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

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Re: Review of equipment financing documents for St. Croix Chippewa Indians of Wisconsin

Dear Mr. Richey:

This letter responds to your request on behalf of the St. Croix Chippewa Indians of Wisconsin (the Tribe) for the National Indian Gaming Commission's Office of General Counsel to review the draft equipment financing documents specified below (collectively the "Loan Documents"). Specifically, you have asked for an opinion whether the Loan Documents are management contracts requiring the NIGC Chairwoman's approval under the Indian Gaming Regulatory Act. After careful review, it is my opinion that the Loan Documents specified below 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 marked "HHR Draft 10/04/10" (the Loan Agreement) between the Tribe and Prudential Insurance Company of America (Prudential) as the collateral agent for the unnamed lenders (the Lenders);
- Form of promissory note marked "HHR Draft 09/23/10" attached as Exhibit A to the Loan Agreement;
- Form of draw request attached as Exhibit B to the Loan Agreement;
- Form of assignment and assumption attached as Exhibit C to the Loan Agreement;
- Form of compliance certificate attached as Exhibit D to the Loan Agreement;
- Form of security agreement attached as Exhibit E to the Loan Agreement;
- Security agreement marked "HHR Draft 09/16/10" (the Security Agreement) between the Tribe and Prudential as the collateral agent for the Lenders; and

- Intercreditor agreement marked "HHR Draft 10/04/10" (Intercreditor Agreement) between the Tribe; Heartland Business Bank as administrative agent, note B lender, security agent, paying agent and mortgagee; and Prudential as collateral agent for the Lenders and as a lender.

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.*, 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 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 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 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, specifically the appointment of a receiver and the right to require new management be hired. *Id.* at 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, which is the tribal entity that wholly owns the Lake of the Torches Resort Casino. *Id.* at 1059. 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 Loan Agreement, the Tribe grants to Prudential and the Lenders a security interest in the collateral that includes all of the Tribe's right, title and interest in the equipment purchased with the loan proceeds. *See* Security Agreement,

§ 2.1. Thus, unlike the financing agreements at issue in *Lake of the Torches*, the Loan Documents do not provide the Lenders or Prudential with a security interest in the Tribe's gaming revenues.

Further, I note that the Loan Documents do not set out the appointment of a receiver as a specific remedy upon default. Instead, the Security Agreement reserves to the Lenders and Prudential "the rights and remedies of a secured party under the UCC." *See* Security Agreement §7.1(b). Similarly, the Loan Agreement provides the Lenders and Prudential with the right "to exercise any and all remedies under . . . the Security Agreement, or otherwise available under applicable law, in equity, or otherwise." *See* Loan Agreement § 9.1. Although those rights and remedies could typically include the appointment of a receiver, the clear intent of the parties is that the Loan Documents not be management contracts.

The Loan Documents expressly prohibit any secured party, such as the Lenders and Prudential, from exercising any remedy that would constitute the management of all or part of the Tribe's gaming enterprises. Specifically, the Loan Agreement states:

> NOTWITHSTANDING ANY OTHER POSSIBLE CONSTRUCTION OF ANY PROVISION(S) CONTAINED HEREIN OR IN THE OTHER LOAN DOCUMENTS, THE PARTIES ACKNOWLEDGE AND AGREE THAT: . . . (C) NO SECURED PARTY WILL EXERCISE ANY REMEDY OR OTHERWISE TAKE ANY ACTION UNDER ANY LOAN DOCUMENT IN A MANNER THAT WOULD CONSTITUTE MANAGEMENT OF ALL OR ANY PARTY OF THE GAMING BUSINESS WITHIN THE MEANING OF IGRA;

See Loan Agreement, § 12.17. The identical language appears in the Security Agreement and the Intercreditor Agreement. *See* Security Agreement § 8.13; and Intercreditor Agreement § 8.13.

Beyond the intent and structure of the Loan Documents, it is unclear, following *Lake of the Torches*, that a receiver without any limitation is an available remedy under the UCC, any other applicable law or in equity. *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 Loan 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. *Id.*

Further, the Loan Documents appear to expressly prohibit the exercise of any third-party decision-making with regard to any Management Activities. Specifically, the Loan Agreement provides:

> Notwithstanding any provision in any Loan Document, none of the Secured Parties shall engage in any of the following: planning, organizing, directing, coordinating, or controlling all or any portion of the Borrower'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 operating expenses;
>
> *provided however,* that upon the occurrence of a default, no Secured Party will be in violation of the foregoing restriction solely because a Secured 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 Collateral securing the Obligations.

Loan Agreement, § 12.19. The identical language appears in the Security Agreement and the Intercreditor Agreement. *See* Security Agreement § 8.14; and Intercreditor Agreement § 17. Thus, the Loan Documents do not contain any provision that would run afoul of the court's decision in *Lake of the Torches*.

Finally, you asked for my opinion as to whether the Loan Documents violate IGRA's requirement that the Tribe has the sole proprietary interest in the Tribe's gaming enterprises. The deal term sheet provided to us by the Tribe explains the Tribe is required to agree to the final interest rate prior to closing and that the interest rate of the loan will be based on the interpolated U.S. Treasury rate corresponding to the weighted average

life of the loan plus a commercially reasonable applicable margin. Assuming that the rate is consistent with current standards in the financial markets at that time, the Loan Documents do not appear to transfer any ownership interest in the Tribe's gaming enterprises.

Conclusion

Based on our review, it is my opinion that the Loan Documents are not management contracts requiring the approval of the NIGC Chairwoman. That said, because the Loan Documents have been submitted as undated and unexecuted drafts that are represented to be in substantially final form, if the Loan Documents change in any material way prior to closing or are inconsistent with assumptions made herein, 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

cc: Lewis Taylor, Chairman, St. Croix Chippewa Indians of Wisconsin
Aaron Loomis, General Counsel, St. Croix Chippewa Indians of Wisconsin

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