval of the Chairman. It is also my opinion that the Agreement does not violate IGRA's sole proprietary interest requirement. b4

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.*, 547 F.3d 115, 130 (2nd Cir. 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 NIGC regulations do not define *management*, the term has its ordinary meaning. Management 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 Chairman's approval. Management contracts not approved by the Chairman are void. 25 C.F.R. § 533.7; *Wells Fargo Bank, N.A. v. Lake of the Torches Economic Development Corp.*, 677 F. Supp. 2d 1056 (W.D.W.I. 2010).

Sole Proprietary Interest

No agreement may give a proprietary interest in any Indian gaming activity to any entity other than the tribe itself, except for certain individually owned gaming operations

not at issue here. 25 U.S.C. § 2710(b)(2)(A); 25 U.S.C. § 2710(b)(4). Among IGRA's requirements is that "the Indian tribe will have the sole proprietary interest and responsibility for the conduct of any gaming activity." 25 U.S.C. §27109(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. *See also* 25 C.F.R. § 522.4(b)(1).

Proprietary interest is not defined in the IGRA or the NIGC's implementing regulations. However, it is defined in Black's Law Dictionary, 7th Edition (1999), as "the interest held by a property owner together with all appurtenant rights..." *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, a proprietary interest is ownership, with the right to possess, use, and convey something.

Additionally, the NIGC has provided a non-exhaustive list of arrangements that would violate the sole proprietary interest clause.

- An agreement whereby a vendor pays the tribe for the right place gambling devices that are controlled by the vendor on the gaming floor;
- A security agreement whereby a tribe grants a security interest in a gaming operation, if such an interest would give a party other than the tribe the right to control gaming in the even of default by the tribe; and
- Stock ownership in a tribal gaming operation, even by tribal members.

58 F.R. 5802, 5804 (Jan. 22, 1993).

Analysis

To begin with, I am aware of the recent decision in *Wells Fargo v. Lake of the Torches*, 677 F. Supp. 2d 1056 (W.D.W.I. 2010), and the court's holding there that a bond trust indenture was a management contract. *Id.* at 1060-61. This was based in part on the grant to the bondholders of on going discretionary control over management decisions such as the annual amount to be spent on capital expenditures and the hiring or firing of management personnel or a management company. *Id.* at 1059-61. The court also found the bond trust indenture was management because the bondholders could require the Lac du Flambeau Tribe to hire a management consultant, and could exercise approval authority over its choice of consultant. The Lac du Flambeau Tribe was then required to "use its best efforts to implement" the consultant's recommendations if the defined debt service ratio was not met. *Id.* at 1059-60. The court ultimately found these and other terms, "taken collectively and individually," made the bond trust indenture a management contract. *Id.* at 1060-61.

Pursuant to the Indenture and Supplemental Indenture, the Tribe issued [redacted] in bonds. The Further Assurances Agreement is designed to assure the bondholders that the Tribe will honor its obligations and debts under the Indentures with Wells Fargo if they are found to be void or are otherwise unenforceable. For that reason,

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the Agreement is focused on the collateral and establishes the rights and duties of a collateral agent if the tribe files for bankruptcy; is declared insolvent or bankrupt by a court of competent jurisdiction; or if any court of competent jurisdiction assumes custody or control of the Tribe or any part of the gaming operations or assets.

Like the Indenture and First Supplemental Indenture, the Further Assurances Agreement pledges gross gaming revenue as collateral. Under the Agreement, the Tribe appoints a collateral agent on behalf of the bondholders to receive the collateral in the event of a triggering event. The collateral agent then distributes the collateral according to the agreement. First, the Trustee and collateral agent fees are paid with the rest applied to the principal of the obligations. Further Assurances Agreement ¶ 7(b). The collateral consists of the gaming revenues, accounts receivable of the gaming operations, each account of the gaming operations, and all the accounts established under the Indenture and Supplemental Indenture. Indenture § 1.1, *Collateral.*

The court in *Lake of the Torches* found a similar pledge of gross gaming revenue to be management. 677 F. Supp. 2d at 1059-60. While previous OGC opinions have posited that an agreement containing a security interest in a gaming facility's future gross revenues, without further limitation, authorizes management of the gaming facility, in January 2009, we provided guidance in the form of limiting language that would prevent a pledge of gross gaming revenues from resulting in a management contract. The bond trust indenture at issue in the *Lake of the Torches* case did not contain any limiting language. The Further Assurances Agreement here, though, has adopted language that expands upon that contained in our January 2009 letter and states:

> The collateral agent and the holders of the obligations shall not have recourse to any property with respect to the obligations under the bonds and this indenture except the Collateral. Notwithstanding any other possible construction of any provision herein, the Trustee and Bondholders acknowledge and agree that this indenture and the bonds do not create, (A) any rights on the part of the Trustee or the Bondholders to manage the gaming operations, (B) Any rights on the Trustee or the Bondholders to interfere with the Tribe's and/or the Tribal Gaming Commission's right to determine standards of operation and efficient management of the gaming operations (including, but not limited to, operating budgeting matters of the gaming business and policies relating to gaming and gaming operations services) or any rights to have access to the secured areas in the gaming operations; or (C) any lien or right of recourse against any property other than the Collateral or any interest therein, whether tangible or intangible, legal or beneficial, vested or contingent, or any occupancy or other rights or entitlements therein or related thereto. The liens of the Trustee and the Bondholders are strictly limited to the Collateral specifically referred to in this indenture and specifically pledged to the payment of the bonds. The bonds and the Tribe's obligations under this indenture are not general obligations of the Tribe or any affiliate or component of the Tribe.

In addition to the limitations set forth above, and notwithstanding any other provision in this Agreement, neither the Collateral Agent nor the holders of the Obligations nor anyone acting on their behalf shall, nor shall they cause any receiver to, engage in any of the following: planning, organizing, directing, coordinating, or controlling all or any portion of the Gaming Operations (collectively, "Management Activities"), including, but not limited to:

(i) the training, supervision, direction, hiring, firing, retention, compensation(including benefits) of any employee (whether or not a management employee) orcontractor;

(ii) any employment policies or practices;

(iii) the hours or days of operation;

(iv) any accounting systems or procedures;

(v) any advertising, promotions or other marketing activities;

(vi) the purchase, lease, or substitution of any gaming device or related equipment or software, including player tracking equipment;

(vii) the vendor, type, theme, percentage of pay-out, display or placement of any gaming device or equipment; or

(viii) budgeting, allocating, or conditioning payments of the Tribe's operating expenses (it being understood that the collection and disbursement of the Tribe's revenues by a receiver shall not constitute Management Activities under this clause (viii) so long as such receiver disburses from funds received by the receiver (and legally available therefore) amounts necessary to fund the Operating Costs Set Aside Amount each month and, if there has been a shortfall in the amount transferred to the Tribe to fund the Operating Costs Set Aside Amount for the previous month, the amount of such shortfall; provided that no such disbursements shall be required to be made in the event of any exercise of the rights and remedies of the Collateral Agent or the holders of the Obligations as specified in Section 2(b) hereof):

provided. however, that neither the Collateral Agent nor any holder of the Obligations shall be deemed in violation of the foregoing restriction solely because they:

> (1) enforce compliance with any term in this Agreement that does not require the Gaming Operations to be subject to any third-party decision-making as to any Management Activities; or
>
> (2) require that all or any portion of the Gaming Revenues securing the Obligations be applied to satisfy valid terms of this Agreement; or
>
> (3) otherwise foreclose on all or any portion of the Collateral securing the Obligations.

Further Assurances Agreement, ¶ 10.

With the inclusion of the above limiting language, the pledge of gross revenue does not transform the Agreement into a management contract because it prohibits the collateral agent from exerting any management control over the Tribe's gaming operations.

The Further Assurance Agreement also permits the appointment of a receiver. *Id.* at ¶ 6. The court in *Lake of the Torches* ruled that a similar receivership provision was management. *Lake of the Torches*, 677 F. Supp. 2d at 1059. In that case, Wells Fargo argued that a receiver would not exercise management over the Tribe's facility, but merely ensure that the casino corporation deposited revenue and paid liabilities. The court disagreed, finding that making deposits and paying liabilities were aspects of management. Granting a receiver control over those decisions would allow the receiver to exert a form of managerial control since those monies could not be used for other purposes related to the operation of the Casino Faiclity." *Id.* at 1060. Previous OGC opinions have also questioned whether court appointment of a receiver would be contrary to IGRA because the appointment could usurp the tribe's ability to own, operate, and regulate its gaming enterprise.

Ultimately, whether a receivership provision constitutes management depends on how it is structured. A provision for the appointment of a receiver, without further limitation, is management because the receiver has control of operating expenses and management decisions.

In this case, however, the Agreement limits the authority granted under the receivership provision by prohibiting any receiver from exercising any of the management activities. *Id.* at ¶ 6. Specifically, the Agreement states: "in no event shall the Collateral Agent or the receiver have the right to manage, operate or direct the operation of the Gaming Operations." *Id.* The rights of the receiver are further expressly limited by the language from ¶ 10 quoted at length above. These limitations on the receiver satisfy our concerns about the provision and the allowance of a receiver in this case does not make the Agreement a management contract.

In addition to an opinion that the Agreement is not a management contract, you asked for my opinion as to whether the Agreement grants any person a proprietary interest in the Tribe's gaming facilities in violation of IGRA. It is my opinion that it does

not. The Agreement reinforces the Tribe's existing obligations under its bond indentures. It does not transfer any ownership interest in the Tribe's facilities, nor does it give the collateral agent, the bondholders, or any of their representatives any right to control the facility. The Agreement, therefore, does not violate IGRA's requirement that the Tribe have the sole proprietary interest in its gaming facilities.

Conclusion

The Further Assurances Agreement has no indicia of management, and the parties have specifically agreed to exclude the possibility of management. Nothing in the provisions of the Agreement addressing the pledge of gross revenues gives collateral agent or any other third party the discretion or authority to manage any part of Tribe's gaming operations. Therefore, it is my opinion that the Further Assurances Agreement is not a management contract requiring the approval of the NIGC Chairman and does not infringe on the Tribe's sole proprietary interest in its gaming operations.

Other Related Matters

Recently, we have seen financing agreements similar to the Further Assurances Agreement where the default provisions have conflicted with net gaming revenue allocations in tribal revenue allocation plans (RAP). In some instances, tribes have, presumably inadvertently, violated their RAP by complying with the default provisions on their financing agreements. If the Tribe decides to adopt a RAP at some point in the future, it should take into consideration the terms of this Agreement to ensure consistency with the RAP provisions.

I also anticipate that this letter will be the subject of Freedom of Information Act ("FOIA") requests. Since we believe that some of the information in this letter may fall within FOIA exemption 4(c), which applies to confidential and proprietary information the release of which could cause substantial harm, I ask that you provide me with your views regarding release within ten days.

I am also sending of copy of the submitted agreements to the Department of Interior Office of Indian Gaming for review under 25 U.S.C. § 81. If you have any questions, please contact NIGC Staff Attorney Michael Hoenig at (202) 632-7003.

Sincerely,

Penny J. Coleman

Penny J. Coleman
Acting General Counsel

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