August 20, 2010

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

Daniel W. Hester
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Re: Review of financing documents for the Confederated Tribes of the Umatilla Indian Reservation

Dear Mr. Hester:

This letter responds to your August 6, 2010, request on behalf of the Confederated Tribes of the Umatilla Indian Reservation (the Tribes or Borrower) for the National Indian Gaming Commission's (the NIGC's) Office of General Counsel to review the draft financing documents specified below (collectively the "Financing Documents"). Specifically, you have asked for my opinion about whether the Financing Documents are management contracts requiring the NIGC Chairwoman'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 Chairwoman.

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

- Loan agreement (Loan Agreement) between the Tribes and Wells Fargo Bank, National Association (Wells Fargo), as the administrative agent, letter of credit issuer, bond support letter of credit issuer, and swing line lender; and Wells Fargo Securities LLC as sole book runner and sole lead arranger; and Keybank National Association as syndication agent;
- Pledge and security agreement (Pledge and Security Agreement) between the Tribes and Wells Fargo, as the secured party, and the Bank of New York Mellon Trust Company, N.A., as trustee;
- Unjust enrichment and sovereign immunity agreement (Unjust Enrichment Agreement) between the Tribe and Wells Fargo as the agent and on behalf of the lenders;
- Security agreement (Security Agreement) between the Tribes and Wells Fargo as administrative agent and on behalf of the lenders;

- Springing depository agreement (Springing Depository Agreement) between the Tribes and Wells Fargo as administrative agent and depository;
- Remarketing Agreement between the Tribes and Wells Fargo as the remarketing agent;
- Securities account control consent agreement (Securities Account Control Consent Agreement) between the Tribes and Wells Fargo as the secured party; and,
- Pledged asset account agreement between the Tribes, Charles Schwab & Co., Inc. and Wells Fargo as the administrative agent.

The Financing Documents represent a complicated transaction involving the refinancing of existing debt, as well as the financing of the Tribes' planned expansion of the Wildhorse Resort & Casino ("the Casino" or "the Tribes' gaming enterprise") through various financing vehicles such as letters of credit, swing line loans, revolving loans, and term loans. The Tribes' existing debt includes the "USDA RHS Bond" and the "Series 2008 Bonds" as defined in the Loan Agreement. *See* Loan Agreement, § 1.1. The security for the Series 2008 Bonds is a bonds support letter of credit issued by the Bank of America, N.A., which, based on the Loan Agreement, is to be replaced by a bonds support letter of credit to be issued by Wells Fargo. Any bond or loan agreements related to the Tribes' existing USDA RHS Bond or Series 2008 Bonds, including the bond trust indenture dated December 1, 2008, are not covered by this opinion.

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. The NIGC has explained that 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)." 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.

Sole Proprietary Interest

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); *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.* A*ppurtenant* is defined as "belonging to; accessory or incident to . . . " *Id.*

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 there was a management contract. *Id.* at 1060-

1061. In *Lake of the Torches,* the court found the bond trust indenture 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. 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. 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.

Here, as security for the loans and letters of credit issued pursuant to the Loan Agreement, the Tribes pledge all of their right, title, and interest in the collateral which includes all cash and revenues, as well as all deposit accounts of the Tribe. *See* Security Agreement, § 2. The Loan Agreement further defines *Collateral* to include all *Credit Support Assets* which includes all *Gaming Assets* defined by the Loan Agreement to include "all gaming and other revenues of the borrower derived from the operation of the casino or any other portion of the Gaming Enterprise." *See* Loan Agreement, § 1.1. Thus, the security for the loans and letters of credit issued pursuant to the Loan Agreement includes the gross gaming revenue of the Tribe's existing gaming enterprise, Wildhorse Resort & Casino, as well as any other future gaming enterprise that the Tribes may develop.[1]

The bond trust indenture at issue in the *Lake of the Torches* case did not contain any limiting language and was therefore found to be management. Here, the Security Agreement has adopted limiting language proposed by the Acting General Counsel in 2009. *See* Letter from Penny J. Coleman, Acting General Counsel, to Kent Richey, Esq. (January 23, 2009). Section 11.15 states:

> Notwithstanding any provision in any Loan Document, none of the Lender Parties 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:

[1] It is important to note that both the definition of *Collateral* in the Security Agreement, and the definition of *Gaming Assets* in the Loan Agreement specifically exclude the Tribes' interest in trust lands and any other real property.

(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, a Lender Party will not be in violation of the foregoing restriction solely because a 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 Loan Agreement (§ 11.27), the Pledge and Security Agreement (§ 20), the Springing Depository Agreement (§ 6.17), and the Securities Account Control Consent Agreement (§ 22). As such, the pledge of gross revenues in the Financing Documents does not make them management contracts.

Next, none of the Financing Documents set out the appointment of a receiver as a specific remedy upon default. The Loan Agreement provides that in the event of default, Wells Fargo "may proceed in accordance with applicable Laws (but only with the consent of the Required Lenders) to protect, exercise and enforce the rights and remedies of the Administrative Agent and the Lenders under the Loan Documents (including the Collateral Documents) against the Borrower and such other rights and remedies as are provided by Law or equity." *See* Loan Agreement, § 9.2(c). The Security Agreement clarifies that the legal remedies available upon default include those afforded to a secured party under the Uniform Commercial Code. *See*, Security Agreement, § 7(a). Moreover, the Tribe's limited waiver of sovereign immunity in the Loan Agreement provides that:

> THE ADMINISTRATIVE AGENT, THE LEAD ARRANGER, THE L/C ISSUER, THE LENDERS AND SUCH OTHER PERSONS SHALL HAVE AND BE ENTITLED TO ALL AVAILABLE LEGAL AND EQUITABLE REMEDIES, INCLUDING THE RIGHT TO SPECIFIC PERFORMANCE, MONEY DAMAGES AND INJUNCTIVE OR DECLARATORY RELIEF.

Loan Agreement, § 11.26(F). The above provision is also present in the Security Agreement (§ 11.14(f)), the Pledge and Security Agreement (§ 19(f)), the Remarketing Agreement (§ 18(f)), the Springing Depository Agreement (§ 6.11(f)), the Unjust Enrichment Agreement (§ 2(F)), and the Securities Account Control Consent Agreement (§ 20(f)). While the Financing Documents reserve to a creditor all available legal and equitable remedies under the law (including the Uniform Commercial Code) or equity, the clear intent of the parties is that the Financing Documents not be management contracts.

For example, the language of the Loan Agreement itself provides that its provisions be read so as to avoid such an interpretation:

> 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 IGRA: (A) THE LOAN DOCUMENTS, INDIVIDUALLY AND COLLECTIVELY, DO NOT AND SHALL NOT PROVIDE FOR THE MANAGEMENT OF ALL OR ANY PART OF THE GAMING ENTERPRISE BY ANY PERSON OTHER THAN THE BORROWER OR DEPRIVE THE BORROWER OF THE SOLE PROPRIETARY INTEREST AND RESPONSIBILITY FOR THE CONDUCT OF THE GAMING ENTERPRISE; AND (B) NO LENDER PARTY (NOR ANY SUCCESSOR, ASSIGN OR AGENT OF ANY LENDER PARTY) WILL EXERCISE ANY REMEDY OR OTHERWISE TAKE ANY ACTION UNDER OR IN CONNECTION WITH ANY LOAN DOCUMENTS IN A MANNER THAT WOULD CONSTITUTE MANAGEMENT OF ALL OR ANY PART OF THE GAMING ENTERPRISE OR THAT WOULD DEPRIVE THE BORROWER OF THE SOLE PROPRIETARY INTEREST AND RESPONSIBILITY FOR THE CONDUCT OF THE GAMING ENTERPRISE.

Loan Agreement § 9.2(h). The above provision is also present in the Security Agreement (§ 7(h)), the Pledge and Security Agreement (§ 17), the Remarketing Agreement (§ 16), the Springing Depository Agreement (§ 6.16), and the Securities Account Control Consent Agreement (§ 22). In short, taken together, the Financing Documents are unlike

the agreement at issue in *Lake of the Torches*; they lack the type of receivership provision that was one of the bases of the court's finding management there. *Wells Fargo v. Lake of the Torches*, at 1060.

The parties, realizing their limited options in the event of default, have provided a mechanism for the Tribes to continue to operate the gaming enterprise while technically in default. The Springing Depository Agreement is operative only when a "Springing Depository Event" occurs. A Springing Depository Event occurs automatically when the Tribes fail to make a payment on any of its debt obligations but can also occur if the requisite number of lenders have instructed Wells Fargo to give notice to the depository of a default other than non-payment. *See* Springing Depository Agreement, § 1.1. An example of a non-payment default is the failure of the Tribes to meet the fixed charge coverage ratio or total leverage coverage ratio as required under the Loan Agreement. *See* Loan Agreement, §§ 6.10(a) and (b); § 9.1(d).

If the Springing Depository Agreement becomes operable, Wells Fargo, as the depository, will set up a number of depository accounts including an "Operating Expenses Account" and a "Revenues and Proceeds Account." *See* Springing Depository Agreement, § 3.1. Following a Springing Depository Event, the Tribes must cause all revenues and proceeds from the Tribes' gaming enterprise to be transferred into the Revenues and Proceeds Account. *Id.* at § 3.2(a). The funding of the Operating Expenses Account, and thus payment of the operating expenses is required prior to the application of any revenues or proceeds to the Tribes' debt obligations. *Id.* at § 3.5. Therefore, because Wells Fargo is unable to condition the funding of the Operating Expenses Account or otherwise exert any control over the payment of operating expenses, the Springing Depository Agreement is also not a management contract.

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 1059-1060.

In this case, however, the Loan Agreement caps at [redacted] in any fiscal year the amount the Tribes can spend on capital expenditures. *See* Loan Agreement, § 6.10(d). The Loan Agreement does not require the consent or approval of Wells Fargo or any other lender parties in order to spend any additional amount on capital expenditures. *Id.* Therefore, because the Loan Agreement does not provide Wells Fargo or any other lender party with discretionary control over capital expenditures, the provisions contained in the Loan Agreement concerning capital expenditures do not run afoul of the court's decision in *Lake of the Torches*. b4

Finally, you asked for my opinion as to whether the Financing Documents violate IGRA's requirement that the Tribes have the sole proprietary interest in the Tribes' gaming enterprise, Wildhorse Resort & Casino. It is my opinion that they do not. The

terms of the loans and other types of financing contemplated in the Financing Documents are being offered at prevailing market rates. The Financing Documents also do not transfer any ownership interest in the Tribes' gaming enterprise.

Conclusion

The Financing Documents specifically exclude the possibility of management by anyone other than the Tribes. Nothing in the provisions of the Financing Documents addressing remedies, capital expenditures, or the pledge of gross revenues gives to Wells Fargo or any third party the discretion or authority to manage any part of the Tribe's gaming operations. Therefore, it is my opinion that the Financing Documents are not management contracts requiring the approval of the NIGC Chairwoman.[2]

I 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,

Lawrence S. Roberts
General Counsel

cc: Elwood Patawa, Chairman
Board of Trustees, Confederated Tribes of the Umatilla Indian Reservation
(via e-mail: ElwoodPatawa@ctuir.org)

[2] As you know, the Financing Documents have been submitted as undated and unexecuted drafts that are represented to be in substantially final form. If the Financing Documents change in any material way prior to closing, this opinion shall not apply.

cc: Gary E. George, CEO
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