Via facsimile
and First Class Mail

November 29, 2010

Timothy J. Kincaid, Esq.
Fredericks Peebles and Morgan LLP
8079 McKitrick Road
Plain City, OH 43064
Fax: 614-733-0721

Dear Mr. Kincaid:

This letter responds to your October 26, 2010 request on behalf of the Little Traverse Bay Band of Odawa Indians (Band) for the National Indian Gaming Commission's (NIGC) Office of General Counsel to review the Band's bond offering documents. Specifically, you have asked for my opinion about whether the documents are management contracts requiring the NIGC Chairwoman's approval under the Indian Gaming Regulatory Act (IGRA). You also asked for my opinion as to whether the financing documents violate IGRA's requirement that a tribe have the sole proprietary interest in its gaming operation. After careful review, it is my opinion that the documents are not management contracts and do not require the approval of the Chairwoman. It is also my opinion that they do not violate IGRA's sole proprietary interest requirement.

In my review, I considered the following submissions (collectively, "the Financing Documents") which were represented to be in substantially final form:

- draft Indenture for [ ] Senior Secured Notes due [ ] Indenture);
- draft Security Agreement in favor of Wilmington Trust FSB (Security Agreement);
- draft Depository Agreement between Band and Wilmington Trust FSB (Depository Agreement).

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I also reviewed a draft Amended and Restated Indenture for [ ] Senior Notes due [ ] Indenture). The [ ] Indenture is unsecured and will be discussed separately below.

The purpose of the Financing Documents is to restructure outstanding debt the Band assumed under unsecured [ ]enior Notes issued in 2006 (Old Notes). The Band seeks to exchange the Old Notes for cash and secured notes under the [ ] Indenture. According to your October 26, 2010 letter, approximately [ ]f the Old Noteholders have agreed to accept the proposed exchange. If the remaining [ ]opt not to accept the exchange, their notes will remain unsecured and be governed by the amended and restated [ ]ndenture. b4

The notes issued pursuant to the [ ]ndenture will be secured by the Security Agreement made in favor of Wilmington Trust, FSB, which will serve as the trustee and collateral agent on behalf of itself and the noteholders. The [ ]ndenture is supported by the Depository Agreement requiring the Band to deposit certain funds into accounts maintained by Wilmington Trust, which will serve as the depository bank as well as the noteholders' collateral agent and trustee. b4

Authority

IGRA provides NIGC with authority to review and approve management contracts and collateral agreements to management contracts to the extent that they implicate management. *Catskill Development LLC v. Park Place Entertainment Corp.*, 547 F.3d 115,130-131 (2nd Cir. 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 its regulations do not define *management*, the NIGC has explained that the term 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 the recent decision in *Wells Fargo v. Lake of the Torches*, 677 F.Supp.2d 1056 (W.D. Wis. 2010), in which the court held that the bond trust indenture there was a management contract. *Id.* at 1060-61. 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, such as 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. *Id.* at 1059. The court

found that these terms "taken collectively and individually" made the bond trust indenture at issue a management contract. *Id.* at 1060.

As in *Lake of the Torches*, the Financing Documents pledge the gross gaming revenue of the Band's gaming operations as collateral. *See* Security Agreement, § 1. In *Lake of the Torches*, the court found that the bond trust indenture was a management contract because it did not contain any language limiting the trustee's use of operating expenses in the event of default. Here, however, the Financing Documents exclude operating expenses from the gaming revenues pledged as security for the debt. The Financing Documents grant a secured interest in the gross gaming revenue, but "subject to the limitations set forth in Section 4.07(a)(ii) of the Indenture." Security Agreement, § 1. Section 4.07(a)(ii) requires that the Band first deposit gaming revenues in the "Operating and Cage Cash Account." Indenture, § 4.07(a)(ii). That account will be replenished periodically throughout the week to cover operating expenses and to ensure that the cage case requirements are met. The funds remaining after the deposit into the Operating and Cage Cash Account are the "Pledged Revenues." If the Band defaults on the indenture, only the Pledged Revenues will be transferred to the secured Pledged Revenue Account for disbursement pursuant to the Depository Agreement. Indenture, § 4.07(a)(ii). Because the pledge of revenues in the Financing Documents excludes operating expenses, the Trustee has no security interest in the operating revenue and cannot use it to exert control over the gaming operation in the event of default. Therefore, the pledge of gross revenues after payment of operating expenses does not make the Trust Indenture a management contract.

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Although the Financing Documents grant the collateral agent the authority to require that, upon default, all gaming revenues be deposited into accounts controlled by the depository bank, Indenture, § 4.07(a); Depository Agreement, §§ 2.1 and 6.2; Security Agreement, §§ 1 and 5, the Financing Documents segregate operating expenses by first requiring their deposit in a separate account and giving the depository control over only the remaining funds. Because neither the Depository nor any other third party has control over operating expenses, the depository requirements do not make the Financing Documents management contracts.

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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.*, 677 F. Supp. 2d at 1059-60. While the Financing Documents here specifically permit the Trustee to seek appointment of a receiver, Depository Agreement, § 6.2(iii); Security Agreement, § 5(b), the receiver provisions do not grant the receiver any control over operating expenses because the operating expenses are set aside by the Band and segregated from the secured revenues. Furthermore, the Financing Documents limit the authority that may be granted a receiver by specifically stating that the receiver's authority extends to "pledged revenue," which, as discussed above, excludes operating expenses. Depository Agreement, § 6.2(iii). Therefore, the Financing Documents lack the type of receivership provision at issue in Lake of the Torches and do not constitute management.

The Band has also submitted the draft [ ] Indenture for OGC review. As discussed above, this Indenture is unsecured and will only apply to the noteholders that do not exchange their Old Notes for the [ ] Indenture. Nothing in the [ ] Indenture provides for management. The rights of the noteholders on default are limited to acceleration of the notes and the Trustee may pursue any available remedy to collect the payment of the notes. [ ] Indenture, § 6.03. The noteholders have no right to exercise any control over the Band's gaming operations or the revenue derived from those operations. Accordingly, nothing in the [ ] Indenture indicates management

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Finally, you asked for my opinion as to whether the Financing Documents or [ ] Indenture violate IGRA's requirement that the Band have the sole proprietary interest in its gaming enterprises. It is my opinion that they do not. The terms of the Financing Documents are based on prevailing market rates and do not transfer an ownership interest in the Band's gaming enterprises.

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Conclusion

Based on our review, it is my opinion that the Financing Documents are not management contracts requiring the approval of the NIGC Chairwoman. I note, however, that the Financing Documents have been submitted to us as undated and unexecuted drafts that are in substantially final form, and to the extent that they 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 a copy of the submitted Financing Documents to the Department of the Interior Office of Indian Gaming for review under 25 U.S.C. § 81. If you have any questions, please contact NIGC Staff Attorney Michael Hoenig at 202-632-7003.

Sincerely,

Lawrence S. Roberts
General Counsel

cc: R. Lance Boldrey, Dykma Gossett PLLC, Counsel for Noteholders