November 5, 2010

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

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Re: Review of financing documents for the Seneca Nation of Indians

Dear Mr. Richey:

This letter responds to your request on behalf of Bank of America N.A. (BANA) and Banc of America Securities LLC (BAS) 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). The Office of General Counsel's opportunity to review the Financing Documents was limited by the fact that we received some of them in the last few days. Nevertheless, counsel for the parties have been adamant in their request for an opinion this week. Based on our review, it is my opinion that the Financing Documents are not management contracts and do not require the approval of the Chairwoman.

We received the following submissions, all undated and unexecuted drafts, which were represented to be in substantially final form:

- Redlined credit agreement (Credit Agreement) marked "L&W DRAFT 11/3/10" and "SD\726016.24," received via e-mail on November 3, 2010, between the Seneca Gaming Corporation (SGC), an instrumentality of the Seneca Nation of Indians (the Nation), various lenders (the Lenders); BANA as the administrative agent, swing line lender, and letter of credit issuer; Merrill Lynch, Pierce, Fenner & Smith Incorporated (Merrill Lynch) as joint lead arranger and joint book manager; Keybank National Association (Keybank) as joint lead arranger, joint book manager, and syndication agent; Commerzbank AG (Commerzbank) as joint lead

arranger, joint book manager and documentation agent; and RBS Citizens N.A. (Citizens) as documentation agent;

- Redlined pages 103 and 104, revisions to § 7.05 of the Credit Agreement marked "SD\726016.25,"received via e-mail on November 4, 2010;
- Form of committed loan notice attached as Exhibit A to the Credit Agreement, marked "L&W DRAFT DATED 11/4/2010," received via e-mail on November 4, 2010;
- Form of swing line loan notice attached as Exhibit B to the Credit Agreement, marked "L&W DRAFT DATED 11/4/2010," received via e-mail on November 4, 2010;
- Form of term note (Term Note) attached as Exhibit C-1 to the Credit Agreement marked "L&W DRAFT DATED 10/22/2010," and received via e-mail on October 22, 2010, between SGC and the Lenders;
- Revolving credit note (Revolving Note) attached as Exhibit C-2 to the Credit Agreement, marked "L&W DRAFT DATED 10/22/2010," received via e-mail on October 22, 2010, between SGC and the Lenders;
- Form of compliance certificate attached as Exhibit D to the Credit Agreement, marked "L&W DRAFT DATED 11/4/2010," received via e-mail on November 4, 2010;
- Form of assignment and assumption attached as Exhibit E to the Credit Agreement, marked "L&W DRAFT DATED 11/4/2010," received via e-mail on November 4, 2010;
- Redlined form of guaranty (Guaranty) attached as Exhibit F to the Credit Agreement, marked "L&W DRAFT DATED 11/4/2010" and "SD/728695.10," received via e-mail on November 4, 2010, between Seneca Niagara Falls Gaming Corporation (SNFGC), Seneca Territory Gaming corporation (STGC), Seneca Erie Gaming Corporation (SEGC), and Lewiston Golf Course Corporation (LGCC) as guarantors of the SGC obligations and BANA as the administrative agent for the benefit of the Lenders;
- Redlined form of security agreement (Security Agreement) attached as Exhibit G to the Credit Agreement, marked "L&W DRAFT DATED 11/4/10" and "SD\728277.12," received via e-mail on October 27, 2010, between SGC and BANA, as administrative agent and as collateral agent for the parties secured under the agreement;
- Form of administrative questionnaire attached as Exhibit H to the Credit Agreement, marked "L&W DRAFT DATED 11/4/2010," received via e-mail on November 4, 2010;
- Form of intellectual property security agreement (Intellectual Property Security Agreement) attached as Exhibit I to the Credit Agreement, marked "L&W DRAFT DATED 11/2/2010," between SGC, SNFGC, SEGC, STGC, LGCC, and BANA as the collateral agent, received via e-mail on November 2, 1010;

- Indenture (Indenture) marked "LW Draft 10/27/10," received via e-mail on October 27, 2010, between the SGC and Wells Fargo Bank, National Association (Wells Fargo) as trustee;
- Senior notes and form of reverse of note to be issued by the SGC, attached as Exhibit A to the Indenture, received via e-mail on October 27, 2010;
- Preliminary offering memorandum marked "Orrick Comments 10/28/10," received via e-mail on October 29, 2010;
- Redlined nation agreement (Nation Agreement) marked "Faegre & Benson LLP Draft (11-2-10)," received via e-mail on November 2, 2010, between the Nation and SCG; BANA as administrative agent on behalf of the Lenders; Merrill Lynch and unnamed Initial Purchasers; Wells Fargo as trustee for the holders of the notes; and KeyBank Capital Markets Inc. as the Account Provider;
- Attachment 1 to the Nation Agreement titled "Compact Reserve Provisions," and marked "F&B Draft 11/4/10," received via e-mail on November 4, 2010;
- Form of securities account control agreement marked "L&W DRAFT DATED 11/2/2010," received via e-mail on November 2, 2010;
- Form of deposit account control agreement marked "L&W DRAFT DATED 11/2/2010," received via e-mail on November 2, 2010;
- Seneca Nation Resolution CN:S-10-29-10-03, marked "Seneca Gaming Corporation / 2010 Refinancing Approval," adopted on October 29, 2010, received via e-mail on November 3, 2010;
- Dealer-Manager and solicitation agreement marked "*Execution Copy,*" received via e-mail on November 3, 2010, between SGC and Merrill Lynch as dealer-manager;
- Purchase agreement marked "L&W Draft 11/3/2010," received via e-mail on November 3, 2010, confirming SGC's agreements with Merrill Lynch on behalf of the initial purchasers of SGC's notes; and
- Amended and restated assignment and plan of distribution agreement marked "Orrick Draft 10/28/10," received via e-mail on November 4, 2010, between the Nation and SGC.

The Financing Documents represent a complicated transaction in which the Nation seeks to refinance its existing debt through the use of a credit facility involving term loans, revolving loans, swing line loans, letters of credit, and the issuance of new notes.

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 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.

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.* *Appurtenant* is defined as "belonging to; accessory or incident to . . . " *Id.*

Analysis

I am aware of *Wells Fargo v. Lake of the Torches,* in which the court held that a bond trust indenture there was a management contract. *Id.* at 1060-1061. The court found the bond trust indenture to be a management contract in part because it concluded that the indenture 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. 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. Also of import to the court 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"), the tribal entity that wholly owns the Lake of the Torches Resort Casino. 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 notes, loans, and letters of credit issued pursuant to the Credit Agreement and the Indenture, SGC pledges all of its right, title, and interest in all of its revenues, as well as all money and accounts maintained by it. *See* Security Agreement, § 2. SGC derives the majority of its revenues and money kept on account from the Nation's class III gaming operations: SNFGC; STGC; and SEGC. *See* Preliminary Offering Memorandum. SNFGC, STGC, and SEGC are guarantors of the SGC's obligations under the Financing Documents. *See* Guaranty, Recitals; Security Agreement § 5.3 and Annex I (Joinder Agreement). Thus, the security for the notes, loans, and letters of credit issued pursuant to the Credit Agreement and the Indenture includes the gross gaming revenues of the Nation's class III gaming operations.

In *Lake of the Torches,* the court found that the bond trust indenture did not contain any limiting language on the trustee's use of operating expenses in the event of

default and was therefore found to be management. Here, the Financing Documents have adopted limiting language similar or identical to that proposed by the Acting General Counsel in 2009. *See* Letter from Penny J. Coleman, Acting General Counsel, to Kent Richey, Esq. (January 23, 2009). For example, Section 10.04 of the Credit Agreement states:

> Management Activities. Notwithstanding any provision in any Loan Document, none of the Administrative Agent nor any Lender shall engage in any of the following: planning, organizing, directing, coordinating, or controlling all or any portion of the Borrower's or any Guarantor'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 or any Guarantor's operating expenses;
>
> provided, however, that the Administrative Agent or any Lender will not be in violation of the foregoing restriction solely because such 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 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.

Similar provisions are also present in the Security Agreement (§ 11.3), the Indenture (§ 4.24), the Guaranty (§ 3.13), the Nation Agreement (§ 13), the Intellectual Property Security Agreement (§ 7.4), the Deposit Account Control Agreement (§ 15.4), the Securities Account Control Agreement (§ 10.4), and are incorporated by reference into

the Revolving Credit Note and the Term Note. As such, the security interest in gross revenue in the Financing Documents is distinguishable from the concerns expressed by the court in *Lake of the Torches*.

The court in *Lake of the Torches* also found a specific provision allowing for the appointment of a receiver, without further limitation, to be management. *Wells Fargo v. Lake of the Torches* at 1060. Here, none of the Financing Documents set out the appointment of a receiver as a specific remedy upon default. The Security Agreement provides that BANA as the collateral agent "may exercise . . . in addition to 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 [Uniform Commercial Code] (whether or not the UCC applies to the affected Collateral) to collect, enforce or satisfy any Secured Obligations." *See*, Security Agreement, § 7.1(a).The Indenture provides that in the event of a continuing default, Wells Fargo "may pursue any available remedy by proceeding at law or in equity to collect . . . or to enforce." *See* Indenture, § 6.3. Presumably, those rights and remedies would include the appointment of a receiver. However, to say that such general remedies clauses make the Financing Documents into management contracts would produce undesirable results — presumably many financing agreements for Indian casinos could be deemed management contracts. What is more, such a reading would seem to go well beyond the intent of the parties, who have structured straightforward financing agreements. Finally, the Financing Documents expressly prohibit the exercise of any right or remedy on default that would constitute Management Activities. *See* Security Agreement § 7.1(a) citing § 11.3; Credit Agreement, § 8.02 citing § 10.04 quoted above.

Beyond the intent and structure of the Financing Documents, it is unclear, following *Lake of the Torches*, that a receiver without any limitation is an available remedy under "applicable law" here. *Lake of the Torches* found that an explicit receivership provision, at least without removing operating expenses from the receiver's purview, "would in fact be . . . a form of managerial control." *Id.* at 1060. In short, the Financing Documents are fairly read to preclude the appointment of a receiver that would exert management control over the gaming facilities. They lack the receivership remedy that was one of the bases upon which the court in *Lake of the Torches* found management.

Finally, you asked for my opinion as to whether the Financing Documents violate IGRA's requirement that the Nation have the sole proprietary interest in the Nation's gaming enterprises. It is my opinion that they do not. The terms of the loans and other types of financing contemplated in the Financing Documents are based on prevailing market rates. The Financing Documents also do not transfer any ownership interest in the Nation's gaming enterprises.

Conclusion

The Financing Documents specifically exclude the possibility of management by anyone other than the Nation. Nothing in the provisions of the Financing Documents gives the Lenders or any third party the discretion or authority to manage any part of the Nation's gaming enterprises. Therefore, based on our review, it is my opinion that the Financing Documents are not management contracts requiring the approval of the NIGC Chairwoman. 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.

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

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