July 15, 2010

D.K. Sprague, Tribal Chairman
Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians of Michigan
1743 142nd Avenue
P.O. Box 218
Dorr, MI 49323

Robert Rosette, Counsel to Gun Lake Tribal Gaming Authority
566 West Chandler Blvd
Suite 212
Chandler, AZ 85225

Kent Richey, Special Counsel to Goldman Sachs Lending Partners LLC
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-3901

Re: Advisory opinion for financing documents

Dear Chairman Sprague and Messrs. Rosette and Richey:

This letter responds to your April 12, 2010 request for an advisory opinion regarding financing documents between the Gun Lake Tribal Gaming Authority (Authority or Borrower), an instrumentality of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians of Michigan (Tribe), and Goldman Sachs Lending Partners LLC (Agent). You requested an opinion that none of the documents, individually or collectively, constitute a management contract and that the NIGC Chairwoman's (Chairwoman) approval of any of the credit documents is not required in order for them to be valid. While it is the Office of General Counsel that usually reviews financing agreements for management, the financing documents were submitted together with the Sixth Amended and Restated Management Agreement between the Tribe and MPM Enterprises LLC (MPM or Manager), which contained a modification to the existing management agreement made necessary by the financing documents. Therefore, NIGC's Director of Management Contracts and Investigations, Elaine Trimble Saiz, and I have conducted a joint review of the documents, and it is our opinion that they are not management contracts and do not require approval by the Chairwoman.

In our review, we considered the following submissions, (collectively, "the Loan Documents") all unexecuted drafts, which were represented to be in substantially final form:

- Sixth Amended and Restated Management Agreement, [Draft: July 12, 2010];
- Credit and Guaranty Agreement [Draft: July 11, 2010];
- Cash and Collateral Disbursement Agreement [Draft: June 17, 2010];
- Skanska Consent and Agreement—Exhibit G to the Cash and Collateral Disbursement Agreement, presented separately [Draft: June 28, 2010];
- Manager Consent and Agreement—Exhibit H-1 to Credit Agreement, presented separately [Draft: July 11, 2010];
- Architect (Friedmutter Group) Consent and Agreement [Draft: June 28, 2010];
- Engineer (Fleis & Vendenbrink Engineering, Inc.) Consent and Agreement [Draft: June 28, 2010];
- Construction Escrow Agreement [Draft: June 28, 2010];
- Deposit Account Control Agreement [Draft: July 6, 2010];
- Intercreditor Agreement [Execution Version: July 9, 2010];
- Keep Well Promissory Note [Draft: undated];
- Manager Cure Loans Promissory Note [Draft: undated];
- Pledge and Security Agreement [Draft: June 24, 2010];
- Securities Account Control Agreement [Draft: July 6, 2010]; and
- Individual Lender Promissory Notes in favor of:
  - [signed: June 17, 2010];
  - [signed: June 17, 2010];
  - [signed: June 17, 2010]; and
  - [signed: June 17, 2010];

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Background

The Tribe and the Agent have negotiated a dollar loan for a year term to finance the construction and development of the Tribe's new gaming facility. The Agent has coordinated a consortium of lenders to finance the project and acts as the administrative agent for the loan.

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This will be the Tribe's first venture into the gaming industry. The proposed gaming facility will be located on a 146-acre site in Allegan County, Michigan. Previous plans for a Class III million gaming facility have been downsized to be a million, square-foot building having approximately slot machines, approximately table games, a café and a food court, and parking for approximately 2,000 guests.

The Tribe has a management contract with MPM that was approved by the NIGC Acting Chairman on May 13, 2010. The parties acknowledge that certain provisions in the Loan Documents, particularly those referencing subordination of the Manager's debt to the Agent, conflict with the approved contract. Therefore, in conjunction with the

request for a declination letter, the Manager and Tribe have submitted the Sixth Amended and Restated Management Agreement for the Chairwoman's approval, and the Loan Documents are intended to be read with it.

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 Chairwoman's approval. Management contracts not approved by the Chairwoman 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

We are 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 we generally agree with the court's analysis, we 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 Pledge and Security Agreement provides that in the event of default, the Collateral Agent may exercise in respect to the collateral, "all other rights and remedies provided for herein or otherwise available to it at law or in equity, all the rights and remedies of the Collateral Agent on default under the UCC . . ." Pledge and Security Agreement § 9.1(a). Similarly, the Credit Agreement provides that the Tribe waives immunity "with respect to any suit, action, and dispute resolution proceeding of any nature seeking any form of relief, whether brought in law, in equity, or through arbitration proceedings . . .." Credit and Guaranty Agreement § 11.15. 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 CREDIT DOCUMENT, WITHIN THE MEANING OF IGRA: (A) NONE OF THE CREDIT DOCUMENTS, INDIVIDUALLY OR COLLECTIVELY, PROVIDE OR SHALL PROVIDE FOR THE MANAGEMENT OF ALL OR ANY PART OF BORROWER'S OR TRIBE'S GAMING OPERATIONS BY ANY PERSON OTHER THAN MANAGER, BORROWER OR TRIBE OR DEPRIVE THE TRIBE OF THE SOLE PROPRIETARY INTEREST AND RESPONSIBILITY FOR THE CONDUCT OF THE GAMING OEPRATIONS; AND (B) NONE OF THE SECURED PARTIES MAY EXERCISE ANY REMEDY OR OTHERWISE TAKE ANY ACTION UNDER OR IN CONNECTION WITH ANY CREDIT DOCUMENT IN A MANNER THAT WOULD CONSTITUTE MANAGEMENT OF ALL OR ANY PART OF THE GAMING OPERATIONS OR THAT WOULD DEPRIVE THE BORROWER OF THE SOLE PROPIETARY INTEREST AND RESPONSIBILITY FOR THE CONDUCT OF THE GAMING OPERATIONS.

Credit and Guaranty Agreement § 11.18, Pledge and Security Agreement § 15. 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 Credit Document, or any other right to enforce the provisions of any Credit Document, none of the Secured Parties shall engage in any planning, organizing, directing, coordinating, or controlling all or any portion of 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 a Default or Event of Default, none of Administrative Agent, Collateral Agent, Disbursement Agent, Lenders or any other Secured Party will be in violation of this Section 11.28 as a result of any such Person:

i. enforcing (or directing the enforcement of) compliance with any term or condition in this Agreement or any other Credit Document that does not require the gaming operation to be subject to any third-party decision-making as to any Management Activities;
ii. requiring that (or directing the requirement that) all or any portion of the revenues securing the Loans be applied to satisfy terms or conditions of this Agreement or the other Credit Documents; or
iii. otherwise foreclosing (or directing the foreclosure) on all or any portion of the Collateral securing the Obligations.

Credit and Guaranty Agreement § 11.28, and specifically incorporated by reference in the Intercreditor Agreement § 8.18. The Pledge and Security Agreement, the Securities Account Control Agreement, and the Deposit Account Control Agreement, all contain substantively identical provisions, § 16; § 25; and § 18, 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.

We note finally that the Pledge and 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, the OGC provided guidance in the form of limiting language that would prevent a pledge of gross gaming revenues from resulting in a management contract. This very language, set out above, is included in the Credit and Guaranty Agreement § 11.28, and specifically incorporated by reference in the Intercreditor Agreement § 8.18. Likewise, the Pledge and Security Agreement, the Securities Account Control Agreement, and the Deposit Account Control Agreement, all contain identical provisions, § 16; § 25; and § 18, respectively. As such, the pledge of gross revenues in the Loan Documents does not make them management contracts.

Conclusion

The Loan Documents can be fairly read to preclude management in the event of default. Nothing in the provisions of the Loan Documents gives to any third party, the discretion or authority to manage any part of the Tribe's gaming operations. Therefore, it is our opinion that the Loan Documents are not management contracts requiring the approval of the Chairwoman. Furthermore, the Loan Documents are consistent with terms of the Sixth Amended and Restated Management Agreement and, therefore, do not effect a modification that would require approval of the Chairwoman. We 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.

We 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, we ask that you provide your views regarding release within ten days.

We are 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 Jennifer Ward at (202) 632-7003.

Sincerely,

Michael Gross
Associate General Counsel, General Law

Elaine Trimble Saiz
Director of Management
Contracts and Investigations