December 6, 2010

Via U.S. Mail and e-mail

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Re: Review of development and loan agreements between the Spokane Tribe of Indians and WG-Airway Heights LLC.

Dear Mr. Bruce:

This letter responds to your August 10, 2010 request on behalf of Warner Gaming LLC's subsidiary, WG-Airway Heights LLC (Airway), for the National Indian Gaming Commission's (the NIGC's) Office of General Counsel to review Airway's development and loan agreements (collectively, the "Agreements") with the Spokane Tribe of Indians (the Tribe or the Borrower). Specifically, you have asked for my opinion whether either agreement is a management contract requiring the NIGC Chairwoman's approval pursuant to the Indian Gaming Regulatory Act (IGRA). After careful review, it is my opinion that the Agreements, both collectively and individually, are not management contracts requiring the approval of the Chairwoman.

In my review, I considered the following submissions:

- Amended and Restated Development Agreement (Development Agreement) dated August 9, 2010, between the Tribe and Airway.
- Amended and Restated Loan Agreement (Loan Agreement) dated August 9, 2010, between the Tribe and Airway.

The Agreements relate to the development and financing of a Class III gaming facility. Airway has both contracted to develop the facility and agreed to extend a line of credit to the Tribe in an amount up to [redacted] to obtain a determination by the Secretary of the Interior that certain tribal trust land is eligible for gaming under 25 U.S.C. § 2719(b)(1). The Tribe seeks to open a third gaming facility on the trust land at issue—the Tribe's proposed Airway Heights gaming facility. b4

Authority

IGRA provides the NIGC with authority to review and approve gaming-related 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 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 1060-1061. 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, 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"), which is 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.

Neither of the Agreements grants Airway control over management decisions. Unlike in *Lake in of the Torches*, the Agreements do not grant Airway authority to determine the amount to be spent on capital expenditures, nor do they grant the company any control over hiring or firing of any management personnel. All of Airway's responsibilities under the Development Agreement will be complete upon the opening of the Airway Heights casino. Accordingly, the Court's concern with on-going discretionary control over management decisions in *Lake of the Torches* is not applicable here.

Further differentiating the Agreements here from the indenture at issue in *Lake of the Torches* is that here the Tribe pledges the net revenues of the Chewelah Casino as

security for the loan. Loan Agreement, § 3.6. The Tribe defines *net revenue* as it applies to gaming as, "Gross Gaming Revenue (win) from Gaming Operations less all Gaming related Operating Expenses, excluding the management fee, and less the retail value of any Promotional Allowances." Loan Agreement, § 3.6 *referencing* Chewelah Management Agreement. Thus, the security for the line of credit issued pursuant to the Loan Agreement does not include the gross gaming revenue of the Tribe's gaming enterprise, and operating expenses are explicitly excluded from the collateral. As such, the pledge of collateral does not make the Loan Agreement a management contract.

I note also that neither of the Agreements sets out the appointment of a receiver as a remedy upon default. The Loan Agreement does, however, allow Airway to "exercise any rights available to the Lender with respect to the Collateral as conferred upon Lender in connection with...the UCC, or other applicable provisions of law." Loan Agreement, § 11(b). Those rights presumably include the appointment of a receiver. The collateral, however, is limited to net revenues, which excludes any operating expenses. Therefore, any appointed receiver could not exert management control over the gaming facility through control over its operating expenses.

Finally, you asked for my opinion as to whether the Agreements violate IGRA's requirement that the Tribe have the sole proprietary interest in its gaming enterprise. The Development Agreement provides a fee [redacted]

Based on the parties' representations and industry standards, the [redacted] development fee does not appear to constitute a proprietary interest. However, my opinion with regard to proprietary interest may change if the parties enter into a subsequent management agreement whose terms incorporate or alter the Development Agreement in any material way. b4

In the same vein, the [redacted] interest rate and other fees in the Loan Agreement reflect prevailing market rates and are not inconsistent with other commercial type loans. Further, the Agreements also do not transfer any ownership interest in the Tribes' gaming enterprise. Thus, the Loan Agreement does not appear to grant a proprietary interest in the Tribe's gaming operations to Airway.

Conclusion

The Agreements pledge net rather than gross revenues, and nothing gives Airway 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 Agreements are not management contracts requiring the approval of the NIGC Chairwoman.

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,

Michael Gross
Associate General Counsel
(Acting General Counsel)

cc: Paula Hart, Director
Office of Indian Gaming Management
(via US Mail w/incoming)

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