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

Kent Richey, Esq.
Faegre & Bensen L.L.P.
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-3901
Fax: (612) 766-1600
E-mail: krichey@faegre.com

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;

- 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