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;

- 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)