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
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